

**We the Burden:
Equal Citizenship and Its Limits in EU Law**

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THESIS

Submitted for the degree of Doctor of Philosophy (D.Phil.) in Law
Trinity Term 2013

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Abstract

The dynamic interpretation of EU citizenship as a 'fundamental status of all Member State nationals' has opened the door for more horizontal conceptions of equality in European Union law. At the same time, the meaning and purpose of equal treatment in the case of economically inactive and dependent EU citizens has remained ambiguous. The objective of this study is to clarify what normative justifications, other than to eradicate the obstacles to the internal market, can be offered for more just and equal relationships between EU citizens within the existing constitutional order of the EU.

What defines EU citizenship as an equal status is how those individuals who hold this status are treated in relation to one another. The thesis discusses in detail how the rationale for discrimination analysis under Article 18 TFEU has changed in parallel with the evolution of EU citizenship. The question of how unlawful discrimination differs from legitimate differential treatment under the so-called 'real link' case law leads to a more theoretical question of what philosophical justifications underlie the EU principle of equality.

The democratic theory of equality is used to support the argument that the current bias in favour of 'activity' at the expense of 'status' in EU equality law is rooted in a narrow and individualistic view of agency. The thesis, then, argues that recognizing the inherent connection between EU citizens' agency and their subjectivity can provide a justification for a more relational conception of equality even in the absence of a full democratic pedigree in EU law. This analysis contributes a perspective which is usually not there by examining how EU citizenship can benefit from the psycho-dynamic theories of subjectivity that underlie the feminist critique of 'citizenship as agency'.

The argument that EU citizens become full and equal subjects of EU law only in and through their relationships with other EU citizens is rooted in the analytic tradition of constitutional constructivism which underlines the law's potential to generate social relations. A constructive perspective to EU citizenship leads the thesis to conceptualize the theoretical argument of 'subjectivity through relationships' by means of what is called the 'equality of relationships' paradigm. The implications of this paradigm for the constitutional order of the EU will be discussed both at the level of discrimination analysis and at the level of integration theory. On this basis, the thesis concludes that the EU's quest for more just and equal relationships between EU citizens can be legitimised as an attempt to give more substance to the Court's early reference to private individuals as (full and equal) subjects of EU law.

Total word count 81,200

Acknowledgements

I would like to express my deepest gratitude to my supervisor Professor Katja Ziegler. This work would not have been possible without her continuous support and critical insight. She inspires me as an academic and her feedback has transformed my thinking and writing more than anything else before.

I am also deeply grateful to my former supervisors. Professor Tuomas Ojanen opened my eyes to the puzzle of transnational law and his encouragement has been crucial at every stage of this work. Mr Colm O'Cinneide's research and seminars laid the ground for my interest in equality theory and anti-discrimination law. Mr Janne Salminen encouraged me to pursue postgraduate studies and helped me forward at the beginning and many times later.

Professor Stephen Weatherill and Dr Cathryn Costello assessed my transfer of status and confirmation of status reports with great patience and their comments have shaped this work in an invaluable way.

The Osk. Huttunen Foundation, The Emil Aaltonen Foundation, and The Finnish Law Society funded my studies. I am deeply grateful for their generosity.

A number of individuals and institutions have made my time in Oxford more rewarding than I could ever have imagined.

Dr Paola Mattei at the European Studies Centre introduced me to the various connections between democratic accountability and citizenship through many great conversations.

The Oxford GCF has provided a friendly and safe forum to expand the limits of my academic thinking.

Desta Beraki, Gemma Barber-Miani, and Meg and Geoffrey Phillips have made this country a home away from home for me.

David Jesson and Miriam Pepper put the idea of a PhD into my mind many years ago. Emilie Noteboom, Jessica Whittle, Andrew Kerr, Kelli Bryant, Joel Harrison, Rob and Lizzie Heimburger, and Sonja Kujansuu have been good friends to me in Oxford. And I would not have finished this work without Deborah and Eve, thank you for being my two Oxford sisters!

Finally, I am thankful to my family in Finland. My siblings, Antti and Leena-Maria, have always been willing and able to cheer me up. My parents, Helmi and Kari, ensured my well-being in body, mind, and, spirit during this project and their example showed the way to academia.

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*'Doublethink means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.'*¹

Introduction

The difference in treatment between economically active and inactive individuals often appears as an inherent feature of European (economic) integration. But the emergence of EU citizenship has shed light on a new dilemma: the gap of entitlements between economically inactive nationals and economically inactive non-nationals, all of whom are European Union (EU) citizens.² The limited personal and material scope of equal treatment has become more difficult to maintain and justify when private individuals derive their right to equal treatment from EU citizenship instead of direct contribution to economic integration. It is, therefore, important to consider further why some individuals are protected against discrimination on the grounds of nationality under EU law while others are not.

The fact that the EU principle of equality often seems to approach the Orwellian idea of doublethink, in accordance with which 'the aim is simultaneously recognized and not recognized', can be clarified by asking the following three questions:

¹ G. Orwell, *Nineteen Eighty-Four* (1949).

² See Miguel Poiars Maduro's critical analysis of how the development of the European (Economic) Constitution under what is now Article 34 TFEU laid the ground for the further constitutionalization of European Union law through the protection of individual rights. Miguel Poiars Maduro, *We the Court: The European Court of Justice And The European Economic Constitution A Critical Reading of Article 30 of the EC Treaty* (Hart 1998).

- When are those EU citizens who are both willing and able to use their right to free-movement treated as equals?
- What does equality mean for those EU citizens who, for one reason or another, are unable or unwilling to use their right to free-movement and residence?
- How are those people who fall outside the whole concept of EU citizenship treated?

If the goal of positivist legal research is generally to find the norm, the focus of this thesis lies in the 'norm behind the norm', i.e. in the question of why EU citizens' general right to equal treatment under Article 18 of the Treaty on the Functioning of the EU (TFEU) exists in the first place in the current state of integration. The necessity of the EU to justify its existence and prove additional value leads to the question of what the *Telos* of the EU principle of equality is. I will engage with this debate by examining how EU citizens' right to equal treatment is construed in European Union law in so far as the members of the unwanted and unfortunate 'underclass', i.e. economically inactive and dependent Union citizens, pursue their fundamental freedom to move and reside in the area of Member States other than their state of origin. The objective of this study is to clarify what normative justifications, other than to eradicate the obstacles to the internal market, can be offered for equality between EU citizens under European Union law and how the limits of EU citizens' right to equal treatment delimit what role EU citizenship can play in the process of European integration in practice and in theory.

Most commentators are keen to point out that, while they see EU citizenship as a normative concept, they prefer 'pragmatic and restricted' approaches over the 'construction of grand philosophical schemes'.³ My argument is, in contrast, that the analysis of EU

³ E.g. Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995), 74.

citizenship cannot avoid the question of how different philosophical conceptions of equality and distributive justice are reflected in the interpretation of EU citizens' right to equal treatment. This theoretical exercise aims to provide us with a better understanding of the way in which the EU principle of equality is applied *between* Union citizens, as well as to explain how the current indeterminacy of the EU principle of equality could be addressed within the existing constitutional framework of EU law. By looking at the ways in which EU law confers access to non-contributory social assistance, above all minimum subsistence benefits and maintenance grants,⁴ for 'needy' EU citizens, this thesis provides a normative critique of the EU concept of equality in the context of Article 18 TFEU against which the existing judicial practices and institutional structures can be evaluated.

For some commentators, it logically follows from the ambiguity of social equality that the establishment of social citizenship belongs to the sphere of legislative and not judicial competence.⁵ It seems to me that both the Union legislature and the Union courts would, nonetheless, benefit from a more nuanced understanding of what normative basis the existing legal system of the European Union can provide for equal treatment between EU citizens. EU citizenship as a political concept will remain largely meaningless as long as some Union citizens cannot enjoy their citizenship rights, such as the right to free movement and residence, because of their need for social assistance.⁶

⁴ It is common to distinguish between contributory or insurance-based benefits and non-contributory or tax-funded public benefits. Minimum subsistence benefits belong to the latter category and they have an essential market correcting role in the modern welfare state. The idea of redistributive justice is traditionally qualified by two exclusionary criteria: nationality and territoriality/non-exportability. The development of EU citizenship has challenged both of these fundamental restrictions on the scope of national welfare systems. See e.g. Anne Pieter Van der Mei, *Free Movement of Persons within the European Community – Cross-Border Access to Public Benefits* (Hart 2003) 2-7.

⁵ E.g. Kay Hailbronner, 'Union citizenship and access to social benefits' (2005) 42 CMLRev 1245, 1266.

⁶ E.g. S  fra O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer 1996) 99. See also Commission, 'Second Report From the Commission on Citizenship of the Union' COM (1997) 230 final.

Union legislature may opt for a narrow interpretation of equal treatment between EU citizens, but it must bear in mind the constitutional safeguards for the protection of the rights of EU citizens as expressed in the general principles of EU law, such as fundamental rights. The general scope of EU law is tied to the objectives of the Treaties and only conflicts with one of the aims of the Union fall into the scope of the Treaty articles. The analysis must therefore turn to the question of whether European integration aims to prevent unjust differences only if they obstruct economic integration or whether integration in itself is about the prevention of unjust differences between the subjects of European integration (= equality as a constitutive element of integration).

Research question

Very few legal rights are absolute and the same is true for the right to non-discrimination and equal treatment under European Union law. The right to equal treatment has been thoroughly analysed in recent EU law scholarship in relation to the issue of reverse discrimination in what the Court of Justice calls 'purely internal situations'.⁷ It is also clear that the limited personal scope of EU citizenship leads to the standard of mere 'near-equality' in so far as long-term resident third-country nationals are concerned.⁸ This problem has been addressed by many authors who argue for more inclusive 'postnational' or 'transnational' conceptions of EU citizenship. One of the best examples is Dora

⁷ E.g. Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer 2009).

⁸ Those long-term resident third country nationals who fall into the scope of Directive 2003/109/EC are now entitled to enjoy some of the same material benefits as citizens of the Union under Article 11 of the Directive. But their situation is weak in terms of equality and non-discrimination if compared to Union citizens. They fall outside the prohibition of nationality discrimination under Article 18 TFEU, as well as outside the Treaty-based free-movement provisions. The situation of those third-country nationals who do not fall into the scope of Directive 2003/109/EC is even weaker. See further e.g. Louise Halleskov, 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality' (2005) 7 *European Journal of Migration and Law* 181.

Kostakopoulou's argument that the 'nationality model' of EU citizenship undermines the 'transformative' or 'constructive' potential of EU citizenship.⁹ I share her concern that 'the normative foundations and boundaries of membership in the European polity must be rethought'¹⁰. Too often, however, the critical analysis has been limited to the jurisdictional scope of EU citizenship (1) in relation to third-country nationals or (2) in regard to 'purely internal situations'. Despite the proliferation of academic literature on EU citizenship, EU law scholarship has failed to fully address the question of what equality means between EU citizens and how the accepted limitations on EU citizens' right to equal treatment qualify the status of EU citizenship.

The continuous debate on the external boundaries of EU citizenship is important.¹¹ However, what defines EU citizenship as an equal status is how those private individuals who already hold the status of EU citizenship are treated in relation to one another. The focus of my enquiry lies in those individuals who jurisdictionally qualify for the right to non-discrimination under Article 18 TFEU (i.e. migrant EU citizens) but who are banned from equal treatment because of their lack of belonging to the society of the host Member State. By looking at the justificatory criteria for legitimate differential treatment between Union citizens in the context of Article 18 TFEU, this thesis addresses the question of *what is the (de facto) scope of EU citizenship in the realm of non-discrimination and equality*. In order to answer this research question, it is necessary to

⁹ See e.g. Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 ELJ 623, 626-28. See further her argument of 'constructive citizenship' as a way 'to invent an alternative strategy for dealing with difference' in Dora Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4 The Journal of Political Philosophy 337, 341.

¹⁰ Dora Kostakopoulou, 'Nested "Old" and "New" Citizenship in the European Union: bringing out the complexity', (1998-1999) 5 Columbia Journal of European Law 389, 413.

¹¹ See e.g. Kostakopoulou (n 9) 634 who argues that 'Processes of equalisation - - co-exist with processes of exclusion, and the relativisation of the Member States' borders is accompanied by the reinforcement of the external frontiers of the Union'. Similarly in Mark Bell, 'Civic Citizenship and Migrant Integration' (2007) 13 EPL 311, 314.

understand how legitimate differential treatment between EU citizens differs from unlawful nationality discrimination and what limitations are imposed on the right to non-discrimination and equal treatment in those cases which fall into the personal and material scope of application of Article 18 TFEU.

According to Article 18 TFEU, 'Within the scope of application of the Treaties, and without prejudice to any special provision contained therein, any discrimination on grounds of nationality shall be prohibited'.¹² The jurisdictional threshold for the application of Article 18 TFEU is thus based on the scope of application of the Treaty itself. However, the definition of its actual scope of application has turned out to be an elusive task.¹³

- The **personal scope** defines *who* can be protected under Article 18 TFEU. EU citizenship as a criterion for the personal scope of Article 18 TFEU now lays the basis for how the difference between legitimate discrimination and non-discrimination is defined under EU law.
- The **jurisdictional dimension of material scope** answers the question of *why* anybody is protected under Article 18 TFEU. The limited jurisdictional scope of Article 18 TFEU means that there are instances in which differential treatment between EU citizens is *implicitly* classified as non-discrimination simply because there is no sufficient 'connecting factor' with EU law.
- The **substantive dimension of material scope** defines *how* those people are protected who fall into the jurisdictional scope of Article 18 TFEU. The substantive limitations on EU citizens' right to equal treatment are based on discrimination

¹² The jurisdictional threshold for the application of Article 18 TFEU is, thus, based on the scope of application of the Treaty itself.

¹³ Astrid Epiney, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship' (2007) 13 ELJ 611, 612.

analysis and they define more *explicitly* where the difference between discrimination and non-discrimination lies in the case of EU citizens.

In practice, a 'certain degree' of economic or social integration into the society of the host Member State has become the defining criterion for when differential treatment between EU citizens can be classified as non-discrimination under Article 18 TFEU. The analysis of the EU principle of equality will problematize the implications of this requirement for the status of EU citizenship.

A constructive and critical view of the EU's constitutionalization

The above research question is methodologically rooted in the wider development of fundamental and human rights as part of the process of European constitutionalization.¹⁴ The EU's definition of itself as a constitutional actor has become seemingly axiomatic, but the legitimacy of this definition is still far from uncontroversial.¹⁵ For the purpose of this study, the constitutional perspective is methodologically useful because of its relevance for 'conditions of membership' and 'strategies for dealing with the alien'¹⁶. My interest in constitutionalism is rooted in its substantive and constructive use as a means of (re)defining the relationship between the Union and private individuals and between the Member States and private individuals.¹⁷ However, I will focus on the question of whether

¹⁴ See e.g. J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) 19-25.

¹⁵ See e.g. Katja Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 HRLRev 288.

¹⁶ Nicholas Tsagourias, 'Introduction – Constitutionalism: a theoretical roadmap' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press 2007) 4 and J. H. H. Weiler, 'In defence of the status quo: Europe's constitutional Sonderweg' in J. H. H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003) 19.

¹⁷ See e.g. Pavlos Eleftheriadis, 'Aspects of European constitutionalism' (1996) 21 ELRev 32, 41-24 who argues that 'the endorsement of new Constitution can be evaluated and justified only by substantive [italics added] criteria related to constitutionalism and the rule of law'. See also Francis Snyder, 'The unfinished

the constitutionalization of EU law must redefine not just the vertical relationships between citizens of the Union and its Member States but also the horizontal relationships between Union citizens themselves across the borders of the Member States.

The way in which this thesis conceptualises European Union law is based on the assumption that normative and critical potential can be developed *within* European Union law and its constitutional order.¹⁸ This methodological approach can be described by referring to Kaarlo Tuori's concept of 'critical legal positivism' according to which law is a multi-layered phenomenon within which there is critical potential for ethical analysis of its limits and legitimacy.¹⁹ This thesis can also be seen as a descendant of 'new constructivism' following Alexander Somek's critical work on EU anti-discrimination law.²⁰ This approach claims that the critical potential of any legal system can be fully grasped only by looking at its theoretical and philosophical foundations. It is important to understand the internal logic and functioning of equality as part of the EU legal system, while simultaneously acknowledging that the internal and external points of view of the law become increasingly blurred when the analysis of EU law moves towards more critical and constructive approaches.

constitution of the European Union: principles, processes and culture' in J. H. H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003) 56.

¹⁸ See for a similar methodological approach to EU constitutional law e.g. Dagmar Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law* (Edward Elgar Publishing 2012).

¹⁹ Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002).

²⁰ According to Somek, his approach is 'constructivist' because it 'avoids embracing legal positivism and natural law theory without retreating to the intellectual high ground of postmodernism' and because it 'shares the belief that legal thought is devoted to making our normative ideas clear'. However, what Somek calls the 'new constructivism' does not share the Kelsenian view that the conceptual system itself could always provide 'one right answer'. Somek nevertheless claims that 'even where legal institutions are marked by indeterminacy, this indeterminacy is bounded and the product of the work of a set of concepts and normative ideals'. For Somek, the task of scholarship is, therefore, 'to remove from the appearance of legal materials, piece by piece, the ideological distortions that originate from overconfident justifications'. Alexander Somek, *Engineering Equality An Essay on European Anti-Discrimination Law* (OUP 2011) 19-20.

This methodological approach lays the ground for the question of whether the idea of European integration in itself requires a certain idea of constitutionalization vis-à-vis private individuals. The normative standards of this analysis are derived from the internal sources of Union law, i.e. the founding treaties, including the EU Charter of Fundamental Rights, and the general principles of EU law. In the light of the recent incorporation of the EU Charter of Fundamental Rights into primary law and the forth-coming accession of the Union to the European Convention on Human Rights and Fundamental Freedoms (ECHR), it is justified to pose the question of whether the principles of non-discrimination and equality can be seen as integrative *per se*.²¹ The thesis will engage in this task by exploring the philosophical underpinnings of the EU concept of equality in the light of the objectives and values of integration as expressed in the existing primary sources of EU law. Instead of going beyond the objectives of the Treaty, the thesis asks how our understanding of these objectives has been transformed after the entry-into-force of Lisbon Treaty and how it might be transformed even further in the aftermath of the accession of the Union to the ECHR.

Theorizing the EU principle of equality

Equality is often listed as one of the key elements of citizenship along with 'membership' and 'rights and obligations'. The quest for equal citizenship is conditioned on who is

²¹ This potential is convincingly captured by E. Muir and A. P. Van der Mei in the following comment: 'Throughout the history of EU law, the principle of equality had triggered the analytical skills of academic minds. It is a principle that has contributed to shaping the general evolution of EU law and the overall integration process, which, in turn, have had a profound impact on the scope and substantive meaning of the equality principle. That process of mutual influencing and cross-fertilization will no doubt continue. The integration process is dynamic, and so is EU law and its general principle of equality'. Elise Muir and Anne Pieter Van der Mei, 'Editorial' (2011) 18 MJ 3.

entitled to 'share in the space of civic equality'.²² Some commentators argue that 'equality should be the goal of Union citizenship, and judicial protection its guarantee'.²³ Others suggest more moderately that '[i]f Union Citizenship is to be at all meaningful, equality of treatment must be secured for holders of this Citizenship in relation to some matters of importance'.²⁴ To the extent that the whole idea of supranational citizenship is still an artefact rather than a flourishing social institution, the status of EU citizenship is contingent on the way in which equality and non-discrimination as rights of EU citizens are constituted and construed in EU law.

At the heart of this analysis lies the question of what consequences the Court's definition of Article 18 TFEU as a fundamental right must have for the limits of equal treatment. Although discrimination law scholarship has problematized individual justice-based models of anti-discrimination law,²⁵ the development of EU law towards a personal right to non-discrimination and equality offers an interesting vantage point for the process of supranational polity-forming and, thus, for a critique of EU citizenship. From this starting point, this thesis seeks to identify the normative foundations for the method and manner of conceiving of equality as a fundamental right of all EU citizens.

²² See e.g. Ruth Rubio Marin, 'Equal Citizenship and the Difference that Residence Makes' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer 1998) 201. Note also how Rubio Marin defines the term 'equal citizenship' in fn 2 as 'the membership status that results from sharing in the space of civic equality regardless of whether that status is or is not achieved directly, through the equal entitlement of rights, or indirectly, through another membership status, such as that of national citizenship'.

²³ David O'Keeffe and Antonio Bavasso, 'Fundamental Rights and the European Citizen' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer 1998) 254.

²⁴ Andrew Evans, 'Union Citizenship and the Constitutionalization of Equality in EU Law' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer 1998) 268.

²⁵ See e.g. Christopher McCrudden, 'Theorising European Equality Law' in Cathryn Costello and Eilis Barry (eds), *Equality In Diversity: The New Equality Directives* (Irish Centre for European Law 2003) 20-22.

The concept of equality is potentially 'diverse'²⁶, or even 'empty'²⁷, and its content depends on more substantive non-egalitarian standards and criteria. This thesis builds on the view that the idea of 'significantly related people'²⁸ forms a natural starting point for the analysis of equality in EU law. It has been noted that 'the fundamental question of justice as equilibrium is that very old question, “who is my neighbor?”'.²⁹ As a comparative right equality must be 'at bottom - - relational and social'.³⁰ It is, therefore, important to consider **what constitutes a meaningful legal relationship in the context of EU law, i.e. how the basis on which 'those whom they believe to be their equals'**³¹ **has been transformed by the creation of EU citizenship.** This question is particularly relevant when we discuss the equal treatment of economically inactive and dependent migrant EU citizens in relation to the economically inactive nationals of the host Member State.

The focus of this thesis lies in the question of equal treatment between EU citizens irrespective of nationality under Article 18 TFEU. The universal principle of non-discrimination in relation to other prohibited grounds, such as sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation, as outlined in Article 19 TFEU, does not directly fall into the scope of this analysis. At the same time, however, the way in which the idea of 'meaningful relationships' is used to shift the focus of theoretical

²⁶ Christopher McCrudden, 'The New Concept of Equality' Academy of European Law, ERA-Forum, Trier, 2 – 3 June, 2003. It has also been noted that there is no 'pan-European consensus' on the substantive content of equality. Colm O'Connell, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 International Journal of Discrimination and the Law 7, 13-14.

²⁷ E.g. Peter Westen, 'The Empty Idea of Equality' (1982) 95 HarvLRev 537 and Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 228-229.

²⁸ Kent Greenawalt, "'Prescriptive Equality': Two Steps Forward' (1997) 110 HarvLRev 1265, 1283 and 1289.

²⁹ Jan Broekman, 'Justice as Equilibrium' (1986) 5 Law and Philosophy 369, 390-391.

³⁰ Kenneth W. Simons, 'Equality as A Comparative Right' (1985) 65 BosULRev 387, 482.

³¹ See e.g. Greenawalt (n 28) and Broekman (n 29).

analysis of the EU principle of equality from nationality discrimination to equal citizenship in the context of Article 18 TFEU can potentially also contribute to our understanding of non-discrimination in its wider, universal, sense in the context of Article 19 TFEU in so far as it replaces the traditional requirement of comparability as similarity and likeness with that of equal treatment on the basis of 'meaningful relationships'. Whether or not this is the case depends on how inclusively these relationships can ultimately be defined. This will be a topic for future research and cannot be addressed in this specific study.

The creation of EU citizenship has inspired comments that equality has now been 'constitutionalized in favour of Union Citizens'.³² These arguments seem to find immediate support from the case law, for the Court of Justice of the EU now refers to Article 18 TFEU as a personal right to non-discrimination and equal treatment for all EU citizens who fall into the scope of the EU Treaties. However, the accepted limitations on EU citizens' right to non-discrimination and equal treatment under Article 18 TFEU have qualified the nature of EU citizenship as an equal status. It has been pointed out that the structural inequalities originating from the limitations of freedom of movement and residence may 'constitute a pervasion of Community principles' in so far as the fundamental idea of justice penetrates the process of European integration.³³

In practice, these structural inequalities lead to a situation in which 'discrimination attaches to those very precepts that purport to advance human rights'.³⁴ This can be

³² Evans (n 24) 267-8. By this, the commentators mean that all EU citizens now fall into the personal scope of the right to non-discrimination and equal treatment under Article 18 TFEU.

³³ See e.g. T. Hoogenboom, 'Free Movement and Integration of Non-EC Nationals and the Logic of the Internal Market' in Schermers and Flinterman and Kellermann and Haersolte and van de Meent (eds), *Free Movement of Persons in Europe: Legal Problems and Experiences* (Martinus Nijhoff Publishers 1993) 498-499 and 511.

³⁴ Andrew Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004) 202. See further Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010) 263 and 277 where the author argues that 'whatever else the ECJ may have done, particularly through its

demonstrated by looking at the parameters, sometimes entitled as 'new generation imperative requirements'³⁵ which define when a migrant EU citizen does not deserve to be treated as equal to the nationals of the host Member State because of an insufficient degree of integration, i.e. the lack of a significant relationship or belonging.

However, the question of how unlawful discrimination differs from legitimate differential treatment under Article 18 TFEU cannot be separated from a more theoretical question of what philosophical conception of equality underlies the EU principle of equality. This thesis endorses the view that it is important to explore the philosophical foundations which underlie the justificatory criteria for legitimate differential treatment between EU citizens. These philosophical propositions of equality must be clarified and must, then, be critically examined in the light of the objectives of European integration. The question of what equality means as an element of EU citizenship will be addressed both in practice, by examining the limits of EU citizens' right to non-discrimination and equal treatment in the realm of non-contributory social welfare benefits, and in theory, by examining the philosophical foundations of EU citizens' right to equal treatment in relation to other EU citizens on the basis of the shared status of EU citizenship.

It has been claimed that: 'The fact remains that there is no jurisprudential tradition in European law. Both constitutionally and jurisprudentially Europe is as yet “silent”'.³⁶ This 'silence' over the jurisprudential foundations of EU law is particularly poignant in the field of equality law where the choice between different conceptions of equality imposes a

development of general principles, it has singularly failed to countenance “justice” as a clear ethical commitment in its own rights'.

³⁵ See more about the relationship between the traditional market access theory and Union citizenship e.g. in Eleanora Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution', (2004) CMLRev 41, 743 – 773.

³⁶ Ian Ward, 'Identity and Difference: The European Union and Postmodernism' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995) 27.

great normative force on the rights of private individuals. It is important to recognise that the idea of equality can be described and justified in a variety of ways. Alternative interpretations and philosophical justifications of equality must therefore be weighted against the objectives of integration. Any attempt to bring more clarity and coherence into the EU concept of equality and, thus, into the status of EU citizenship is clearly normative. However, this thesis will also present more doctrinal criticism which shows why this theoretical exercise is so crucial for the future of EU citizenship. Even if the reader does not share the conceptualisation of European integration through the normativity of just and equal relationships between the subjects of integration in the final chapters of the thesis, it is hoped that he/she will recognise why further debate on these questions is still needed on the basis of the critical analysis in the preceding chapters.

Outline of the Thesis

CHAPTER 1 of the thesis examines in detail how the rationale for discrimination analysis in European Union law has changed along with the evolution of EU citizenship. The core argument in Chapter 1 is that a new 'Equality Problem' has emerged in EU law in parallel with the development of EU citizenship. By this, I refer to the legal and philosophical uncertainty on what it means for the substance of EU citizens' right to equal treatment that EU citizenship now defines the personal scope of that right.

CHAPTER 2 will develop this argument further in the context of the Union test for nationality discrimination. I will suggest that the EU equality problem can be stratified by asking how the shift in comparability from economic activity to EU citizenship has changed the definition of legitimate objective justifications for differential treatment under EU law. The first part of the chapter provides a critical analysis of the scope of EU citizens'

right to equal treatment by directing attention to the structural dimensions of the EU equality problem, i.e. to the fact that EU citizens' fundamental right to equal treatment has no *de facto* independent scope. The second part of the chapter will, then, move on to analyse the limitations of EU citizens' general right to equal treatment by underlining the substantive dimension of the EU equality problem, i.e. the lack of independent and non-economic criteria for legitimate differential treatment between EU citizens.

The analysis of the structural and substantive dimensions of the EU equality problem in Chapter 2 paves the way for a more theoretical argument in CHAPTER 3 that *ex ante* integration as a condition for the enjoyment of equal treatment implies that EU citizens' duty to be active trumps the status of EU citizenship and that the EU principle of equality suffers from a fundamental normative indeterminacy between the activity-based and status-based conceptions of equality. By using the theory of democratic equality as a critical tool, this chapter endorses the view that the activity-based conception of equality in EU law **(1)** fails to recognise equality as a 'normative ideal of human relationships' and **(2)** has its roots in a narrow and reductionist view of agency. On this basis, the chapter concludes that it is necessary to explore justifications for a more balanced view of agency in EU law and, thus, for more just and equal relationships between EU citizens.

CHAPTER 4 will discuss in more detail how the activity-based conception of equality in EU law could be replaced with a relational view of equality. The chapter begins its search for a more balanced view of agency by discussing how the feminist critique of 'citizenship as agency' emerges from the ideal of inter-subjective agency. It will be seen that this argument builds on the view that **(1)** citizens' agency is inherently connected with their subjectivity and that **(2)** political subjectivity can only be constituted in and through social relationships. Recognising the inherent connection between 'agency' and 'subjectivity' shifts the focus of analysis to the question of under what conditions EU

citizenship could be constructed as a source of political and legal subjectivity so that EU citizens could be seen as full and equal subjects of EU law and European integration.

In order to answer this question, Chapter 4 will have a closer look at those psycho-dynamic theories of subjectivity that underlie the feminist rethinking of citizenship. A brief overview of subjectivity in developmental psychology supports the argument that understanding EU citizens' subjectivity can benefit from the analytic categories of a 'relational subject' and a 'subject-in-process'. Moreover, it will be seen that what combines the different theoretical approaches to subjectivity is the claim that the subject's relationship to the 'Other' at the early level of human development sets the basis for later interactions – whether social, political, or legal – and that the psycho-dynamic constitution of subjectivity at the early levels of human development is reflected at the later stages of social, political, and legal identity-building. On this basis, the chapter concludes that recognising the connection between EU citizens' agency and their subjectivity would both require and justify a more relational approach to the ideal of equality – even in the absence of a democratic pedigree in EU law.

CHAPTER 5 will finish the thesis by examining both the practical and theoretical implications of EU citizens' subjectivity for the constitutional order of the EU. First, it will be shown that EU citizens' full subjectivity necessitates what is called a *constitutional constructivist* approach to EU law. Secondly, the chapter will outline how the ideal of EU citizens as full and equal subjects of European integration provides a new interpretative standard which is called the *equality of relationships paradigm*. What implications this paradigm may have for discrimination analysis under Article 18 TFEU will also be discussed. Finally, the chapter concludes that the legitimacy of these arguments depends on whether European integration can be defined as a project that derives its existence from

recognizing and deepening dynamic interdependence between its constituent subjects, including not just the Member States but also EU citizens.

The CONCLUSIONS will, then, address the *penultimate* question of whether the EU's quest for justice in the form of just and equal relationships between EU citizens can be legitimated by means of cognitive reforms, while the reader will be left to answer the *ultimate* question of whether it can only find its justification in the sphere of transcendence.

1 The Evolution of Equality in EU Law: From Nationality Discrimination towards Equal Citizenship

1.1 Introduction

The EU principle of equality is a dynamic legal concept by its very nature. This chapter follows the evolution of the EU principle of equality from the early years of European integration through the creation of EU citizenship until the recent adoption of the EU Charter of Fundamental Rights as a source of primary EU law and the forthcoming accession of the Union to the European Convention on Human Rights. It will be seen how the interpretation of the EU principle of equality has shifted from non-discrimination on the grounds of nationality towards equality between EU citizens. I conclude this analysis by arguing that a new Equality Problem has emerged in EU law along with these constitutional developments. The core of this problem is that it is yet unclear what equality between EU citizens means in practice and in theory.

1.2 An economic right under Article 45 TFEU

Article 45(1) TFEU secures the freedom of movement of workers within the European Union. This guarantee is completed by Article 45(2) TFEU which provides that '[s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member State as regards employment, remuneration and other conditions of work and employment'. The Court of Justice has given this provision a wide effect as one of the four fundamental economic freedoms by interpreting the concept of a 'worker' broadly and autonomously as will be seen in Chapter 2. It is, nevertheless, clear that the scope of the prohibition of nationality discrimination would remain limited if it was only triggered in the context of economic activity, such as 'employment, remuneration and other conditions of work and employment'.

1.3 A citizenship right under Article 18 TFEU

Article 18 TFEU includes a prohibition of nationality discrimination with a more general scope of application.³⁷ However, opinions differ on whether Article 18 TFEU should apply independently or whether it can only be invoked in the context of the four economic freedoms and the right to free movement and residence under Article 21 TFEU. One argument in favour of a more independent application of Article 18 TFEU is that its mere status as a primary Treaty right can move it 'onto a different and normatively higher plane, perhaps best described as a constitutional one'.³⁸ But the independence of Article 18 TFEU also depends on how the prohibition of nationality discrimination relates to fundamental rights as general principles of EU law. In the well-known *Konstantinidis* case, Advocate General Jacobs attempted in his Opinion to extend the jurisdiction of the Court and the scope of Community law by establishing a connection between European citizenship and fundamental rights.³⁹ The Court did not adopt this approach in *Konstantinidis*, but the status of EU citizenship rights has been considerably strengthened since then. Whether Article 18 TFEU has the potential to become an independent constitutional right is,

³⁷ What distinguishes nationality from other prohibited grounds of discrimination in EU law is its general scope of application 'within the scope of application of the Treaties'. Article 19 TFEU which prohibits discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation has no direct effect and its implementation in Directive 2000/43/EC of June 29 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000) are limited in their material scope of application. Similarly, although the Commission's proposal for a new Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation would have extended the scope of the prohibition of discrimination to cover social protection, social advantages, education, and access to and supply of goods and services which are available to the public, it would still not have suggested a general scope of application for the non-discrimination principle under Article 19 TFEU. See COM (2008) 426 final 8. See for further analysis Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/??/EC changing Directive 76/207/EEC in context' (2002) 8 ELJ 290.

³⁸ Niamh Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009) 175.

³⁹ Case C-168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt* [1993] ECR I-1191, Opinion of AG Jacobs.

therefore, closely connected to the degree to which the right to non-discrimination and equal treatment can be characterised as a fundamental right, or even a human right, under EU law.

1.4 A fundamental right under the EU Charter

The EU Charter of Fundamental Rights forms now part of EU primary law and its Article 21(2) reiterates the wording of Article 18 TFEU by stating that '[w]ithin the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'. Article 21 of the Charter has been criticized for failing to expand the commitment to prohibiting nationality discrimination beyond the existing Treaty provisions.⁴⁰ The double-regulation both in the Treaty and in the Charter can, nevertheless, be seen as an important emphasis on the prohibition of nationality discrimination as a fundamental right. Otherwise, why would it be necessary to repeat the exact wording of Article 18 TFEU in the EU Charter of Fundamental Rights?

Besides the provisions of the EU Charter of Fundamental Rights, the right to non-discrimination and equal treatment can also gain the status of a fundamental right as one of the general principles of EU law. The Court of Justice has stated that it has competence to examine the compatibility of national rules with fundamental rights as general principles in all those cases in which national rules fall into the scope of EU law.⁴¹ The recent *Fransson* judgment confirms that this is still the case, irrespective of the wording of Article 51(1) of the Charter, which states that the Charter applies to the Member States 'only when they are

⁴⁰ E.g. Sandra Fredman, 'Europe with a Social Face: Equality and Social Rights in the European Union' (2001) 22 *Industrial Law Journal* 1467, 1480.

⁴¹ Cases 60 and 61/84 *Cinétheèque SA and others v Fédération nationale des cinémas français* [1985] ECR 2605, para 26; Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 28 and Case C-260/89 *Ellinki Radiophonia Tileorassi AE and and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925, paras 41-42.

implementing Union law'.⁴² It is, therefore, possible that EU citizens' fundamental right to non-discrimination and equal treatment can influence the interpretation of Article 18 TFEU, not just as a provision of the EU Charter but also as a general principle of EU law. The crucial question is just whether the general principle of equality and non-discrimination is one of those general principles of EU law which are simultaneously fundamental rights. In the light of Article 21 of the EU Charter, the positive answer to this question seems more convincing than the negative one.

It may, therefore, be asked: What impact could the recognition of EU citizens' right to non-discrimination and equal treatment as a fundamental right have on the limits of equal treatment under Article 18 TFEU? This question relates to the more general question of whether a fundamental right can be subject to limitations and derogations to the same extent as an economic freedom. It has been suggested that the legal effect of Treaty rights becoming fundamental rights should imply both a broad interpretation of the 'initial or *prima facie* right itself' (scope) and a narrow interpretation of the 'exceptions to that right' (limitations).⁴³ In the case of fundamental rights, limitations define the 'terms of exercise' of the right rather than the 'right itself, or to whom it belongs'.⁴⁴ It is, therefore, possible to argue that to articulate the prohibition of nationality discrimination as a fundamental right ought to have an impact on the way in which the scope and the limits of equal treatment are interpreted in the case-law of the Court of Justice.

At the same time, however, it is important to bear in mind that recognising equal treatment as a fundamental right may also complicate the interpretation of Article 18

⁴² C-617/10 *Åklagaren v Hans Åkerberg Fransson* 26 February 2013, para 21.

⁴³ Chris Hilson, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) 29 *EurLRev* 636, 648.

⁴⁴ Síofra O'Leary, 'The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CMLRev* 519, 540-41.

TFEU. First, it has been noted that a 'deeper critique' of fundamental rights has been missing from EU law scholarship because, until recently, any reference to individual rights was welcomed by academic commentators as a long-awaited alternative to the purely economic goals of integration.⁴⁵ Secondly, it is controversial whether the 'language of rights' has any integrative potential in the first place or whether the assumption of 'shared values' as expressed in EU fundamental rights is simply misleading.⁴⁶ The establishment of equal treatment as a fundamental right of all Union citizens at the level of primary law, nonetheless, provides the starting point for our analysis of the EU principle of equality. This evolution is important because it promises to transform the status of EU citizenship beyond M. Everson's well-known metaphor of 'Market Citizenship'.⁴⁷

1.5 A human right under the ECHR

In order to grasp the full picture of EU citizens' right to equal treatment, we must also consider how the issues of nationality discrimination and equal treatment are addressed within the European Convention on Human Rights. This is important not just in the light of the forthcoming accession of the Union to the ECHR but also because the Convention has been recognised as a legitimate source of inspiration for the interpretation of EU law since the 1970s.⁴⁸ That the right to non-discrimination on the grounds of nationality enjoys the status of a human right under the ECHR system may strengthen a more rights-based interpretation of Article 18 TFEU - despite the fact that, in practice, the protection against

⁴⁵ Gráinne de Búrca, 'The Language of Rights and European Integration' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon 1995) 29-30.

⁴⁶ E.g. J. H. H. Weiler, 'To be a European citizen – Eros and civilization' (1997) 4 *Journal of European Public Policy* 495, 499-502. See also de Búrca 1995 (n 45) 45.

⁴⁷ Everson (n 3).

⁴⁸ Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 13.

nationality discrimination under EU law is currently in many ways more stringent than under the ECHR, as discussed below in this section.

The European Convention on Human Rights does not include an explicit prohibition of nationality discrimination. The European Court of Human Rights has nevertheless adopted the view that nationality can amount to 'other status' on the grounds of which discrimination is prohibited in the context of the enjoyment of Convention rights under Article 14 ECHR.⁴⁹ Moreover, Article 1 of Protocol No. 12 of the Convention now includes a general prohibition of discrimination in 'the enjoyment of any right set forth by law' in all those Member States of the Council of Europe that have ratified this protocol.⁵⁰ The openness of Article 14 ECHR means that the case-law has played a crucial role in defining when nationality discrimination is prohibited under the ECHR.

It is characteristic of the Strasbourg Court that the intensity of scrutiny varies considerably between different grounds of discrimination.⁵¹ The Court has made it clear that nationality discrimination can be justified only for 'very weighty reasons' and that the State's margin of appreciation must be applied narrowly in those cases.⁵² In the *Gaygusuz* case, the Court had to determine whether the prohibition of discrimination under Article 14 applies to social minimum benefits. The Court decided that contributory social minimum benefits, such as the right to 'emergency assistance' in question, could fall into the ambit of

⁴⁹ Article 14 of the European Convention of Human Rights states that 'The Enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (CETS No. 155), Rome 4.XI.1950.

⁵⁰ The Protocol has currently been ratified by 18 of 47 Member States of the Council of Europe.

⁵¹ Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Kluwer 2003) 31 and 41.

⁵² *Gaygusuz v Austria* ECHR 1996-IV, para 42.

Article 14 ECHR as 'a pecuniary right for the purposes of Article 1 of Protocol No. 1'.⁵³ In the later *Stec* case, the Court expanded this principle to cover all social benefits by stating that if a State 'does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention'.⁵⁴ The prohibition of nationality discrimination under Article 14 ECHR could now, in theory, apply to some of those situations in which economically inactive and dependent Union citizens are not granted equal access to non-contributory social benefits because of their lack of integration.

This case-law must, of course, be examined within the overall framework of the Convention system which in many ways adopts a less restrictive approach to nationality discrimination than the EU framework. First of all, the Strasbourg Court is renowned for its generous interpretation of objective justifications which can be invoked both in the case of direct and indirect discrimination.⁵⁵ The EU Court of Justice holds that justifications for direct nationality discrimination can normally be accepted only if they take a form of statutory exceptions. Moreover, the Strasbourg Court has only recently recognised the harmfulness of indirect discrimination. Although a failure to treat different situation differently can now constitute discrimination under Article 14 ECHR⁵⁶, it took several decades for the Strasbourg Court to recognize the unlawfulness of indirect discrimination in the first place.⁵⁷ It has been argued that even this recognition is limited because the mere 'disparate impact' has not been regarded as sufficient proof for discrimination but the

⁵³ Ibid paras 39 and 41.

⁵⁴ *Stec and others v the UK* ECHR, 12.4.2006, para 53.

⁵⁵ E.g. *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* (the Belgian Linguistic case) 23.7.1968 A6, Sec. IB, para 10.

⁵⁶ E.g. *Thlimmenos v Greece* ECHR 2000-IV, para 44.

⁵⁷ *Hugh Jordan v the UK* (ECtHR, 4 May 2001) para 154. This approach was given more substance in *D. H. and Others v The Czech Republic* App no 57325/00 (ECtHR, 13 November 2007).

applicant can be asked to prove the underlying cause of this impact.⁵⁸ That is a considerable difference with regard to EU law, for the Court of Justice of the EU has prohibited nationality discrimination both in its 'overt' and 'covert' forms, as well as non-discriminatory obstacles to the freedom of movement both under Articles 21 and 45 TFEU.⁵⁹

The Strasbourg Court has also been willing to show deference to the limited personal scope of EU citizenship. The more beneficial treatment of Union citizens in the case of deportation came under scrutiny in the *Moustaquim v Belgium* and *C v Belgium* cases in which the Strasbourg Court stated that 'such preferential treatment is based on an objective and reasonable justification, given that the member States of the EU form a special legal order, which has, in addition, established its own citizenship'.⁶⁰ However, it is important to note that the Strasbourg Court seems less willing to defer to the limited material scope of EU citizenship. For instance, in the *Koua Poirrez* case, the Strasbourg Court found nationality discrimination in the situation in which one of the Member States had refused to award the allowance for disabled adults to the applicant who was resident as an adopted son of a Union citizen in the country of which the adoptive parent held the nationality.⁶¹ This was in contrast to the fact that the Court of Justice had already decided that the case did not fall into the jurisdictional scope of the prohibition of nationality

⁵⁸ Arnardóttir (n 51) 83-84 and 124.

⁵⁹ For indirect discrimination, see e.g. Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 11 and C-278/94 *Commission of the European Community v Kingdom of Belgium* [1996] ECR I-4307, para 27 and, for non-discriminatory obstacles to freedom of movement in the context of Article 45 TFEU, C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Boisman* [1995] ECR I-4921, para 96 and, in the context of Article 21 TFEU, in C-135/99 *Ursula Elsen v Bundesversicherungsanstalt für Angestellte* [2000] ECR I-409, para 34. See more about this below in Sections 2.2.1 and 2.3.1.

⁶⁰ *Moustaquim v Belgium* 18.2.1991 A193, paras 48 – 49 and *C v Belgium* ECHR 1996-III, paras 37-38.

⁶¹ *Koua Poirrez v France*, ECHR 30.9.2003, paras 16, 41 and 47-49.

discrimination under EU law because it was a 'purely internal situation' without a sufficient connecting factor with EU law.⁶²

This case is an example of the different jurisdictional scopes of the prohibition of nationality discrimination under EU law and the ECHR. However, it is plausible that the interpretations of what constitutes nationality discrimination under EU law and under the ECHR could also vary in so far as objective justifications for *prima facie* discriminatory treatment are concerned. The Court of Justice has traditionally held that the protection of fundamental rights as general principles of Union law must happen within the 'structure' and 'overall objectives' of the Union.⁶³ In practice, this means that fundamental and human rights form one of the many dimensions of EU law, whereas the whole existence of the ECHR system is built upon the protection of individual rights.⁶⁴ A common fear is that the Court of Justice may apply the objective justification test too broadly in favour of fundamental freedoms at the expense of fundamental and human rights.⁶⁵ For instance, the *Viking* and *Laval* judgments have been criticized on the basis that the Court of Justice justified fundamental rights on the basis of fundamental freedoms.⁶⁶ The status of non-

⁶² Case C-209/91 *Ettien Koua Poirrez v Caisse d'allocations familiales de la région parisienne* [1992] ECR I-6685, paras 10-13.

⁶³ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4 and 4/73 *J. Nold v Commission of the European Communities* [1974] ECR 491, para 14.

⁶⁴ Tuomas Ojanen, *The European Way. The Structure of National Court Obligation under EC Law* (Gummerus 1998). See further in Tuomas Ojanen, *EU-oikeuden perusteita* (Edita 2006) 169.

⁶⁵ Steve Peers, 'Taking Rights Away? Limitations and Derogations' in Steve Peers and Angela Wards (eds), *The European Union Charter of Fundamental Rights* (Hart, 2004) 142-143 and John Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 ELJ 15, 37.

⁶⁶ E.g. Somek (n 20) 49. In the *Laval* and *Viking* judgments, the Court of Justice approached the right to collective action as a restriction to the fundamental freedom of establishment which can only be justified by an overriding public interest. See Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, paras 75, 77 and 79 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

discrimination and equal treatment as fundamental rights under EU law must therefore always be evaluated in the broader context in which EU law is interpreted and applied.

At the same time, the fact that the prohibition of nationality discrimination in the context of non-contributory social minimum benefits is clearly defined as a human right under the European Convention on Human Rights could have at least inspirational influence on the interpretation of nationality discrimination under EU law. The future accession of the Union to the ECHR will justify the following two questions: **(1)** does the accession reflect any change in the 'overall objectives' of the Union and **(2)** does it have any impact of the interpretation of Article 18 TFEU that the Union becomes a Contracting Party to an international human rights instrument which recognises the prohibition of nationality discrimination in the field of non-contributory social benefits as a general human right and not as a mere citizenship right. These questions are important because the future changes in the relationships between the Strasbourg and Luxembourg Courts may both reduce the Strasbourg Court's deference to the limited personal scope of the EU prohibition of nationality discrimination and increase the potential for conflicts between EU law and the ECHR in so far as the limitations of the prohibition of nationality discrimination are concerned.

1.6 The emergence of a new Equality Problem

The project of European integration arguably lacks a 'coherent political theory or philosophy' and it has been suggested that equality as a general principle of EU law could provide a way forward.⁶⁷ It has even been proposed that a general equality clause could be used to give legitimacy to the EU legal order as a whole.⁶⁸ However, the potential of

⁶⁷ Gráinne de Búrca, 'The Role of Equality in European Community' in Alan Dashwood and Síofra O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell 1997) 31-32 and 34.

⁶⁸ E.g. Erica Szyszczak, 'Building A European Constitutional Order: Prospects for A General Non-Discrimination Standard' in Alan Dashwood and Síofra O'Leary (eds), *The Principle of Equal Treatment in*

equality to legitimate anything depends on whether the principle of equality provides a 'free-standing right' or merely a 'method of interpretation'.⁶⁹ The purely instrumental view of equality as a tool for completing the internal market has been challenged by the creation of EU citizenship but, at the same time, the limited competences of the Union constrain the principle of equality and non-discrimination as an 'autonomous' goal of EU law.⁷⁰

The Court of Justice has recently confirmed that 'although the principle of prohibition of any discrimination on grounds of nationality within the scope of application of Community law is expressly laid down in Article 12 EC [18 TFEU], it is a general principle'.⁷¹ The Court has also underlined that '[t]he general principles of Community law have constitutional status'.⁷² However, any reference to the prohibition of nationality discrimination as a constitutional principle of EU law raises a range of difficult questions:

- What does it mean that any citizen of the Union can rely on Article 18 TFEU in all situations falling within the scope of the EU treaties?
- Above all, what 'activates' the status of EU citizenship and, thus, EU citizens' right to non-discrimination and equal treatment?
- Does the judicial review under Article 18 TFEU always require the exercise of one of the four fundamental freedoms or shall citizens of the Union 'enjoy the rights conferred by the Treaty' as such, including the right to non-discrimination and equal treatment?

EC Law (Sweet & Maxwell 1997) 35 and Catherine Barnard, 'P V. S: Kite Flying or A New Constitutional Approach?' in Alan Dashwood and Síofra O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell 1997) 67-68.

⁶⁹ Barnard (n 68) 79.

⁷⁰ de Búrca (n 67) 26-27 and 30-31.

⁷¹ Case C-115/08 *Land Oberösterreich v ČEZ as* [2009] ECR I-10265, para 91.

⁷² Case C-101/08 *Audiolux SA and Others vs Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others* [2009] ECR I-9823, para 63.

These questions show that the relationship between Article 18 TFEU and the four fundamental freedoms is a complex one. The fundamental freedoms can be understood both as prohibitions on nationality discrimination and as prohibitions of restrictions on cross-border mobility. Some commentators defend the traditional view of fundamental freedoms as prohibitions of nationality discrimination.⁷³ Others, however, suggest that it is better to distinguish between 'migration discrimination' and 'nationality discrimination' because the exercise of movement rights has become an independent and self-sufficient rationale for the prohibition of discrimination.⁷⁴ On this basis, it has been argued that the general principle of non-discrimination on the grounds of nationality has become redundant because it fails to explain many of the Court's judgments in the area of 'migrant discrimination' under Article 21 TFEU.⁷⁵ At the same time, however, it has also been noted that the focus of the case-law has moved from 'the simple fact of movement' towards 'a more substantive or material connection'.⁷⁶ This has led many commentators to consider whether equal treatment between Union citizens and the nationals of the host Member States could be derived from their 'mere presence' in the territory of another Member State rather than the exercise of their right to free movement.⁷⁷

⁷³ E.g. Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer 2002) and more recently e.g. in Gareth Davies, 'Discrimination and Beyond in European Economic and Social Law' (2011) 18 MJ 7. Davies' major concern is that '[w]here it is suggested that free movement law must go "beyond discrimination" this can only be understood as a call for positive action'. Davies argues further that 'some of the most important justifications for positive action is social law do not translate to the market context'.

⁷⁴ Anastasia Iliopoulou and Helen Toner, 'A new approach to discrimination against free movers?' (2003) 28 ELRev 389, 392 and 394.

⁷⁵ Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 ELJ 1, 26.

⁷⁶ Niamh Nic Shuibhne, 'The European Union and Fundamental Rights: Well in Spirit but Considerably Rumbled in Body?' in Paul Beaumont and Carole Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 194.

⁷⁷ Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 CMLRev 731, 750.

These two, seemingly conflicting, interpretations of the fundamental freedoms illustrate the changing relationship between 'non-discrimination' and 'equality' in EU law.⁷⁸ Several authors have recently pointed out that the traditional market access theory fails to explain the prohibition of non-discriminatory obstacles to the free movement of persons and how EU citizenship could, potentially, explain the move away from the 'internal market rationale' towards 'protecting the *individual* from disproportionate regulations imposed by Member States regardless of an effect, even only potential, on the exercise of intra-Community economic activities'.⁷⁹ It has also been suggested that this development can be seen as a step away from the formal concept of equality towards a more substantive concept of equality.⁸⁰

The lessening importance of the prohibition of nationality discrimination in the context of free movement of persons can, thus, imply an increasing interest in equal treatment of Union citizens. Although the right to free movement has been described as the

⁷⁸ The case law on non-discriminatory obstacles has been summarized by Stephen Weatherill as follows: 'The injection of an adequate cross-border element enables a claim not simply to an equality right, but instead to the dynamic protection of Community law on free movement, subject only to the capacity of the regulator to show justification for the restriction (when the focus shifts to the legislative role)'. Stephen Weatherill, 'After Keck: some thoughts on how to clarify the clarification' (1996) 33 CMLRev 885, 904-905. The Court of Justice itself has summarized the prohibition of non-discriminatory restrictions in the so-called 'Gebhard test', which says that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: 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'. Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37. Other relevant cases include C-19/92 *Kraus* [1993] ECR I-1663; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921; Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493 and Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. See for further analysis of 'market access' in Jukka Snell, 'The Notion of Market Access: a Concept or a Slogan?' (2010) 47 CMLRev 437.

⁷⁹ Spaventa (n 35) 744 and 768. According to Spaventa, the difficulties in defining what constitutes an obstacle to market access implies that '[t]he market access test might indeed attempt to conceal the fact that the Court's interpretation of the free movement provisions might no longer be justified with regard to the internal market rationale alone'. Loc.cit 764.

⁸⁰ Mattias Malmstedt, 'From employee to EU citizen – A development from equal treatment as a means to equal treatment as a goal?' in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer 2001) 120. Malmstedt refers to this development as the 'two-fold development' of equality.

'core and origin'⁸¹ of EU citizenship, EU citizenship has also been viewed as a 'non-economic *lex generalis* behind the fundamental freedoms'⁸² or as 'a rearrangement of the prior distinction between *lex specialis* and *lex generalis*'⁸³. In order to understand the EU principle of equality, one must, therefore, understand what consequences the shift of focus from 'nationality discrimination' towards 'equality between EU citizens' has on the discrimination analysis under Article 18 TFEU. The dynamic interpretation of EU citizenship as a 'fundamental status of all Member State nationals' has equipped the right to non-discrimination on the grounds of nationality with an entirely new tenet. At the same time, however, the meaning and purpose of 'equal treatment' has remained complex and ambiguous in relation to EU citizens' general right to equal treatment.

Academic literature has predominantly focused on how EU citizenship can be used to expand the EU non-discrimination principle to tackle the instances of reverse discrimination. Whether the requirement of a cross-border element is compatible with the idea of EU citizenship has recently been assessed by several authors.⁸⁴ However, this study is interested in the question of how EU citizenship affects what has been called the 'inner limits' of EU citizens' right to equal treatment, i.e. in those limits that 'lie inside the notion of discrimination itself'.⁸⁵ Namely, the conditions and limitations of free-movement rights

⁸¹ Hans Ulrich and Jessurun d'Oliveira, 'European Citizenship: Its Meaning, Its Potential' in Renaud Delhousse (ed), *Europe After Maastricht: An Ever Closer Union?* (Beck Law Books 1994) 132.

⁸² Wollenschläger (n 75) 30.

⁸³ Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 EPL 533, 559.

⁸⁴ Some authors argue that the possibility of reverse discrimination is in conflict with the idea of EU citizenship, while others claim that the purely internal situation doctrine is 'a suitable instrument to meet the constitutional necessity of respecting the division of powers between the Union and its Member States'. Dominik Hanf, "'Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?' (2011) 18 MJ 29.

⁸⁵ E.g. Anne Pieter Van der Mei distinguishes between the '**outer limits**' of Article 18 TFEU which refer to the requirement of a cross-border element and the non-application of EU law in internal situations and the '**inner limits**' which 'lie inside the notion of discrimination itself' in the sense that differential treatment can be labelled discriminatory on in so far as nationals and non-nationals are in 'comparable position' and

can constitute an additional level of '*de facto*' discrimination not just in the case of 'static' EU citizens, but also in the case of 'needy' migrant EU citizens.⁸⁶ The rest of this section will first briefly discuss how the dynamic interpretation of EU citizenship has influenced the so-called 'outer limits' of EU citizens' right to equal treatment, i.e. the requirement of a cross-border element and the non-application of EU law to 'purely internal situations'. It will, then, turn back to the research question of this thesis by explaining how a new 'Equality Problem' has emerged in relation to the 'inner limits' of EU citizens' right to equal treatment.

EU citizenship and the 'Outer Limits' of Article 18 TFEU

Economically active EU citizens enjoy the right to non-discrimination and equal treatment on the basis of their status as 'Union workers' under Article 45 TFEU and Article 7 of Regulation 492/2011. In the case of economically inactive EU citizens, it has been more elusive how a sufficient 'connecting factor' with EU law is established for a case to fall into the scope of the general prohibition of nationality discrimination under Article 18 TFEU. The Court's traditional understanding is that the Treaty provision on non-discrimination and equal treatment does not apply to the so-called purely internal situations 'where there is no factor connecting them to any of the situations envisaged by Community law'.⁸⁷ However, the requirement of a link to 'any of the situations envisaged by Community law'

differential treatment 'cannot be justified'. See Anne Pieter Van der Mei, 'The Outer Limits of The Prohibition of Discrimination on the Grounds of Nationality: A Look Through The Lens of Union Citizenship', (2011) 18 MJ 62.

⁸⁶ See e.g. Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 Columbia Journal of European Law 169, 196.

⁸⁷ Case 175/78 *The Queen v Vera Ann Saunders* [1979] ECR 1129, para 11.

has been interpreted loosely in such familiar cases as *Surinder Singh*, *Zhu and Chen*, and *Carpenter*.⁸⁸

In practice, the requirement of a cross-border link as a 'connecting factor' covers many situations with a 'very tenuous'⁸⁹ link with the fundamental freedoms. EU citizenship has played an important role in transforming the requirement of a 'connecting factor' from purely activity-based standards towards a more status-based understanding of what relates an individual to the Union. At the same time, however, it has remained unclear what exactly activates the status of EU citizenship in those cases in which a Union citizen has not made use of the right to free movement but which still cannot be assimilated to purely internal situations 'for that reason alone', as the Court has put it.

In the more recent *Ruiz Zambrano* case, the Court of Justice seemed to finally address this question in its statement that Article 20 TFEU 'precludes national measures which have the effect of depriving citizens of the Union the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.⁹⁰ The Court's reasoning in this seminal case was unfortunately short-spoken but what was noticeable was the clear emphasis on the *status* of EU citizenship, irrespective of the

⁸⁸ Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265, para 23; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, para 19 and Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, paras 30 and 39. In the *Zhu and Chen* case, the Court stated that '[t]he situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation'. Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, para 19. Similarly, the Court has accepted that the rights to free movement and establishment must not be violated by the country of origin 'when a Community national who has availed himself or herself of those rights returns to his or her country of origin'. Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265, para 23.

⁸⁹ Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43, 44.

⁹⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* [2011] ECR I-1177, paras 42 and 45.

activities pursued by a Union citizen.⁹¹ However, the Court of Justice qualified the reference to the genuine enjoyment of the substance of EU citizenship rights in the later *McCarthy* and *Dereci* judgments, both of which underlined that the criterion relating to the denial of the genuine enjoyment of the substance of EU citizenship rights refers to those rather extreme situations in which 'the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole'.⁹²

The *McCarthy* and *Dereci* judgments show that the new criterion of 'genuine enjoyment of the substance of EU citizenship rights' only provides an exception to the main rule that Articles 21 and 18 TFEU are not applicable to EU citizens who have not exercised their right to free movement and who have always resided in the Member State of which they are nationals.⁹³ It has also been noted that this case-law seems to distinguish between the 'status of Union citizenship' and the 'exercise of certain rights which that status confers'.⁹⁴ Despite these qualifications, the Court's reference to the 'genuine enjoyment of the substance of Union citizens rights' has provided a new tool for the assessment of the

⁹¹ More detailed reasoning was found in the Opinion of Advocate General Sharpston which compensates the artlessness of the Court's judgment both in length and in breadth. The Advocate General considered whether EU citizenship implies a 'true citizenship' beyond being merely a 'non-economic version of the same generic kind of free-movement rights as have long existed for the economically active and for persons of independent means'. Opinion of Advocate General Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, para 3. Her suggestion was that Article 18 TFEU should be applicable if the following three 'cumulative conditions' were met: (1) discrimination is caused by the 'interaction' between Article 21 TFEU and national law, i.e. the situation of 'static' Union citizens must be 'comparable, in other material respects, to that of migrant Union citizens, (2) the case 'entails a violation of a fundamental rights protected under EU law' and (3) 'at least equivalent protection is not available under national law'. Ibid, para 144.

⁹² Case C-256/11 *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké, Dragica Stevic v Bundesministerium für Inneres* 15 November 2011, para 66. See also Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375, paras 49-50.

⁹³ Case C-256/11 *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké, Dragica Stevic v Bundesministerium für Inneres* 15 November 2011, para 74 and Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375, paras 55-56.

⁹⁴ Síofra O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' in Michael Dougan and Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 58.

traditional distinction between the purely internal situations and a sufficient connecting factor with EU law, i.e. the 'outer limits' of EU citizens' right to equal treatment. The broad interpretation of the *Ruiz Zambrano* case would suggest that the mere 'interaction'⁹⁵ between national law and Article 21 TFEU might sometimes be enough to bring the case into the jurisdictional scope of EU citizenship rights, including the right to non-discrimination and equal treatment under Article 18 TFEU. It is therefore easy to understand why EU citizenship is seen as 'slowly but steadily evolving into a fifth Treaty freedom'.⁹⁶

EU citizenship and the 'Inner Limits' of Article 18 TFEU

The critical analysis of the limits of Article 18 TFEU cannot be limited to the mere jurisdictional issues but the question of the substantive content of the EU principle of equality, i.e. what rights are conferred on Union citizens and how these rights can be limited, must also be addressed. The limited access to EU citizenship rights in the case of 'static' EU citizens is often regarded as one of the main examples for the lack of substance of Union citizens' rights to equal treatment. But the limitations on EU citizens' right to non-discrimination and equal treatment can also be more substantive, stemming from the application of the objective justification test in those cases which fall into the jurisdictional scope of application of Article 18 TFEU. It is under these justificatory criteria for differential treatment that the degree of equality between Union citizens is ultimately defined.

⁹⁵ See Opinion of Advocate General Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, para 3.

⁹⁶ Editorial Comments, 'Two-speed European Citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 CMLRev 1, 1.

EU citizenship as the criterion for the personal scope of Article 18 TFEU unavoidably leads to the question of what 'equal citizenship' means for the substance of that article. The Court, therefore, needs to address the question of what equal treatment, and not just non-discrimination, means for those EU citizens who now fall into the personal and material scope of EU law. However, when the need for a more substantive analysis of EU citizens' right to non-discrimination and equal treatment has been recognized, the focus of scholarly enquiry has typically been on Union citizens' right to reside in the area of other Member States than their State of origin, while the Court's mantra of 'equal treatment of all those legally residing in the area of another Member State'⁹⁷ has been taken for granted. In practice, however, the right to equal treatment is far from absolute even in those cases in which an economically inactive Union citizen is legally resident in another Member State.

In the case of economically inactive and dependent migrant EU citizens, the limits of the right to non-discrimination and equal treatment are defined by using the requirement of social integration as a decisive criterion. Having its origins in the case-law of the Court of Justice of the EU, the so-called 'real link' test defines which degree of vertical belonging is required between the Member State and an individual before the right to equal treatment is fully triggered under EU law. The real link test has been characterized as a 'pretext' to allow nationality discrimination in certain cases in which it was 'squarely prohibited before'.⁹⁸ It is, therefore, surprising how little attention the emergence and evolution of this test has attracted amongst legal scholars. The scholarly analysis is limited to a few authors, all of whom explore the requirement of a 'real link' as a practical rather than a theoretical or

⁹⁷ See in more detail in Chapter 2.

⁹⁸ Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', Jean Monnet Working Paper 8/10 56, fn 262.

philosophical problem.⁹⁹ Moreover, very little attention has been paid to the question of how the requirement of *ex ante* integration in the form of a 'real link' affects horizontal relationships between migrant EU citizens and nationals of the host Member State.

Traditionally, EU law scholarship has adopted a functional perspective under which EU citizens' right to non-discrimination and equality has been construed as a means of expanding the existing market freedoms beyond the strict limits of economic activity. These theories, while varying in detail, consider equality as a tool of integration and derive the justification of equal treatment from EU citizens' right to free movement and residence. While these approaches help to shed light on the historical development of the EU principle of equality, they fail to consider how the equality of legal relationships constitutes a supranational polity and whether equality of relationships has value as an objective of legal integration in itself. In practice, the limits of Article 18 TFEU have remained widely unravelled in so far as their effect on equality *between* Union citizens is concerned.

Recent EU law scholarship has started to pay more attention to the lack of substance of the EU principle of equality. However, it has been argued that the formalistic interpretation of equality has its origins in the limited jurisdictional scope of EU law or, as Dimitry Kochenov has put it, in 'a situation where equality stops at the arbitrary and extremely mobile border between the legal orders'.¹⁰⁰ This thesis has its origins in the same problem, i.e. the lack of substance of the EU principle of equality, but it is approached from a different angle. The shift of focus from 'nationality discrimination' to 'equal citizenship' by affirming EU citizenship as a 'fundamental status' of all Member State

⁹⁹ Charlotte O'Brien and Oxana Golynger make an important exception, but the more philosophical analysis of the 'real link' case-law is still largely missing.

¹⁰⁰ Kochenov (n 98) 9.

nationals leads to a new question: What are the consequences of that status for the interpretation of EU citizens' right to non-discrimination and equal treatment? A coherent theory of EU citizenship as an Equal Status of all Union citizens is still missing and this thesis is an attempt to contribute to that discussion in so far as the normative justification of equality between Union citizens is concerned.¹⁰¹

1.7 The quest for equal citizenship in EU law

In a modern democratic state, citizenship rights belong to everyone. This development contains its own paradox: the removal of social exclusion within a State has consolidated citizenship as a status which predominantly refers to 'membership in a *particular* community'.¹⁰² In practice, the two meanings of citizenship as a form of membership and as a form of participation are now closely intertwined.¹⁰³ This development is vividly captured in Ulrich Preuß's statement that citizenship as including particular rights and duties and citizenship as granting a participative member of a political community now present 'two sides of one and the same coin whose message is: citizenship is an exclusive status'.¹⁰⁴ The emphasis on the exclusive nature of national citizenship explains why the idea of supranational (let alone global) citizenship seems so controversial to many authors.¹⁰⁵ However, although the differentiation between nationality¹⁰⁶ and citizenship¹⁰⁷

¹⁰¹ Despite the proliferation of literature on EU citizenship in general, EU law scholarship has only recently started to show more interest in the horizontal conceptions of EU citizenship as an equal status. As an exception, I would again like to mention Dimitry Kochenov's argument for 'respect as equals' in his Jean Monnet working paper (n 98).

¹⁰² See further e.g. Ulrich Preuß, 'Problems of a Concept of European Citizenship' (1995) 1 ELJ 267, 269.

¹⁰³ Massimo La Torre, 'Citizenship: A European Wager' (1995) 8 Ratio Juris 113, 114 and 121.

¹⁰⁴ Ulrich Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in Richard Bellamy and Vittorio Butacchi and Dario Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995) 107.

¹⁰⁵ This can be contrasted with the Kantian ideals of universalism and hospitality. The tension between these two approaches to citizenship is addressed by the so-called communitarians (e.g. Michael Walzer, David Miller and Rogers Brubaker). See also Richard Bellamy, 'Evaluating Union citizenship: belonging, rights and participation within the EU' (2008) 12 Citizenship Studies 597, 609 for an argument that 'European citizenship must continue to be but an adjunct to national citizenship'. Along with the notions of 'origin' and

has lost much of its practical relevance in a modern constitutional state,¹⁰⁸ the conceptual and normative difference between these two statuses is still relevant for understanding what a membership of society means in practice and in theory, as well as for understanding what it could mean in the supranational context.

As national self-consciousness promises to connect those 'who had been strangers to one another' by creating 'more abstract form of social integration', it is important to consider what type of consciousness could function as a motivating factor for new forms of social integration within a supranational polity, such as the European Union, and whether EU citizenship has any role to play in this task.¹⁰⁹ For instance, Jürgen Habermas has noted that a 'conceptual gap' between the constitutional state and the nation will always remain

'culture', citizenship arguably forms one of the 'three major dimensions of nationalist projects. See Nira Yuval-Davis, *Gender & Nation* (SAGE Publications 1997) 21.

¹⁰⁶ *Nationality* has historically been attached to the person's origin on the basis of birth. In Roman law, the term *natio* referred to a community built upon geographical and family relations, whereas the term *civitas* referred to the political community. As time went on, it became more common to move from these concrete attributes to the use of nationality as an identification for a more abstract idea of shared identity. In the aftermath of, first, the Peace of Westphalia and, then, the French Revolution, the political sovereignty of the State came to be derived directly from the ideals of nation and nationality. In other words, nationality was no longer an attribute of a pre-political community, but it was given a primary normative role in defining the political identity and democratic community. E.g. Jürgen Habermas, 'Citizenship and National Identity' in Bart van Steenberg (ed), *The Condition of Citizenship* (SAGE 1994) 22-23.

¹⁰⁷ *Citizenship* defines the position of an individual in relation to a political community. The dual role of citizens both as the objects and the subjects of a political community requires autonomy and loyalty. For this reason, citizenship rights were originally limited to a small elite. Hans van Gunsteren, 'Four Concepts of Citizenship' in Bart van Steenberg (ed), *The Condition of Citizenship* (SAGE 1994) 36. At the other end of the scale, the Enlightenment idea of citizenship started to toy with a more universalistic or cosmopolitan distribution of certain citizenship rights. (See e.g. Kant) It was along with the industrialization and protectionist economic policy that the rights to free movement and residence became privileges accessible only to the members of the State community. See in more detail in O'Leary (n 6) 103-104.

¹⁰⁸ Preuß (n 102) 269. For the idea of nationalism as the normative source of political identity see e.g. David Miller, *Citizenship and National Identity* (Polity Press with Blackwell 2000). However, it is worth noting in this context how Benedict Anderson has convincingly developed the argument of nations as 'imagined political communities'. See Benedict Anderson, *Imagined Communities Reflections on the Origin and Spread of Nationalism* (Verso 1983).

¹⁰⁹ Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (1996) 9 *Ratio Juris* 9(2) 125, 128-29. Habermas' own focus lies in the idea of democratic citizenship which would generate solidarity between strangers' and under which citizens concern their citizenship as 'the frame for that dialectic between legal and actual equality from which fair and preferable living conditions for all of them can emerge'. Ibid 134-35. This vision of 'constitutional patriotism' leads Habermas to conclude that 'the nation state can no longer provide the appropriate frame for the maintenance of democratic citizenship in the foreseeable future'. Ibid 137.

for the very reason that both the territorial and the social boundaries always appear as normatively 'contingent'.¹¹⁰ It is this 'gap' between 'nationality' and 'constitutional citizenship' that can justify the idea of transnational or supranational citizenship. At the same time, it is clear that any attempt to expand the concept of citizenship beyond the boundaries of a nation state must address a whole range of difficult legal and political questions. The current status of EU citizenship provides an excellent example of what these difficulties and compromises are in practice.

EU citizenship is inherently different from national citizenship due to its lack of independence. What applies to citizenship in a national state does not automatically apply to a 'derived'¹¹¹ citizenship or an 'intermediate status between a qualified legal subjectivity - - and full citizenship'¹¹² in a supranational polity. Moreover, EU citizenship 'is different from "citizenship" as we know it' not just because of its complementary nature in relation to national citizenship but also because of 'its content in terms of *legal status*'.¹¹³

- 1) The rights of EU citizenship primarily advance the legal status of private individuals in countries other than their country of origin.¹¹⁴ Thus, the creation of EU citizenship has challenged the link between the status of nationality and the enjoyment of citizenship rights.¹¹⁵

¹¹⁰ Ibid 131-32.

¹¹¹ Carlos Closa, 'Citizenship of the Union and Nationality of the Member States' (1995) 32 CMLRev 487, 510.

¹¹² La Torre (n 103) 122.

¹¹³ Vincenzo Lippolis, 'European Citizenship: What It Is and What It Could be' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer 1998) 317.

¹¹⁴ Ibid 320.

¹¹⁵ Andrew Evans, 'Nationality law and European integration' (1991) 16 ELRev 190, 190.

- 2) EU citizenship defines the status of Union citizens in relation to the host Member State, rather than in relation to the Union itself.¹¹⁶
- 3) EU citizens' primary rights to free movement, residence, and equal treatment do not just differ from universal fundamental or human rights in their 'partiality'¹¹⁷, but they also differ conceptually from classic citizenship rights.¹¹⁸
- 4) The right of Union citizens to free movement and residence is argued to be 'highly anomalous'¹¹⁹ when compared to modern citizenship rights because of a 'glaring disparity of treatment'¹²⁰ between economically active and inactive EU citizens.

The concept of EU citizenship can be examined both as a 'normative' and a 'descriptive' concept.¹²¹ In the absence of a clear-cut European *Demos*, the normative potential of EU citizenship has become more important than its descriptive dimensions. As a normative concept, EU citizenship can be derived from a liberal ideal of status-based citizenship

¹¹⁶ Wollenschläger (n 75) 2. The status of EU citizenship confers rights on Union citizens both directly in relation to the Union itself and by virtue of the right to equal treatment in relation to the Member States. In the latter case, the Member States are obliged to grant Union citizens the same rights and benefits as they grant to their own nationals. See further e.g. Anne Pieter Van der Mei, 'The Elusive and Exclusive Concept of Union Citizenship, A Review Essay' (1998) 5 MJ 391, 394.

¹¹⁷ Hilson (n 43) 642. See also e.g. Robin CA White, 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 54 ICLQ 885, 902 and Preuß (n 102) 275.

¹¹⁸ Davies (n 73) 121.

¹¹⁹ Ibid 131.

¹²⁰ Stefano Giubboni, 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice' in Yuri Borgmann-Prebil and Malcolm Ross (eds), *Promoting Solidarity in the European Union* (OUP 2010) 170.

¹²¹ For instance, Jo Shaw has pointed out that it is important to recognise the 'interaction' between 'a narrow and formal legal concept of citizenship', on the one hand, and 'a broader notion of "membership" comprising constitutional, political and socio-economic elements', on the other Jo Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 MLR 293, 294. See also e.g. Jo Shaw, 'Citizenship: contrasting dynamics of the interface of integration and constitutionalism' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 575 – 609. Similarly, Norbert Reich has formulated the question of EU citizenship by asking whether it is 'merely a legal concept which defines a formal link of European citizens via nationality' or whether it can also be 'extended to some fundamental civic, political, and social links'. Norbert Reich, 'Union Citizenship – Metaphor or Source of Rights?' (2001) 7 ELJ 4, 5.

rights or from a communitarian ideal of supranational/shared cultural identity.¹²² This means that the rights of EU citizens can either be seen as status rights or they can be based on the premise that the enjoyment of common rights would eventually create a bond between EU citizens.¹²³ Besides these two approaches, it has also been envisioned how 'European citizenship would open the symbolic space for social activities which could finally lead to a European "*societas civilis sive politica*", i.e. a civil society beyond the physical boundaries of the nation-states'.¹²⁴ The principle of equality within EU citizenship could, then, be seen as one of the practical methods of 're-formulating' the traditional concept of citizenship.¹²⁵

However, it has been argued that the imbalance between the rights of 'citizens proper' and the rights of 'market citizens' in the realization of the European internal market has given rise to 'a self-interested "citizen" whose allegiance to Europe may not be simply taken for granted'.¹²⁶ For some commentators, the concept of market citizenship provides both an empirically appropriate and a normatively legitimate way to describe EU citizenship.¹²⁷ What is noteworthy, however, is that the disagreement over EU citizenship here gains a normative dimension. It is widely agreed that "What" is grounded in constitutionalism is the substantive point¹²⁸ but the opinions are divided when it comes to the question of what the EU constitutionalizes: a market or something more? The very use

¹²² Gerard Delanty, 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1 *Citizenship Studies* 285, 285.

¹²³ Ulrich Preuß, 'Two Challenger to European Citizenship' (1996) *Political Studies* XLIV 534, 548-49.

¹²⁴ Preuß (n 102) 280.

¹²⁵ Carlos Closa, 'Supranational Citizenship and Democracy: Normative and Empirical Dimensions' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer 1998) 431.

¹²⁶ Everson (n 3) 84-85 and 89.

¹²⁷ Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *CMLRev* 1597, 1599.

¹²⁸ *Ibid* 1605.

of the ideologically-loaded concept of citizenship seems to confirm that at least some elements of the 'equality of relationships' between citizens in a national state were aimed to be reinforced in the context of European Union law.

This brief analysis of EU citizenship supports the argument of the new 'Equality Problem' in the previous section. The EU prohibition of nationality discrimination has traditionally been selective between different groups of people and, for many commentators, its importance is gradually declining due to the increasing reliance on the broader prohibition of non-discriminatory obstacles to free movement. At the same time, however, the creation of EU citizenship has strengthened the constitutional dimension of equality in EU law.¹²⁹ All EU citizens who exercise their right to free movement and residence under Article 21 TFEU fall now into the personal scope of the right to non-discrimination and equal treatment under Article 18 TFEU. In so far as the concept of EU citizenship defines the personal scope of Article 18 TFEU, it is not feasible to avoid the question of what equal citizenship means for the substantive scope of the same article.¹³⁰

¹²⁹ Evans (n 24) 267-8.

¹³⁰ Even the personal scope of EU citizenship rights is contested. It is common amongst legal scholars to discuss the feasibility to base EU citizenship rights on residence instead of nationality. See e.g. Marie-José Garot, 'A New Basis For European Citizenship: Residence' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer 1998). Residence has been advocated as an alternative for nationality as a 'condition for access to equality'. E.g. Andrew Evans, 'Union Citizenship and the Equality Principle' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In Search of a New Order* (SAGE Publications 1995) 110 and Roy W. Davis, 'Citizenship of the Union ... rights for all?' (2002) 27 ELRev 121, 135. Residence has also gained attention as a potential membership criterion for 'civic citizenship' in the case of third-country nationals. E.g. Bell (n 11) 318. See also the so-called Tampere Agenda of 2000, Tampere European Council 15 and 16 October 1999, Presidency Conclusions Nr: 200/1/99. The idea of EU citizenship based on residence has been introduced as a way to expand the personal scope of EU citizenship to cover third-country nationals because it would make the right to equal treatment independent of nationality. E.g. Samantha Besson and André Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 ELJ 573, 580-582 and Gareth Davies, 'Any Place I Hang My Hat? Or: Residence is the New Nationality' 2005 11 ELJ 43. Ideally, a residence-based approach would allow economically inactive Union citizens to be 'regarded as being entitled to membership rights reflecting the degree to which they are actually participating in the project that is the European Union'. Davis (n 130) 137. However, it is important to bear in mind that none of these suggestions can avoid the 'substantive equality problem'. The conditions of residence would still need to define the extent to which EU citizenship constitutes an 'equal status'. It has also been noted that '[r]esidence is indeed anchored even deeper in territorial bounds than nationality'. Besson – Utzinger (n 130) 582.

The EU equality problem is essentially a problem about the equal treatment of EU citizens *in relation to one another*. It has been claimed that the focus of EU citizenship should be on the 'genuine enjoyment of the substance of the rights' conferred by virtue of that status rather than on the 'enjoyment of rights flowing from national citizenship'.¹³¹ However, the essence of the rights of EU citizenship depends on how we address the 'still unanswered question of what Union citizenship actually is or ought to be'.¹³² The following chapters of the thesis will address this question from the premise that the EU principle of equality and the status of EU citizenship are so closely intertwined that one cannot be addressed without the other. This view finds support, for instance, in the recent *Vardyn and Wardyn* case in which the Court of Justice explained the fundamental nature of the status of EU citizenship by referring to the fact that EU citizens enjoy the right to equal treatment and a prohibition of discrimination on grounds of nationality.¹³³

1.8 Conclusion

This chapter showed how the interpretation of the EU principle of equality has moved from 'nationality discrimination' towards 'equal citizenship'. I have argued that using EU citizenship as the criterion for the personal scope of Article 18 TFEU unavoidably leads to the question of what 'equal citizenship' means for the substance and substantive scope of that article. The next chapter will examine in more detail how the creation of EU citizenship has modified discrimination analysis in EU law. This analysis will address the structural and substantive dimensions of the 'Equality Problem' in EU law.

¹³¹ Van der Mei (n 85).

¹³² Loc.cit.

¹³³ Case C-391/09 *Malgžata Runevič-Vardyn, Lukasz Pawel Wardyn* [2011] ECR I-3787, paras 60-61.

2 Equal Treatment: A (Limited) Right of All Union Citizens

2.1 Introduction

Chapter 1 showed that EU citizenship as a criterion for the personal scope of Article 18 TFEU has shed light on a new 'Equality Problem', i.e. the question of what equality means *between* EU citizens. This chapter will examine in more detail how the shift from 'nationality discrimination' towards 'equal citizenship' has changed the balance between different levels of discrimination analysis under Article 18 TFEU. The analysis of the Union test for discrimination shows that the EU equality problem emerges both at the level of the *scope* of and the *limitations* on EU citizens' right to equal treatment. First, it will be seen in Section 2.2 that EU citizens' general right to equal treatment has no *de facto* independent scope but is conditioned on the accepted limits on their right to residence and, thus on the proportionality analysis (the structural Equality Problem). Secondly, it will be seen in Section 2.3 that the accepted limitations on EU citizens' right to equal treatment depend on economic criteria which fail to address the question of what differential treatment means for equality of relationships between EU citizens (the substantive Equality Problem).

The prohibition of nationality discrimination has been referred to as a 'specific enunciation' of the general principle of equality since the early years of European integration.¹³⁴ The notion of discrimination usually refers to decision-making on arbitrary or irrelevant grounds, whereas the notion of equality can vary from a purely formal definition of 'like should be treated alike' to different substantive definitions of equal

¹³⁴ E.g. Case 117/76 and 16/77 *Albert Ruckdeschel & Co., et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen*; *Diamalt AG v Hauptzollamt Itzenhoe* [1977] ECR 1753, para 7. See for more recent case-law e.g. Case C-115/08 *Land Oberösterreich v ČEZ as* [2009] ECR I-10265, para 91, according to which 'although the principle of prohibition of any discrimination on grounds of nationality within the scope of application of Community law is expressly laid down in Article 12 EC, it is a general principle'. See also Case C-101/08 *Audiolux SA and Others vs Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others* [2009] ECR I-9823, para 63 for the statement that '[t]he general principles of Community law have constitutional status'.

treatment.¹³⁵ The Court of Justice has given the concept of equality a primarily formal meaning by stating that similar situations must be treated similarly and different situations differently, unless there are objective justifications for differential treatment of similar situations or similar treatment of different situations.¹³⁶

In order to answer the question of what constitutes a violation of the EU principle of equality, it is important to understand the internal logic of discrimination analysis. In its simplest and most common form, the applicability of the non-discrimination principle is extracted from the following three steps: (1) two situations are comparable, (2) there is a

¹³⁵ The relationships between 'equality' and 'non-discrimination' can be defined technically. Under this approach, equality represents a principle or value which is materialized within the prohibition of discrimination. For instance, Catharine Barnard has described the non-discrimination principle as 'the framework for enforcing legal rights to equality', whereas the principle of equality is argued to serve 'a political or symbolic purpose rather than a legal function'. Catherine Barnard, 'The principle of equality in the Community context: *P, Grant, Kalanke*, and *Marschall*: four uneasy bedfellows?' (1998) 57 Cambridge Law Journal 352, 353. Similarly, L. Betten notes that the prohibition of discrimination on arbitrary grounds is the 'consequence' of the requirement of equal treatment. Lammy Betten, 'New equality provisions in European law: some thoughts on the fundamental value of equality as a legal principle' in Kim Economides and Lammy Betten and John Bridge and Andrew Tettenborn and Vivien Shrubsall (eds), *Fundamental Values* (Hart 2000) 71, fn 12. But the distinction between these two concepts can also be drawn on the basis of their substantive content. First, the principle of non-discrimination seems to go further than the mere requirement of formal equality because non-discrimination can derive its content from substantive values such as autonomy and dignity, whereas equality is often based on the formal idea of treating like cases alike. Elisa Holmes, 'Anti_Discrimination Rights Without Equality' (2005) 68 MLR 175 and Tarunabh Khaitan, 'An autonomy-based foundation for legal protection against discrimination' (D.Phil thesis, University of Oxford 2010). However, this picture changes considerably when we distinguish between the formal and substantive conceptions of equality. Different notions of substantive equality promise to transform the formal understanding of comparability. Unlike its formal counter-part, the principle of substantive equality recognizes that there is no axiomatic or uncontroversial comparability between different groups and that social circumstances play an important role when actual comparability or similarity is defined. E.g. Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011) 7-15. The difference between the formal and substantive approaches to equality and non-discrimination has been demonstrated by pointing out how formal equality 'assumes that the comparator groups are actually similarly situated and able to compete equally when, in fact, their social circumstances may mean that in practice they are not'. Catherine Barnard, 'Social Policy Revisited in the Light of the Constitutional Debate' in Catherine Barnard (ed), *The Fundamental of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007) 133.

¹³⁶ E.g. Case 13/63 *Italy v Commission* [1963] ECR 165, para 4 which stated: 'The different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination. An appearance of discrimination in the form may therefore correspond in fact to an absence of discrimination in substance. Discrimination in substance would consist in treating either similar situations differently or different situations identically'. See also e.g. Van der Mei (n 4) 69, fn 241.

difference in treatment on the basis of one of the prohibited grounds (e.g. nationality) and (3) there is no objective justification for differential treatment.¹³⁷

In using discrimination analysis as an analytical tool, this chapter will discuss how the concept of EU citizenship has provided the Court of Justice with a new standard of comparability and how this has shifted the balance between **(1)** the scope of the right to equal treatment which has its basis in the comparability standard and **(2)** the limitations on the right to equal treatment which depend on the accepted justifications for legitimate differential treatment. This analysis of the Union test for discrimination is based on the presumption that there is more than one possible interpretation of equality in EU law and that the emergence of EU citizenship may transform what equality means in the context of EU law. Examining the shift of balance between different levels of discrimination analysis in the interpretation of EU citizens' right to equal treatment will lay down the basis for my critique of what philosophical justification of equality is promoted in EU law in Chapter 3.

2.2 The scope of the right and the structural Equality Problem

2.2.1 A personal right to equal treatment – based on what?

Comparability of situations as the first stage of discrimination analysis refers to the question of 'which features of persons it takes to be relevantly alike or unlike'.¹³⁸ Equal treatment is required in those cases which are relevantly alike and differential treatment is required in those cases which are relevantly unlike each other. The operation of formal equality, therefore, depends on finding a 'suitable comparator'.¹³⁹ Similarly, the Court of Justice has defined nationality discrimination by stating that 'discrimination can arise only

¹³⁷ See e.g. J. Usher, *General Principles of EC Law* (Longman 1998) as discussed in Gavin Barrett, 'The Concept of Equality in European Community Law' in Cathryn Costello and Eilis Barry (eds), *Diversity In Equality: The New Equality Directives* (Irish Centre for European Law 2003) 114-118.

¹³⁸ See e.g. Carl Knight, 'Describing Equality', (2009) 28 *Law and Philosophy* 327, 331.

¹³⁹ E.g. Barret (n 137) 105.

through the application of different rules to comparable situations or the application of the same rule to different situations'.¹⁴⁰ The definition of relevant parameters for comparability is, therefore, crucial for understanding discrimination analysis as currently applied in the Court's case law. At the same time, however, the analysis of the EU principle of equality through the concept of 'meaningful relationships' in the later chapters of this thesis will also challenge the traditional, assimilationist, idea of comparability as a prerequisite for equal treatment under Article 18 TFEU.

This section explains how EU citizenship has changed the comparability analysis in EU law and discusses whether this change has actually led to more equality between EU citizens. For the purpose of this analysis, it is important to bear in mind that the concept of citizenship itself can be seen as affirming comparability between those who are otherwise different.¹⁴¹ The Court of Justice has bowed in this direction in its reference to the right of all those EU citizens 'who find themselves in the same situation' to enjoy equal treatment within the material scope of the EU Treaties.¹⁴² However, it needs to be asked *on what basis* EU citizens find themselves in the same situation with the nationals of the host Member State and how this may qualify the initial comparability between EU citizens. This is important because the interpretation of comparability between EU citizens defines the extent to which the common status of EU citizenship can provide a tool for accommodating 'otherness' between the nationals and non-nationals within one and the same Member State.¹⁴³

¹⁴⁰ Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-225, para 30.

¹⁴¹ For instance, Ulrich Preuß has articulated this by stating that citizenship entails the idea of 'free and equal individuals who are not "naturally" free and equal and whose rights are not inborn'. Preuß (n 104) 111.

¹⁴² E.g. C-391/09 *Malgžata Runevič-Vardyn, Lukasz Pawel Wardyn* [2011] ECR I-3787, para 61.

¹⁴³ The question of 'otherness' is discussed in more detail in Chapter 4.

The central role of comparability standard in discrimination analysis implies that our understanding of equality is connected to our understanding of who is relevantly similar and deserves equal treatment.¹⁴⁴ However, the problematic nature of making comparisons is widely recognized amongst anti-discrimination law scholars who engage in the academic discourse on non-discrimination as a universal right – as opposed to non-discrimination as a citizenship right as discussed in this thesis. The critics have pointed out that 'categories of morally alike people do not exist in nature'¹⁴⁵ and that the aspects which are weighted in the comparability analysis remain 'sociologically and culturally determined'¹⁴⁶. Moreover, the actual requirement of comparability is more often about 'proportionality, fairness, or balance'¹⁴⁷ than about similarity as such. In practice, comparability analysis is often mixed up with the reasonableness analysis.¹⁴⁸ The tendency to blur the line between the comparability analysis and the objective justification test at different levels of discrimination analysis means that the reasonableness analysis will become a 'justification for considering situations relevantly similar or dissimilar in the first place'.¹⁴⁹ Thus, the objective justification test becomes 'the centre of the discrimination analysis'¹⁵⁰ itself rather than being a tool to determine whether discrimination is justified.

¹⁴⁴ See e.g. Gavin Barrett, 'Re-examining the Concept and Principle of Equality in EC Law' (2003) 22 Yearbook of European Law 117, 132.

¹⁴⁵ Aileen McColgan, 'Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons' (2006) 6 EHRLRev 650, 652.

¹⁴⁶ Sacha Prechal, 'Equality of treatment, non-discrimination and social policy: achievements in three themes' (2004) 41 CMLRev 533, 543.

¹⁴⁷ Fredman (n 135) 13.

¹⁴⁸ Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 1992), 584.

¹⁴⁹ Arnardóttir (n 51) 157.

¹⁵⁰ McColgan (n 145) 670.

A similar tendency to merge the comparability analysis with the reasonableness analysis can be tracked in EU equality and welfare law. In the context of nationality discrimination, the discrimination analysis focuses on similar treatment in relation to the nationals of the host Member State. The comparability analysis asks who should be treated equally to the nationals of the host Member State. In order to reply to this question, it is important to understand which aspects of agency are regarded to be relevant for the comparisons between the nationals of the Member State in question and nationals of other Member States in European Union law.¹⁵¹ The introduction of EU citizenship as a new standard of comparability has been qualified by a lenient application of the reasonableness test, both in relation the scope of and the limitations on the right to equal treatment. This implies that the status of EU citizenship alone does not constitute a relevant agency within the EU legal framework.¹⁵²

In a series of cases beginning with the seminal *Martínez Sala*, *Baumbast*, and *Grzelczyk* judgments, the Court of Justice has underlined the importance of EU citizenship as 'the fundamental status of nationals of the Member States, 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'.¹⁵³ EU citizenship as 'the fundamental status of all Member State nationals' has added a new strand into the

¹⁵¹ Regarding the need of comparator, A. Evans writes: 'Persons from the various Member States will usually be alike in some respects and different in other respects. Hence, criteria are necessary to determine which similarities demand like treatment and which differences demand differential treatment.' Evans (n 130) 95. Similarly, Floris De Witte has noted that 'If it is accepted that Union citizenship only obliges Member States to treat economically inactive Union citizens equally when they find themselves in a comparable situation to nationals, we must describe which ties distinguish non-nationals from nationals'. Floris De Witte, 'The End of EU Citizenship and The Means of Non-Discrimination' (2011) 18 MJ 86.

¹⁵² See more about this below in Section 3.5.

¹⁵³ Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, paras 30 – 31. See also Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, paras 61 – 62. What is interesting here is the way in which the Court uses the idea of comparability by referring to 'those who find themselves in the same situation'.

definition of comparability between private individuals within the Union. However, it has been noted that '[i]t is by no means obvious'¹⁵⁴ what the provisions of EU citizenship add to the principle of non-discrimination or what is the relationship between Articles 18 and 21 TFEU. It is, therefore, important to examine in more detail what is required from the holders of EU citizenship to find themselves in the same situation with the nationals of the host Member State. This is where the comparability analysis merges with the objective justification test and reasonableness analysis.

I agree with the recent suggestion that the welfare rights of migrant EU citizens should be approached from the perspective of comparability rather than through what is called 'the rather mechanical triptych "infringement-justification-proportionality"'.¹⁵⁵ While the notion of comparability has been problematized in anti-discrimination law, as discussed above in this section, it can still provide a useful analytical tool for interpreting Article 18 TFEU: namely, viewing the status of EU citizenship as a relevant comparison class, other differences notwithstanding, can both necessitate and justify a more inclusive view of equal treatment under EU law. What is noteworthy here is the way in which the idea of supranational citizenship simultaneously both maintains the requirement of comparability through the idea of equality between citizens and challenges it by shifting the focus of discrimination analysis from assimilation and similarity to that of 'meaningful relationships' between the holders of EU citizenship. In practice, this means that the argument of comparability between EU citizens is not limited to the mere Aristotelian concept of formal equality ('alike should be treated alike') but can also accommodate a more substantive ideal of equality as a means of protecting new 'meaningful relationships' between EU citizens.

¹⁵⁴ F. C. Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 ELJ 591, 594.

¹⁵⁵ De Witte (n 151).

However, a mere reference to the comparability between EU citizens hides the fact that EU citizens' agency still remains contingent on activity rather than on the status of EU citizenship. In the aftermath of the *Martínez Sala* judgment, it has been suggested that 'something close to a universal non-discrimination right including access to all manner of welfare benefits has now taken root in Community law as a consequence of the creation of the figure of the Union citizen'.¹⁵⁶ Others, however, have argued that the potential of Union citizenship to 'generalize' the right of non-discrimination and equal treatment has 'proven limited'.¹⁵⁷ It seems more truthful to claim that, although 'citizenship is essentially an equality problem',¹⁵⁸ the mere reference to the equality principle fails to provide a solution to the current indeterminacy of EU citizenship.

It has been noted that the difficulties in defining a 'coherent proxy' for comparing nationals and non-nationals follow from the undefined nature of Union citizenship.¹⁵⁹ To the extent that a 'Union Citizen' is a descendant of a 'Market Citizen'¹⁶⁰, it is logical to begin the analysis of the EU principle of equality and the EU equality problem by examining how the discrimination analysis varies between economically active and inactive Union citizens. Below in Sections 2.2.2 and 2.2.3, it will be shown how the relationship between scope of and limitations on the right to non-discrimination and equal treatment depends on whether the right to equal treatment is derived from the status of a

¹⁵⁶ Fries – Shaw (n 83) 536. Fries and Shaw nevertheless qualify this statement by noting that the Court of Justice 'has just taken the more limited – but nonetheless important – step of using Union citizenship to bind together the material and personal scope of Community law in order to provide a more extended range of application for the non-discrimination principle'.

¹⁵⁷ Wollenschläger (n 75) at 33.

¹⁵⁸ Evans (n 130) 86-87.

¹⁵⁹ De Witte (n 151).

¹⁶⁰ See Everson (n 3) 79. Everson points out that 'the rights of the market citizen, particularly that of free movement, have not merely been transferred to the Union citizen but continue to form the very core of that citizenship'. See also Nic Shuibhne (n 127).

'Union worker' or from the mere status of a 'Union citizen'. It can be concluded on the basis of this analysis that EU citizenship appears as a 'transitory status' which primarily assists the nationals of the Member State in striving for the more equal and privileged status of a Union worker.

2.2.2 Union workers and the status-based right to equal treatment: a story of strong comparability

It has been crucial for the EU principle of equality that the Community institutions, above all the Commission, refused to see the free movement of workers in 'macroeconomic terms' and instead underlined the right to free movement as a 'personal freedom' to choose the country in which citizens of the Member States want to work.¹⁶¹ The objective of the original Treaty-based right to free movement was clarified with the adoption of Regulation 1612/68 on the freedom of movement for workers within the Community (now Regulation 492/2011) and Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.¹⁶² It was around this time that the Vice-President of the Commission for the first time addressed the freedom of movement of workers as an 'embryonic form of European citizenship'.¹⁶³ The preamble to Regulation 1612/68 made it clear that the exercise of the right to freedom of movement 'in freedom and dignity' requires equal treatment. In practice, this has meant that the discrimination analysis under Regulation 1612/68 and now Regulation 492/2011 builds on the status of a 'Union worker' and any limitations on Union workers' status-based right to equal treatment have been interpreted strictly.

¹⁶¹ Van der Mei (n 4) 26-27.

¹⁶² Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968 2–12; Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, OJ L 141, 27.5.2011 p. 1–12; Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968 13-16.

¹⁶³ See Levi-Sandri, 'Free Movement of Workers in the European Community' (1968) Bull.EC 11. 5.

The rights to establish residence and to enjoy equal treatment under Article 7(2) of Regulation 1612/68 are conditioned on the status of a Union worker which requires the pursuit of 'effective and genuine economic activities' as opposite to 'marginal and ancillary activities'. In the *Levin* case, the Court emphasised that the pursuit of an 'effective and genuine' economic activity leads to the status of a Union worker even in a situation which 'yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence'.¹⁶⁴ Moreover, the Court has adopted a generous interpretation of the temporal dimension of the 'worker' status. In the *Leclerc* case, it was established that the status of a Union worker 'may produce certain effects' even after the actual employment relationship is ended. The Court also noted that the person must be classified as a worker if he/she is 'genuinely' seeking work after the previous employment relationship has ended.¹⁶⁵

The Court has also examined the retention of the 'worker' status in the case of voluntary and involuntary unemployment. In the *Raulin* case, the status of a Union worker was retained during the studies which were pursued after voluntary unemployment on the basis that there was a 'link between the previous occupational activity and the studies in question'. Moreover, the Court emphasised that the requirement of a 'link' could not be imposed on a migrant worker who seeks vocational training in another field of activity in the case of involuntary unemployment.¹⁶⁶

¹⁶⁴ Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para 18. See also Case 53/81 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1982] ECR 2121, para 22.

¹⁶⁵ Case C-43/99 *Ghislain Leclerc and Alina Deaconescu v Caisse nationale des prestations familiales* [2001] ECR I-4265, para 55. The Court clarified this statement further by noting that a former worker must be protected against 'any discrimination affecting rights acquired during the former employment relationship but, since he is not currently engaged in an employment relationship, cannot thereby claim to acquire new rights having no links with his former occupation'. *Ibid*, para 59.

¹⁶⁶ Case C-357/89 *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, para 21. Similarly, In the *Lair* case, the Court stated that no link between the previous employment and university studies could be required from a claimant who had become involuntarily unemployed but that 'a worker who

In the light of these cases, it is clear that the Court has made a great effort to interpret the status of a Union worker in a wide and inclusive manner. However, this does not mean that the status would be all-inclusive. In the *Brown* case, a national of another Member State, who had entered into an employment relationship in the host State for eight months and who would not have been employed by his employer if he had not already been accepted for admission to university, was regarded to be a 'worker' according to Article 7(2) of Regulation No 1612/68. However, the Court concluded that the Member State could refuse to grant him a grant for studies under Article 7(2) of Regulation 1612/68 on the basis that the employment relationship was 'merely ancillary to the studies to be financed by the grant'.¹⁶⁷ In other words, even the pursuit of those activities which were categorised as 'marginal and ancillary' would entitle the applicant to equal treatment in employment-related issues. But these activities would not entitle the applicant to equal access to social advantages under Article 7(2) of Regulation 1612/68.¹⁶⁸ In these situations, they would need to rely on the general right to equal treatment as EU citizens.¹⁶⁹

In order to understand the differences in discrimination analysis in the case of Union workers and in the case of Union citizens *qua* Union citizens, it is important to have a closer look at the Court's interpretation of the accepted conditions and limitations on Union workers' right to equal treatment. In the case of those EU citizens who hold the status of a 'Union worker', the need of social assistance does not terminate the right to

is a national of another Member State and has exercised his right as such to freedom of movement is entitled in the same way as national workers to all the advantages available to such workers for improving their professional qualifications and promoting their social advancement'. Case 39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 3161, para 22.

¹⁶⁷ Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205, paras 23 and 27.

¹⁶⁸ See further e.g. Van der Mei (n 4) 35-37 and 42.

¹⁶⁹ See Section 2.2.3.

establish residence in another Member State.¹⁷⁰ The right to take up employment in another Member State includes the right to establish residence for that purpose under Article 45 TFEU.¹⁷¹ And the established employment in another Member State under Article 45 TFEU grants EU citizens the right to equal treatment in many cases which are not directly related to the employment issues.¹⁷² Under Article 7(2) of Regulation 492/2011 (ex Article 7(2) of Regulation 1612/68), migrant Union workers are granted the right to equal treatment in relation to social advantages. Moreover, unlike the coordination system which only applies to benefits covering one of the risks specified in Regulation 883/2004¹⁷³, Regulation 492/2011 applies to general social benefits, such as benefits guaranteeing a minimum means of subsistence.¹⁷⁴

The case-law shows that the Court has adopted a notably wide interpretation of what is meant by 'social advantages' under Article 7(2) of Regulation 1612/68 and now Article 7(2) of Regulation 492/2011, as well as a narrow interpretation of the accepted conditions and limitations on the status-based right to equal treatment in the case of Union

¹⁷⁰ Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, paras 11-16 and Case 139/85 *R. H. Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, paras 14-15.

¹⁷¹ The details of this right were first regulated in Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257 of 19 October 1968 13-16.

¹⁷² See further in Van der Mei (n 4) 31.

¹⁷³ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166 of 30 May 2004 1–123.

¹⁷⁴ In practice, this means that the provisions of Regulation 1612/68 and now Regulation 492/2011 on freedom of movement for workers within the Union have provided a tool for the Court of Justice to soften the material limits of the coordination system by giving a wide interpretation to the concept of 'social advantages' in the context of the principle of equal treatment under what used to be Article 7(2) of Regulation 1612/68 and is now Article 7(2) of Regulation 492/2011 is concerned. The Court has confirmed that Article 7(2) of Regulation 1612/68 can be applied to those 'social advantages' which simultaneously fall within the scope of Regulation 1408/71 (now Regulation 883/2004). For instance, Josephine Steiner has described the situation between the two regulation as follows: 'Basing its arguments on the aims of the Treaties and the preambles and general scheme of Regulations 1408/71 and 1612/68 the Court remedies the deficiencies of each Regulation by arguing by analogy from one to the other - - and building imperceptibly on its own case law'. Josephine Steiner, 'The Right to Welfare: Equality and Equity under Community Law' (1985) 10 ELRev 21, 39.

workers. In the *Ugliola* case, the Court underlined that the principle of equal treatment in Article 7(2) of Regulation 1612/68 is based on the Treaty Article (now Article 45 TFEU) and 'prescribes the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.¹⁷⁵ This interpretation was taken further in the *Cristini* case where the Court stated that Article 7(2) cannot be interpreted 'restrictively' and that 'in the view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment'.¹⁷⁶

In the *Even* case, the Court formulated the test according to which the material scope of Article 7(2) would cover all those benefits 'which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'.¹⁷⁷ The Court has clearly not been disturbed by the fact that many of the social benefits falling into the scope of its broad definition of 'social advantages' under Article 7(2) of Regulation 1612/68 do not explicitly fall into the scope of the EU treaties.¹⁷⁸ Instead, the scope of equal treatment is defined by using a criterion under which the right to equal treatment is

¹⁷⁵ Case 15/69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola* [1969] ECR 363, para 3.

¹⁷⁶ Case 32/75 *Anita Cristini v Société nationale des chemins de fer français* [1975] ECR 1085, paras 12-13.

¹⁷⁷ Case 207/78 *Criminal proceedings against Gilbert Even and Office national des pensions pour travailleurs salariés (ONPTS)* [1979] ECR 2012, para 22. See also Case C-249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR 973, para 20.

¹⁷⁸ It has even been claimed that the Court of Justice has constitutionalized Article 7(2) of Regulation 1612/68 by interpreting it as an expression of the principle of equal treatment in the EU Treaties. Giubboni (n 120) 189. As an example, see Case C-287/05 *D. P. W. Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen* [2007] ECR I-6909, para 53.

regarded to cover all rights and benefits which seem to facilitate the integration of the worker into the society of the host Member State.¹⁷⁹

Despite the wide interpretation of the concept of a 'social advantage', there must be a benefit 'flowing from the migrant worker, albeit indirectly' for Article 7(2) to apply.¹⁸⁰ For instance, in the *Lebon* case, the Court rejected the right of family members to equal treatment in the context of minimum subsistence in those cases in which they were no longer dependant on the Union worker.¹⁸¹ However, in the same case, the Court underlined that the principle of equal treatment 'contributes to the integration of migrant workers in the working environment in the host country in accordance with the objectives of the free movement of workers'.¹⁸² It has been noted that the Court's case-law on social advantages under Article 7(2) of Regulation 1612/68 includes a 'shift from the criterion of assistance of mobility to facilitation of the integration of the migrant worker into the host State'.¹⁸³ Moreover, Union workers can rely on the general prohibition of discrimination under 18 TFEU in those cases which do not concern social advantages in the meaning of Article 7(2) of regulation 1612/68.¹⁸⁴ On this basis, it has been argued that '[v]irtually all social and economic benefits are covered'.¹⁸⁵

The Court of Justice has expanded the Union workers' right to equal treatment not just by interpreting the personal scope of the Treaty provisions and the material scope of

¹⁷⁹ Van der Mei (n 4) 34.

¹⁸⁰ Evelyn Ellis, 'Social Advantages: A New Lease of Life?' (2003) 40 CMLRev 639, 643.

¹⁸¹ Case 316/85 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 2811, para 13.

¹⁸² *Ibid*, para 11.

¹⁸³ Ellis (n 180) 652.

¹⁸⁴ Case C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* [2000] ECR I-8081, paras 45 and 62.

¹⁸⁵ See e.g. Van der Mei (n 4) 33.

the equal treatment provision of Regulation 1612/68 broadly, but also by developing more nuanced jurisprudence on indirect discrimination.¹⁸⁶ The Court has confirmed that the rules of equal treatment under Article 7(2) of Regulation 1612/68 'forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'.¹⁸⁷ In practice, the prohibition of indirect discrimination has directed attention towards residence conditions.¹⁸⁸ The compatibility of residence requirements with Article 7(2) of Regulation 1612/68 has been assessed in several cases. In all of these cases, the Court of Justice has adopted a narrow interpretation of the accepted conditions. This is important because, as will be seen in Section 2.3, the discrimination analysis for EU citizens' general right to equal treatment seems to focus on the objective justifications at the expense of 'equal status'.

In the *Meeusen* case, the Court concluded that the requirement of residence as a condition for financing the studies of the children of non-national workers was (directly) discriminatory on the basis that national legislation did not impose such conditions on the children of national workers.¹⁸⁹ In the *Meints* case, the Court highlighted that a residence condition cannot be accepted unless it is objectively justified and proportionate to its aim because it could be more easily met by national workers than by those from other Member

¹⁸⁶ Hailbronner (n 5) 1246.

¹⁸⁷ Case C-111/91 *Commission of the European Communities v Grand Duchy of Luxembourg* [1993] ECR I-817, para 9 and Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617, para 17.

¹⁸⁸ E.g. Maurizio Ferrera, 'European Integration and National Social Citizenship: Changing Boundaries, New Structuring?' (2003) 36 *Comparative Political Studies* 611, 636 notes that 'the line of defense on the side of national systems thus shifted to control over rules of residence'.

¹⁸⁹ Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, para 23.

States.¹⁹⁰ In this case, the Court rejected the residence condition on the basis that it was 'neither necessary nor appropriate, in order to achieve the aim of excluding persons laid off as a result of their own action from entitlement to the benefit'.¹⁹¹ In the *Commission v France* case, the Court similarly held that 'criteria such as the place of origin or residence of a worker may, according to the circumstances, be tantamount, as regards their practical effect, to unlawful discrimination on the grounds of nationality'.¹⁹² Moreover, the Court underlined the priority of equal treatment by stating that the 'financial consequences' may never alone suffice to justify such limitations.¹⁹³

The scope and limitations of the Union workers' right to equal treatment is relevant to the analysis of equal treatment in the case of economically inactive Union citizens because the Court of Justice has confirmed that those rights and benefits which fall into the material scope of Article 7(2) of Regulation 1612/68 also fall into the material scope of the general prohibition of discrimination under Article 18 TFEU.¹⁹⁴ It is important to bear in mind that, despite the shared material scope, the discrimination analysis under Article 7(2) of Regulations 1612/68 and 492/2011 differs from the discrimination analysis under Directive 2004/38/EC, which regulates the free movement and equal treatment of economically inactive Union citizens. The most important difference between these two legal instruments concerns the definition of objective justifications, above all residence conditions, in the context of indirect discrimination.

¹⁹⁰ Case C-57/96 *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689, paras 45-46.

¹⁹¹ *Ibid* para 48.

¹⁹² Case C-35/97 *Commission of the European Communities v French Republic* [1998] ECR I-5325, para 51.

¹⁹³ *Ibid*, para 52.

¹⁹⁴ See more about this in Section 2.2.3.

To sum up, EU citizens who hold the status of a 'Union worker' enjoy a broad right to equal treatment and the Court of Justice has adopted a very narrow approach to objective justifications for differential treatment between national workers and non-national workers when it comes to their access to social assistance.¹⁹⁵ The focus of discrimination analysis in the case of Union workers lies in the establishment of the 'worker' status which, then, grants a broad status-based right to equal treatment. The Union workers' right to equal treatment provides an example of *strong comparability* which escapes the structural Equality Problem as will be discussed in Section 2.2.4. The next section shows that this is not the case with the EU citizens' general right to equal treatment.

2.2.3 Union citizens and the residence-based right to equal treatment: a story of weak comparability

The original 1957 Treaty of Rome granted free movement and equal treatment rights to workers, self-employed persons and providers of services. In 1979, the Commission made a proposal for a directive on the general right of residence for nationals of the Member States in the territories of other Member States.¹⁹⁶ This proposal was never adopted and the Commission replaced it with three separate proposals concerning the rights of residence of students, pensioners, and all other Community citizens in 1989.¹⁹⁷ Economically inactive individuals gained the right to free movement and residence with the adoption of the three Residence Directives in 1990, but their rights under these directives were dependent on the

¹⁹⁵ The narrow interpretation of residence requirements seems to be a general rule in the case of Union workers. This becomes clear if we look at the coordination system on social security as a point of comparison.

¹⁹⁶ See 'Proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State' OJ 1979 C 207 of 17 August 1979, page 14 and COM(79) 215 final, 26 July 1979. See also 'European Union. Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Communities', Bulletin of the European Communities, Supplement 1/76 (Bull.EC 8 -1975), i.e. 'the Tindemans Report'.

¹⁹⁷ 'Proposal for a Council Directive on the right of residence for students' OJ 1989 C 191 of 28 July 1989, page 2; 'Proposal for a Council Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity' OJ 1989 C 191 of 28 July 1989, page 3, and 'Proposal for a Council Directive on the right of residence' OJ 1989 C 191 of 28 July 1989, page 5. See further on the historical background of these directives in Van der Mei (n 4) 44-46.

possession of sickness insurance and sufficient financial resources.¹⁹⁸ The three separate residence directives were replaced by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territories of the Member States.¹⁹⁹

The general Treaty-based right to free movement and residence (now Article 21 TFEU) was included in the EC Treaty when the concept of EU citizenship was created by the Maastricht Treaty in 1992. The Court of Justice has given a wide interpretation to the material scope of application of the Treaty articles in the context of free-movement, residence and non-discrimination. Most disputes concerning social benefits will now come within the jurisdictional scope of Union law both *ratione personae* and *ratione materiae* but it is less clear when EU citizens will actually have access to those benefits.²⁰⁰ This section will discuss how the discrimination analysis in relation to EU citizens' general right to equal treatment differs from the discrimination analysis in the case of Union workers. It will be seen that the status-based right to equal treatment in the case of Union workers has been considerably modified in the case of EU citizens as EU citizens.

Lawful residence in another Member State brings Union citizens into the personal scope of the right to equal treatment when they apply for social welfare benefits covered by the material scope of the EU treaties.²⁰¹ In the *Martínez Sala* judgment, the Court

¹⁹⁸ Directive 90/364 on the right of residence [1990] OJ L180/26; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activities [1990] OJ L180/28 and Directive 90/366 on the right of residence of students [1990] OJ L180/30, readopted as Directive 93/96 [1993] OJ L317/54. These three directives were repealed by Directive 2004/38 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 L229/35.

¹⁹⁹ 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, OJ L 158 of 30 April 2004 77–123.

²⁰⁰ Matthew Elsmore and Peter Starup, 'Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy' (2007) 26 Yearbook of European Law 57, 105.

²⁰¹ Fries and Shaw (n 83) 550.

confirmed that a 'national of a Member State lawfully residing in the territory of another Member State' comes within the material scope of EU citizenship on the basis of this residence and is therefore entitled to rely on the rights attached to that citizenship under Articles 18 and 21 TFEU.²⁰² Moreover, the Court extended the scope of the non-discrimination principle by deriving the legality of residence from the sources which fell outside Union law and by stating that, within this extended personal scope of Union citizenship, EU citizens can rely on the general prohibition of nationality discrimination in all situations which fall within the *ratione materiae* scope of EU law.²⁰³

The Court could have limited Union citizens' right to equal treatment to those rights which fall into the material scope of the Treaty provisions of EU citizenship in Articles 22 - 25 TFEU.²⁰⁴ But it was confirmed in the *Martínez Sala* and *Grzelczyk* cases that, once the Union citizen is lawfully resident in the territory of another Member State, the question of whether a social benefit falls into the material scope of the right to equal treatment under Article 18 TFEU must be defined by using the same criteria as in the context of Union workers and their right to equal treatment.²⁰⁵ This means that Union

²⁰² Case C-85/96 *Maria Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, paras 61-62.

²⁰³ Loc.cit.

²⁰⁴ See for this suggestion e.g. Síofra O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999) 21 ELRev 68, 77-78 and Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' (2008) 27 Yearbook of European Law 167, 179-80.

²⁰⁵ In the literature, it has nevertheless been asked how social benefits, such as minimum subsistence benefits 'lex generalis' come within the material scope of the Treaties so that the applicant can rely on his/her general right to non-discrimination. For instance James Mather has noted that it is possible to find two explanations for the material scope of Article 18 TFEU in the case-law of the Court of Justice. In the first case (in *Martínez Sala*), the social benefit would fall into the material scope of the Treaty on the basis that it constitutes a social advantage under Article 7(2) of Regulation 1612/68 irrespective of the fact that the applicant is not economically active. In the second case (in *Grzelczyk*), the exercise of fundamental freedoms provided for in the Treaty would suffice to bring the case into the material scope of the Treaty on the basis that 'the benefit in question necessarily had some connection to the exercise of the right'. See James Mather, 'The Court of Justice and the Union citizen', (2005) 11 ELJ 722, 736-38. It has been widely accepted in academic commentary that it is the second, broader definition, of the material scope of the EU Treaties which has been accepted in the Court's more recent case-law. See e.g. Mel Cousins, 'Citizenship, residence and social security', (2007) 32 ELRev 386, 389-90. In practice, this means that '[t]he essential requirement for a

citizens who are lawfully resident in the territory of another Member State can now rely on their right to equal treatment and non-discrimination under Article 18 TFEU in all those cases which fall into the material scope of the EU Treaties and not just in those cases which fall into the material scope of the citizenship provisions of the Treaty.

Some commentators have argued that the fact that the mere exercise of fundamental freedoms, such as the right to free movement and residence under Article 21 TFEU, suffices to bring the case within the scope of Article 18 TFEU 'implies that the scope of Union citizens' right to equal treatment in another Member State is unlimited'.²⁰⁶ This, however, is not the whole truth, for EU citizens' general right to non-discrimination and equal treatment is not protected as 'securely' as in the case of Union workers.²⁰⁷ In the context of Union citizens, unlike in the case of Union workers, the right to equal treatment is 'premised on residence' under Article 21 TFEU.²⁰⁸ This means that the accepted conditions and limitations on EU citizens' right to residence define the *de facto* scope of their right to equal treatment.

It has been noted that EU citizenship can paradoxically provide a justification for the general right to non-discrimination under what is now Article 18 TFEU, while the exercise of their right to free movement and residence is 'still ever subordinate to the economic imperatives'.²⁰⁹ Conversely, this paradox means, as will be discussed in the next

measure to fall within the scope of Article 12 is that it affects negatively the access to, or the exercise of the fundamental freedoms'. Catherine Jacqueson, 'Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship', (2002) 27 ELRev 260, 273 and Christian Tomuschat, 'Comment on Case C-85/96, María Martínez Sala v Freistaat Bayern, Judgment of 12 May 1998, Full Court. [1998] ECR I-2691' (2000) 37 CMLRev 449, 451.

²⁰⁶ Anne Pieter Van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial, Welfare State' (2005) 7 European Journal of Migration and Law 203, 208.

²⁰⁷ Van der Mei (n 4) 50.

²⁰⁸ Elsmore and Starup (n 200) 101.

²⁰⁹ James Mather makes the following statement: 'although the Union citizen cannot rely on that status to exercise the fundamental right to reside in another Member State, he or she may perversely rely on it to claim

section, that the *de facto* scope of the fundamental right to non-discrimination and equal treatment has been made contingent on the proportionality analysis which defines the limits of the right to residence. Opinions are divided on the question of whether the requirement of lawful residence should be considered as a 'prerequisite' for the application of EU citizens' right to non-discrimination and equal treatment under Article 18 TFEU, or whether it should rather be considered as a 'condition' which can limit access to social benefits under the right to equal treatment.²¹⁰ However, in so far as the host Member States can legitimately terminate the right to residence in the case of 'needy' migrant EU citizens, they can also restrict the *de facto* scope of his/her right to equal treatment.²¹¹

Migrant EU citizens' non-economic right to equal treatment and its limitations are now included in Directive 2004/38. According to Article 24(1) of the Directive, 'all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty'. Article 24(2) of the same directive qualifies this right by stating that 'the host Member State shall not be obliged to confer entitlement to social assistance during the first

equality of treatment within. This in itself is surely illogical to the already misunderstanding Union citizen'. Mather (n 205) 742.

²¹⁰ Koen Lenaerts, 'Union citizenship and the principle of non-discrimination on grounds of nationality', www.ecas.org/file_uploads/1095.pdf 11.

²¹¹ This is so despite the fact that it is the exercise and not existence of the right to residence which is conditional. Namely, the limitations and conditions mentioned in Article 21 TFEU 'relate to the exercise rather than the existence of the right to reside'. See more about this e.g. Van der Mei (n 4) 148. Note, however, that some authors disagree. For instance, Kay Hailbronner has argued that '[p]roportionality, however, cannot be used to establish rights which are not yet existent' and that the financial means requirement in secondary legislation proves that there is no 'convincing link' between EU citizenship and non-contributory social benefits, not even under the principle of free movement. By referring to the wording of Article 18 EC/21 TFEU, he argues that these articles do not just restrict the exercise of the right to reside ('conditions') but have a limiting impact on the very establishment of the right to reside ('limitations'). This argument derives its normative force from the claim that EU citizenship and the principle of proportionality must not be 'used to rewrite the rules laid down in secondary Community law'. Hailbronner (n 5) 1253-54. See also Mather (n 205) 727 who speaks of a derived right of residence upon Article 18 EC 'through' the application of secondary legislation. It has, nonetheless, been observed that the residual right of the Member State to terminate residence on the basis of the 'unreasonable burden' test constitutes a 'more promising point of departure' for the debate on the autonomous nature of Article 21 TFEU than the arguments about the conceptual difference between 'conditions' and 'limitations'. Yuri Borgmann-Prebil, 'The Rule of Reason in European Citizenship', (2008) 14 ELJ 328, 336-7.

three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)' which regulates the work-seekers right to residence in the area of another Member State.²¹² Article 24(2) also includes a provision stating that the Member States are not obliged to 'grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their family'.

Some argue that the principle of equal treatment must not apply under any circumstances to those EU citizens who belong to the groups mentioned in Article 24(2) of Directive 2003/38/EC, namely short-term residents, work-seekers, and students.²¹³ However, the Court of Justice has adopted a more flexible approach by which the derogation clause must not be applied in a disproportionate manner.²¹⁴ At the same time, even those EU citizens who enjoy the 'full' right to equal treatment under Article 24(1) of Directive 2004/38/EC may find that their right is limited either **(1)** on the basis that their residence is terminated because they have become an 'unreasonable burden' to the welfare system of the host Member State or **(2)** on the basis that the host Member State uses their lack of integration as an objective justification for differential treatment. Objective justifications for legitimate differential treatment between EU citizens are discussed in more detail in Section 2.3. The rest of this section will focus on the question of how conditions of EU citizens' right to residence qualify EU citizens' general right to equal treatment.

²¹² The concern is that the definition of 'social advantages' under the limitation clause of Article 24(2) of Directive 2003/38/EC 'is much broader than the rather marginal and residual concept traditionally used by the Court of Justice in interpreting Regulation 1408/71'. See e.g. Stefano Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 ELJ 360, 372.

²¹³ Hailbronner (n 5) 1262.

²¹⁴ See more about the case law in Section 2.3.

The limitations and conditions of Union citizens' right to reside in the territory of another Member State under Article 21 TFEU find their expression both in the wordings of Directive 2004/38/EC and in the proportionality assessment by the Court of Justice. The three residence directives of 1990 made the right to residence conditional on the possession of sufficient financial means and sickness insurance. Today, the right to residence is limited by the concept of an 'unreasonable burden' which is now included in Article 7(1)(b) of Directive 2004/38/EC. According to this provision, all Union citizens have the right of residence in the territory of another Member State for a period longer than three months if they are workers, self-employed persons or students or 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State'.²¹⁵

Article 14(1) of Directive 2004/38/EC regulates the retention of the right to residence by constituting that Union citizens have the right to reside up to three months under Article 6 'as long as they do not become an unreasonable burden on the social assistance system of the host Member State'. According to Article 14(2), after three months they have the right to reside under Article 7 'as long as they meet the conditions set out therein'. Nevertheless, Article 14(3) clarifies that an expulsion measure 'shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'. Similarly, in the famous *Grzelczyk* case, the Court of Justice stated that the decision to withdraw a residence permit or not to renew it must not become 'the automatic consequence of a student who is a national of

²¹⁵ The right of permanent residence after a continuous period of five years is included in Article 16 of Directive 2004/38/EC and it is not subject to the same conditions as the right to reside under Article 7. In practice, however, the conditions laid down in Article 7 of the Directive have a considerable impact on whether the continuous residency of five years can be reached in practice and, thus, on whether a migrant Union citizen will ever reach the stage of full assimilation with the nationals of the host Member State in so far as access to social minimum benefits is concerned.

another Member State having recourse to the host Member State's social assistance system'.²¹⁶ Instead, the host Member State must show that the applicant has become an 'unreasonable burden' before it can terminate his/her residence on the basis of the recourse to social assistance. Whether or not this is the case is subject to the proportionality analysis.

There is nothing surprising in the fact that the Court of Justice interprets secondary legislation in the light of the general principles of EU law, including the principle of proportionality, if the general principles are regarded as having a direct effect under EU law.²¹⁷ The Court's reliance on the proportionality analysis in this context has even been seen as a sign of 'the application of the rule of reason to Article 18(1) EC [now 21 TFEU] and its limitations analogous to the established four freedoms'.²¹⁸ However, what is noteworthy is that the exercise of proportionality analysis has direct implications on the *de facto* scope of EU citizens' general right to equal treatment in so far as that right depends on residence. Because the limitations on the right to residence are made dependent on the proportionality analysis under the 'unreasonable burden' test and because EU citizens can rely on their right to non-discrimination and equal treatment only in so far as they reside legally in another Member State, the scope of the right to equal treatment is indirectly made dependent on the proportionality analysis, too. This indicates that the comparability on the basis of the status of EU citizenship is much weaker than comparability between Union workers.

²¹⁶ Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 42-43. Although, this judgment dates prior to the adoption of the current Citizenship Directive 2004/38/EC.

²¹⁷ See for a more critical opinion e.g. Michael Dougan, 'The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon' in Ulla Neergaard and Ruth Nielsen and Lynn Roseberry (eds), *Integrating Welfare Functions into EU Law From Rome to Lisbon* (DJØF Publishing 2009).

²¹⁸ Borgmann-Prebil (n 211) 330.

2.2.4 The circularity of EU citizens' general right to equal treatment

In Sections 2.2.2 and 2.2.3 above, it has been made clear that the EU principle of equality has different connotations for economically active and inactive Union citizens. The difference between EU citizens' status-based and residence-based rights to equal treatment has considerable implications on equality between different groups of EU citizens. In academic commentary, this disparity in the legal status between Union workers and Union citizens qua Union citizens has been described by referring to 'the distinction between guaranteed, specific rights and general, highly conditional ones'.²¹⁹ The main division happens between those EU citizens who hold the status of a Union worker and those who do not. However, as will be shown in the next section, the interpretation of EU citizens' right to equal treatment also distinguishes between citizens *stricto sensu* as different criteria for legitimate differential treatment are imposed on different groups of economically inactive EU citizens under Directive 2004/38/EC. The implications of these distinctions on the status of EU citizenship can be conceptualised by looking at the relationship between different levels of discrimination analysis in the Union test for nationality discrimination.

In the case of Union workers, the Court of Justice has widely rejected the use of durational residence as a condition for equal treatment and the interests of the Member States are accommodated in the interpretation of the status of a Union worker.²²⁰ The question of the personal scope of equal treatment is therefore crucial and the Court has established a *strong comparability* between nationals of the host Member State and those individuals who fall within the personal scope of Article 7(2) of Regulation 1612/68 and now Regulation 492/2011, i.e. who qualify for the status of a Union worker. By strong

²¹⁹ Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model', (2009) 46 CMLRev 1107, 1109.

²²⁰ Van der Mei (n 4) 130-31.

comparability, I mean that the status of a Union worker has been given priority over objective justifications, such as residence requirements. The Court has made it clear that an additional residence requirement imposed on non-national Union workers 'constitutes a clear case of discrimination on the basis of the nationality of workers'.²²¹ The wide interpretation of equal treatment under Article 7(2) of Regulation 1612/68 underlines the fact that the receipt of the social benefits under this article is seen as a way to 'promote' integration in the future and no requirement of a 'real link' is therefore imposed on migrant workers under this provision.²²²

Strong comparability can be contrasted with *weak comparability* under which the right to non-discrimination and equal treatment is extensively conditioned on the proportionality analysis and objective justifications at the expense of initial comparability between EU citizens. The current interpretation of EU citizens' general right to equal treatment under Article 18 TFEU will only allow us to speak of weak comparability between those EU citizens who are not Union workers. Their right to non-discrimination and equal treatment is made dependent on legal residence which is ultimately defined by the Member States on the basis of the requirement of proportionality. Moreover, as will be discussed in Section 2.3, their access to social minimum benefits can be limited further by the requirement of already achieved social integration into the society of the host State.²²³ Unlike in the case of Union workers, the integrative force of equal treatment is apparently considered to be less relevant in the case of Union citizens qua Union citizens.²²⁴

²²¹ Case 249/83 *Vera Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR 973, para 24.

²²² O'Leary (n 204) 171.

²²³ See more about this in Sections 2.3 and 3.3.

²²⁴ See also O'Leary (n 204) 183-91 about the risk that the case-law on Union citizenship may have a restrictive impact on the principles of free movement of economically active persons which, so far, has been interpreted as not allowing any additional requirement of integration or residence.

This insight into the structure of discrimination analysis reveals that equal treatment as a fundamental right of EU citizens as EU citizens has no *de facto* independent scope under EU law. On the contrary, the *de facto* scope of EU citizens' general right to equal treatment under Article 18 TFEU depends on the reasonableness analysis which defines the limits to the right to residence and, thus, the boundaries within which EU citizens can rely on their right to equal treatment. This slip away from the strong and status-based comparability in the case of EU citizens *qua* EU citizens to a much weaker form of comparability directs our attention to what I call the structural dimension of the EU Equality Problem. Namely, the emptiness of the scope of EU citizens' general right to equal treatment can easily lead to circularity in the application of the EU principle of equality as is illustrated, for instance, in the *Trojani* case.

Mr Trojani was a French national who resided in Belgium and who, in the context of a personal reintegration programme, did various jobs for about 30 hours a week in a Salvation Army hostel where he was given accommodation in Brussels. The Court confirmed that Mr Trojani's right to reside in the territory of the host Member State under Article 18 EC (now Article 21 TFEU) was limited due to his lack of sufficient resources under Directive 90/364.²²⁵ However, the Court pointed out that, since Mr Trojani was nevertheless issued a residence permit by the municipal authorities, he was able to rely on Article 12 EC (now Article 18 TFEU) in order to be granted the minimum social assistance benefits.²²⁶ Instead of considering how this right to equal treatment could be limited under the objective justification test, the Court stated that 'it remains open to the host Member State to take the view that a national of another Member State who has recourse to social

²²⁵ Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573, para 36.

²²⁶ *Ibid* para 40.

assistance no longer fulfils the conditions of his right to residence'.²²⁷ The case itself is exceptional because the applicant had been granted the right to residence on the basis of national law and not on the basis of EU law. However, the judgment shows not just that the right to equal treatment depends on the right to residence but also that the use of the right to equal treatment can lead to the termination of that residence on the basis of the 'unreasonable burden' test.

In his Opinion on the *Morgan and Bucher* case, Advocate General Ruiz-Jarabo Colomer refers to EU citizenship as a fundamental status 'which has gained in significance from the prohibition of discrimination laid down by Article 12 EC [now 18 TFEU]'.²²⁸ He bases this view of EU citizenship on the above-mentioned *Trojani* case by noting that '[t]he combined reference to the exclusion of discrimination and the freedom of movement is no obstacle to the independence of those principles, each of which may be evaluated on its own'.²²⁹ However, it has been shown in this section that the status of EU citizenship depends on the discrimination analysis as a whole. The slip away from the status-based comparability between EU citizenship as EU citizens can easily lead to the circularity of the EU principle of equality if the use of the right to equal treatment can lead to the termination of the very same right of residence from which the right to equal treatment derives its *de facto* scope of application.

The weak comparability in the case of 'needy' EU citizens indicates that the independence of the principle of equal treatment is illusory. This lack of independence undermines the credibility of the right to equal treatment as a fundamental right and EU

²²⁷ Ibid para 45.

²²⁸ Joined cases C-11/06 and C-12/06 *Rhiannon Morgan v Bezirksregierung Köln* and *Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161, Opinion of AG Ruiz-Jarabo Colomer delivered on 20 March 2007, para 65.

²²⁹ Ibid para 67.

citizenship as the 'fundamental status of all Member State nationals'. It has been noted that the idea of citizenship normally includes 'the reversal of inequality presumptions deeply held by human beings, putting individuals with this status on equal footing in a number of respects by ignoring any *objective* or *subjective* differences between them'.²³⁰ Despite the launch of EU citizenship as a new status-based standard of comparability, the structural Equality Problem emerges from the following circularity in the discrimination analysis:

- 1) The *de facto* scope of EU citizens' fundamental right to non-discrimination and equal treatment depends on the proportionality analysis which is exercised in the context of another Treaty-based right.
- 2) The exercise of the right to equal treatment may lead to the termination of the same right from which it derives its existence in the first place (at least if the right to residence is based on national law and not EU law).

It is important to consider in more detail what it means for equal treatment as a fundamental right of all EU citizens that it has *de facto* no independent scope but the scope of the non-discrimination and equality principles in the case of 'needy' EU citizens is made dependent on the proportionality analysis under the 'unreasonable burden' test. The critics have pointed out that, instead of applying the 'less restrictive alternative test', proportionality review is often reduced to the less intense 'manifestly inappropriate test' when individual rights are balanced against the Union's or Member State's interests.²³¹ The crucial question is how the general principles of EU law as 'optimization requirements'²³² are expressed in the exercise of this balancing. The general principles of

²³⁰ Kochenov (n 98) 18.

²³¹ Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 66.

²³² Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002).

EU law include both administrative principles and fundamental rights.²³³ Which one of these two categories of general principles should prevail when the lawfulness of the limitations and conditions of Union citizens' right to equal treatment is assessed?

Thanks to the entrenched role of proportionality analysis in the EU discrimination analysis, the scale seems to tip in favour of administrative principles at the expense of fundamental rights.²³⁴ In so far, this thesis shares Kay Hailbronner's concern that '[e]ven if one were to accept the Court's use of proportionality principle, the question remains what criteria can be derived from the principle when it comes to determining the rights of students and other non-economically active Union citizens to social benefits'.²³⁵ However, here the concern is not so much that proportionality 'may again serve as an almost unlimited instrument to amend secondary Community law'²³⁶ but that, under the proportionality review, the general principles of EU law are at the risk of being reduced to mere economic considerations without an adequate substantive reference to fundamental rights or other constitutional safe-guards for the interests of private individuals under EU law.²³⁷

²³³ Article 51 of the EU Charter of Fundamental Rights refers to the mere implementation of Union law, whereas the previous case-law established that the Member States are also bound by fundamental rights as general principles of EU law when they impose restrictions on the fundamental freedoms. See more about this above in Section 1.4.

²³⁴ Proportionality is best understood as one of the administrative general principles of EU law. It fails to provide substance for the assessment of the above-mentioned limitations and conditions on Union citizens' right to equal treatment. Proportionality as one of the general (administrative) principles of EU law can be defined by referring to the German concept of proportionality as a three-fold test: the measure must be (1) 'appropriate for attaining the objective', (2) 'necessary, in the sense that no other measure is available' and (3) 'must not be disproportionate to its aim'. Schwarze (n 148) 678. See also e.g. F. G. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999). The difference between these 'levels' of proportionality review has been explained by stating that under the first two levels the limitation of rights is required to be 'as small as possible', whereas the third level, i.e. the balancing test, asks whether the limitation 'adequately compensates for the loss to rights'. Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 201.

²³⁵ Hailbronner (n 5) 1256-57.

²³⁶ Ibid 1264.

²³⁷ See more about this at the end of Section 2.3.

2.3 The limitations on the right and the substantive Equality Problem

2.3.1 Unlawful discrimination or legitimate differential treatment?

The previous section demonstrated how the ideal of comparability between EU citizens is qualified when it comes to 'needy' migrant EU citizens and how this state of affairs leads to the structural Equality Problem because EU citizens' fundamental right to non-discrimination and equal treatment under Article 18 TFEU has *de facto* no independent scope. This section moves on to examine a more substantive question: Under which circumstances is differential treatment legitimate between EU citizens? I will show that the EU equality problem also has a substantive dimension which is rooted in the lack of independence of those criteria under which differential treatment between EU citizens can be justified.

The analysis of justificatory criteria for legitimate differential treatment between EU citizens in this section shows that adopting EU citizenship as a standard of comparability has created new categories of objective justifications which restrict or even prevent the transformation of EU law from 'non-discrimination on the grounds of nationality' towards 'equality between Union citizens'. Zig Layton-Henry has examined the question of European identity by distinguishing between the following four categories: 'insiders who are really insiders', 'insiders who are really outsiders', 'outsiders who are accepted as insiders' and 'outsiders who are really outsiders'. The imbalance between those who seemingly fall into the scope of rights and those who can actually exercise their rights is often considerable.²³⁸ This imbalance is crystallised in the case of economically inactive and dependent migrant EU citizens who now fall into the personal scope of Article 18

²³⁸ Zig Layton-Henry, 'Insiders and Outsiders in the European Union: The Search for a European Identity and Citizenship' in Elizabeth Guild (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer 1999) 52-54.

TFEU but whose right to equal treatment is considerably restricted as 'insiders who are really outsiders'.

Not all differential treatment constitutes prohibited discrimination. Drawing the line between 'legitimate differential treatment' and 'unlawful discrimination', therefore, lies at the heart of discrimination law analysis. The situation is complicated further by the fact that treatment which fulfils the criteria of indirect discrimination can sometimes be objectively justified.²³⁹ The concept of objective justification in its simplest form is defined as a 'reason to be put forward in order to defend the differentiation made'.²⁴⁰ In EU law, the recourse to objective justifications is accepted in the context of indirect discrimination where disparate impact will establish a claim of *prima facie* discrimination which can then be justified by relying on objective justifications.²⁴¹

The concept of objective justification opens the more fundamental question of what is meant by 'discrimination' and whether objectively justified behaviour still falls into the scope of the term 'discrimination'.²⁴² It is an important normative leap if differential treatment is regarded as lawful discrimination rather than legitimate differential treatment, i.e. non-discrimination. Moreover, the definition of justified differential treatment either as 'lawful discrimination' or 'non-discrimination' is not just of mainly theoretical interest but is argued to constitute 'a difference in the threshold of justifiability, which reflects itself in

²³⁹ It is contested whether direct discrimination can be justified under any circumstances. Most commentators agree that direct discrimination should only be possible under explicit statutory exemptions. See e.g. Fredman (n 135) 190 and 196. However, this has not always been self-evident in the case law of the European Court of Human Rights as discussed above in Section 1.5. Moreover, it has also been discussed in academic commentary whether the criteria of objective justification could be used to justify direct discrimination in the name of substantive equality. See e.g. Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (OUP 2012) 91 and 112-113 and Davies (n 73) 13-14 and 27.

²⁴⁰ See e.g. I. P. Asscher-Vonk, 'Towards One Concept of Objective Justification?' in Titia Loenen and Peter Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer 1999) 39.

²⁴¹ Titia Loenen, 'Indirect Discrimination: Oscillating Between Containment and Revolution' in Titia Loenen and Peter Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer 1999) 203.

²⁴² Nicholas Bamforth, 'Setting the limits of anti-discrimination law: some legal and social concepts' in Janet Dine and Bob Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996) 58.

different notions of proportionality'.²⁴³ The way in which legitimate differential treatment between EU citizens is conceptualised under the Union test for nationality discrimination may, therefore, have significant implications for the status of EU citizenship.

A definition of criteria of comparability is a necessary precondition for determining whether differential treatment is based on 'objective criteria'.²⁴⁴ In those cases in which comparability is taken to be 'implicit', the right to similar treatment is materialized 'if no sufficient reason exists for different treatment' and the discrimination analysis becomes more 'contingent' by definition.²⁴⁵ Similarly, the leap from the explicit incomparability between economically inactive and dependent Union citizens and nationals of the host Member State towards their implicit comparability has placed an increasing importance on the assessment of reasonableness criteria and objective justifications as part of the discrimination analysis in EU law.

Despite the relatively uniform definition of direct discrimination²⁴⁶ on the grounds of nationality, it is less clear on which basis *prima facie* indirect discrimination²⁴⁷ may be

²⁴³ See e.g. Nicolas Bernard, 'What are the purposes of EC discrimination law?' in Janet Dine and Bob Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996) 85.

²⁴⁴ Stephen Kon, 'Aspects of Reverse Discrimination in Community Law' (1981) 6 ELRev 75.

²⁴⁵ Simons (n 30) 424. Cf. An 'explicit' use of comparability analysis defines which parameters are relevant for two situations to be relevantly similar for the application of the non-discrimination principle. Loc.cit.

²⁴⁶ The term 'direct discrimination' refers to nationality requirements under which differential treatment is based on the nationality of the host Member State or on other conditions which only non-nationals have to meet. EU law does not prohibit all instances of direct discrimination on the grounds of nationality within the Member States. First, the Member States are entitled to favour their own nationals in all of those situations that fall outside the scope of EU law and, thus, outside the scope of application of the non-discrimination principle. Secondly, Article 45(3)-(4) TFEU includes the so-called public service and public policy exceptions which allow the Member States to exercise differential treatment in certain cases. The Court has, nonetheless, interpreted both of these two exceptions strictly. See e.g. Case 36/75 *Roland Rutili and the Minister for the Interior* [1975] ECR 1219, para 27 and Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11, para 23.

²⁴⁷ The term 'indirect discrimination' refers to situations in which other criteria than nationality are more easily satisfied by the nationals of the host Member State. Unlike in the case of direct discrimination, the Member States are allowed to provide objective justifications for provisions that would constitute *prima facie* indirect discrimination by affecting non-nationals more than nationals.

justified under EU law. In the *O'Flynn* case, the Court of Justice clarified the concept of indirect nationality discrimination by stating that national law can be indirectly discriminatory if 'it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage'.²⁴⁸ In the *Sotgiu* case, the Court confirmed that prohibited nationality discrimination covers both 'overt' and 'covert' forms of discrimination. However, the prohibited forms of discrimination would not cover cases 'which took account of objective differences'.²⁴⁹ The Court of Justice later clarified the notion of objective justifications for indirect nationality discrimination by stating that legitimate justifications 'were objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provision'.²⁵⁰

In the light of Articles 24 and 7 of Directive 2004/38/EC, the migrant Union citizens' right to equal treatment seems to be secured once they reside in the area of another Member State for more than three months and as long as their right to residence is not determined on the basis of becoming an 'unreasonable burden' and they do not seek social assistance as migrant students or work-seekers. The right to equal treatment is not absolute, however. Although EU citizens now enjoy a 'prima facie entitlement'²⁵¹ to residence and equal treatment, it is legitimate for the Member States to require a real and effective link either with the territory or the society of the State in which access to social benefits is being claimed. The 'de-nationalisation' of welfare states by the prohibition of nationality

²⁴⁸ Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617, para 20.

²⁴⁹ Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, paras 11-12.

²⁵⁰ Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637, para 27; Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6212, para 36; Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5774, para 20.

²⁵¹ Síoifra O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in Grainne de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005) 71.

criteria as conditions for access to social benefits²⁵² has not led to the 'de-territorialisation' of welfare states.²⁵³ Direct discrimination in the form of explicit nationality clauses has become rare, but the focus of discrimination analysis has shifted to covert and indirect discrimination.²⁵⁴ This means that the question of objective justifications now forms the core of discrimination analysis under Article 18 TFEU.

One way to address the question of legitimate differential treatment is to argue that the acceptance of justificatory criteria necessarily implies non-comparability. This line of argument suggests that Member States could justify the use of a 'differentiating criterion' by claiming that 'it merely takes note of situations that are not actually comparable' when EU citizens from other Member States are placed at a disadvantage.²⁵⁵ This approach would ensure that such justificatory criteria could no longer be derived from nationality.²⁵⁶ However, it would also ignore the idea of EU citizenship as an equal and comparable status between all those who hold it. The analysis of the 'real link' test below in this section approaches the question of legitimate differential treatment from the perspective that justificatory criteria, whether statutory exceptions or exceptions based on the objective justification test, must not deface the initial comparability between Union citizens., i.e. the idea of EU citizenship as a fundamental status of all Union citizens who fall into the scope of the EU treaties.

²⁵² With certain exceptions in the case of war veterans and military service.

²⁵³ E.g. Van der Mei (n 206) 207.

²⁵⁴ Malmstedt (n 80) 97.

²⁵⁵ Lenaerts (n 210) 17.

²⁵⁶ Ibid 18.

2.3.2 A 'real link' with the geographical employment market: a story of *de jure* economic criteria

This section explores the lack of a 'real link' with the geographic employment market as an objective justification for legitimate differential treatment under EU law. The analysis builds upon the three land-mark cases, which illustrate the development of the 'real link' test in the case of work-seekers. The focus of these cases is primarily economic. The Court approaches the requirement of a 'real link' with the geographic employment market primarily as a restriction on the right to free movement of workers under Article 45 TFEU and only secondarily as a restriction on Union citizens' right to free movement under Article 21 TFEU. The principle of equal treatment is seen as a mere instrument to secure the full enjoyment of the right to free movement. This means that the 'real link' test fails to provide independent criteria for legitimate differential treatment between EU citizens in so far as its use is limited to the establishment of a link with the geographic employment market. Instead, it will only provide a means of extending the boundaries of what economic activity means in the case of EU citizens.

D'Hoop: introducing the economic 'real link' test

The Court laid down the idea of a 'real link' as a legitimate condition for differential treatment between Union citizens in the *D'Hoop* case. The claimant, Ms D'Hoop was a Belgian national who had completed her secondary education in France and was therefore refused the Belgian tide-over allowance to young people who are seeking their first employment. Ms D'Hoop was not regarded as a 'worker' under what is now Article 45 TFEU because she was looking for her first employment. However, the Court concluded that, as a citizen of the Union, her exercise of free movement fell into the scope of Article 8 EEC (now Article 21 TFEU) despite the fact that the provisions of Union citizenship

entered into force only subsequently and that it would not be compatible with a Union citizen's freedom of movement to receive less favourable treatment from his or her own Member State than what he/she would have enjoyed, had he/she not exercised the right to free movement.²⁵⁷ The Court clarified this statement further by pointing out that '[s]uch inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move'.²⁵⁸

However, the Court qualified its own statement of equality as one of the principles that underpin the status of EU citizenship by noting that the inequality of treatment could be justified if it is based on 'objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions'.²⁵⁹ According to the Court, the limitation in question was 'too general and exclusive in nature' because it 'unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tide-over allowance and the geographical employment market, to the exclusion of all other representative elements'.²⁶⁰ The Court's reference to the 'real and effective degree of connection' is here limited to the 'geographic employment market' and, thus, it provides little substance for equality as one of the principles underpinning the non-economic status of Union citizenship.

²⁵⁷ Case C-224/98 *Marie Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191, para 30.

²⁵⁸ *Ibid* para 35.

²⁵⁹ *Ibid* para 36. This was confirmed in the *Pusa* case which reiterated this wording. Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763, para 20.

²⁶⁰ *Ibid* para 39.

Collins: constitutionalizing the economic 'real link' test?

In the *D'Hoop* case, the requirement of a 'real link' appeared between a Union citizen and her state of origin. In the later *Collins* case, the Court applied the same logic to migrant Union citizens in their host Member States. In this case, the claimant was an Irish national who was lawfully resident in the United Kingdom with the intention of seeking employment and applied for a jobseeker's allowance there. After concluding that the right to equal treatment for persons seeking employment could also cover benefits of financial nature under Articles 48 and 6 of the EEC Treaty (now 45 and 18 TFEU), the Court proceeded to answer the question of whether the EU principle of equal treatment prohibits national legislation which makes entitlement to jobseeker's allowance conditional on habitual residence.

With regard to the existence of indirect discrimination, the Court reiterated its statement in the *D'Hoop* case that 'it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question'.²⁶¹ According to the Court, 'while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective'.²⁶² Moreover, the Court amplified this by noting that a required period of residence may not exceed what is necessary for the national authorities to 'satisfy

²⁶¹ Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703, para 67.

²⁶² *Ibid* para 72.

themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'.²⁶³

In the earlier case-law, the Court had maintained that work-seekers were entitled to equal treatment in relation to access to employment but not in relation to social advantages.²⁶⁴ In the *Collins* case, the principle of non-discrimination was extended to cover work-seekers 'in its full scope' by interpreting Article 39 EC/45 TFEU and Regulation 1612/68 in the light of EU citizenship.²⁶⁵ It has been argued that the *Collins* case confirmed that EU citizenship is not just a 'safety net' for those individuals who could not rely on the traditional free movement provisions of the Treaty but that EU citizenship has become a 'genuine constitutional tool' for interpreting the rights to free movement and residence regardless of which status those EU citizens would otherwise hold under EU law.²⁶⁶ However, these comments conceal the fact that EU citizenship and EU citizens' right to equal treatment is here seen as an instrument to expand the economic right to equal treatment in the case of those EU citizens who do not (yet) hold the status of a Union worker but who, nonetheless, strive for that status. This implies that EU citizenship is viewed as a 'transitory status' towards the more fundamental status of a Union worker.

Vatsouras and Koupatantze: the combined application of Article 24(2) of Directive 2004/38/EC and Article 45 TFEU - still more economic than constitutional

²⁶³ Loc.cit.

²⁶⁴ See e.g. Case 316/85 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 2811, paras 26-27.

²⁶⁵ See e.g. Oxana Golyner, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005) 30 ELRev 111, 112.

²⁶⁶ Ibid 116.

In the more recent *Vatsouras and Koupatantze* case, the referring national court wanted to know whether Article 24(2) of Directive 2004/38 is compatible with Article 18 TFEU, 'read in conjunction' with Article 45 TFEU.²⁶⁷ The Court, first, reiterated its earlier conclusions in *Collins* that nationals of a member State seeking employment in another Member State enjoy the right to equal treatment under what is now paragraph 2 of Article 45 TFEU and that, after the establishment of EU citizenship, it is no longer possible to exclude the benefits of financial nature from the scope of that article.²⁶⁸ However, the right to equal treatment can be legitimately limited by the requirement that the jobseeker has established a 'real link' with the labour market of that State. This, says the Court, could be done 'in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question'.²⁶⁹

The Court declared that the derogations in Article 24(2) of Directive 2004/38 must be interpreted in the light of what is now Article 45(2) TFEU, noting that '[b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market' could not be classified as 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.²⁷⁰ But the Court concluded that its examination on these grounds had not challenged the 'validity' of Article 24(2) of Directive 2004/38/EC in this case.²⁷¹ However, in the later *N.* case, which was about the definition of the 'worker' status under Article 45 TFEU, the Court concluded that Articles 7(1) and 24(2) of Directive 2004/38/EC may not prevent a Union citizens from receiving maintenance aid

²⁶⁷ Cases C-22/08 and C-23/08 *Athanasios Vatsouras, Josit Koupatanze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585, para 33.

²⁶⁸ *Ibid* paras 36-37

²⁶⁹ *Ibid* paras 38-39.

²⁷⁰ *Ibid* paras 44-45.

²⁷¹ *Ibid* para 46.

for studies if he or she at the same time pursues effective and genuine employment activities in the host Member State.²⁷²

The focus of the Court's examination in both of these cases was on the relationship between the exception clause in Article 24(2) of Directive 2004/38/EC and Article 45 TFEU. However, despite its seemingly positive outcome, the *N.* case only confirms the privileged position of the economic status of a Union worker if compared to the status of an EU citizen. Recent case-law has emphasised that, unlike the status of EU citizenship, the 'objective status' of a Union worker will 'in principle' establish a 'sufficient link of integration' with the host Member State and will thus allow the holders of that status to benefit from the principle of equal treatment as regards social benefits.²⁷³ Moreover, in *Vatsouras and Koupatantze*, this approach gives the 'real link' test an inherently economic tone despite the reference to EU citizens' general right to non-discrimination and equality under Article 18 TFEU.

The requirement of belonging to the employment market implies a highly instrumental view of equality. It is therefore important to consider whether the Court might have reached a different conclusion in terms of the justifiability of the restriction on equal treatment, had it considered the establishment of a 'real link' against the non-economic EU principle of equality. The Court's choice to interpret Article 24(2) of Directive 2004/38/EC in the light of Article 45 TFEU may be defended by noting that, unlike the general prohibition of nationality discrimination, the prohibition of nationality discrimination of workers under Article 45 TFEU is not subject to conditions or limitations, except for the statutory exceptions in Article 45(3) TFEU. This, however, sounds less convincing in the

²⁷² Case C-46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* 21 February 2013.

²⁷³ Case C-542/09 *European Commission v Kingdom of the Netherlands*, 14 June 2012. See also Opinion of AG Sharpston in Case C-542/09, delivered on 16 February 2012, paras 91 and 95.

light of the hybrid application of Articles 45 and 18 TFEU in the case-law.²⁷⁴ Moreover, it sounds even less convincing if the general prohibition of nationality discrimination in Article 18 TFEU is seen as an expression of the EU principle of equality and as a fundamental right of all EU citizens who fall into the scope of application of the EU Treaties.

2.3.3 A 'real link' based on the length of residence: a story of *de facto* economic criteria

This section examines how the Court has been willing to expand the 'real link' test beyond the purely economic assessment of a 'link with the geographic employment market' or a 'substantial occupation to the national labour market'. First, it will be seen how the 'real link' test is, nonetheless, reduced to an economic assessment because the Court has merged it with the so-called 'unreasonable burden' test. This convergence between the 'real link' test and the 'unreasonable burden test' was introduced in the *Bidar* case and its consequences were clarified further in the more recent *Förster* case. These two cases will, then, be compared with the more recent *Commission v. Austria* and *Prinz and Seeberger* judgments in which the Court addressed some of the problems that follow from a strictly formalistic interpretation of a 'real link'. However, it will be seen that these judgments only strengthen the connection between the 'economic objective' and the 'integration objective' and, thus, fail to recognise a more independent 'equality objective'.

Both *Bidar* and *Förster* concern the right of students for maintenance allowances in the host Member State in the light of the combined application of Article 24(2) of Directive 2004/38/EC and Article 18 TFEU. By looking at these two cases, one can see how the 'real link' test can justify both an extensive and a restrictive interpretation of EU citizens' right to equal treatment under Directive 2004/38/EC. The Court draws a line

²⁷⁴ See e.g. Case C-406/04 *Gérald De Cuyper v Office national de l'emploi* [2006] ECR I-6947, Opinion of AG Geelhoed.

between those students who fall into the scope of Article 24(2) of Directive 2004/38/EC and those students who are already resident under Article 21 TFEU and can, therefore, rely on their right to equal treatment under Article 18 TFEU. However, the 'real link' test provides a means of assessing and justifying differential treatment in both situations. It will, then, be discussed how the Court's reasoning in *Commission v. Austria* has affirmed a more substantive approach to the requirement of a 'real link'.

Bidar: towards a non-economic 'real link' test

Mr Bidar, was a French national who was lawfully resident in the United Kingdom and had received a substantial part of his secondary education there. After starting a university course in the host Member State, he applied for assistance to cover his maintenance costs in the form of a student loan, but his application was rejected on the basis that he was not 'settled' in the United Kingdom. The Court reversed its earlier decisions in the *Lair* and *Brown* cases that the payment of student grants would fall outside the competences of the Union (paragraphs 15 and 18) by stating that, in the light of the establishment of EU citizenship, assistance with maintenance costs for students could fall into the scope of application of the Treaties and thus into the scope of the right to equal treatment.²⁷⁵ The Court, then, proceeded to consider the claim that the scope of application of the Treaty within the meaning of what is now Article 18 TFEU can be limited by the limitations and conditions of the Union citizens' right to move and reside under what is now Article 21 TFEU.

²⁷⁵ 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* [2005] ECR I-2119, paras 38-39 and 42.

The *Bidar* case resembles the above-mentioned cases on work-seekers in the sense that the applicant's right to residence was not contested. Rather, the question was about the right of the host Member State to limit the 'fundamental principle of equal treatment' on the basis of 'objective considerations independent of nationality'. The Court first stated that the definition of who is 'settled' in the United Kingdom for the purposes of national law on the basis of 'certain residence conditions' would 'risk placing at a disadvantage primarily nationals of other Member States'.²⁷⁶ After this, the Court turned to assess the question of whether such a difference in treatment is 'based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions'.²⁷⁷ What is noteworthy is the way in which the Court derives the rationale of the 'real link' test from the 'unreasonable burden' test.

First, the Court points out in paragraph 56 that 'it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance cost of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'.²⁷⁸ And, only then, in paragraph 57, the Court outlines that 'it is *thus* [italics added] legitimate for a Member State to grant such assistance to students who have demonstrated a certain degree of integration into the society of that State'.²⁷⁹ Thus, although the Court in *Bidar* holds that a certain period of residence in the host Member State can indicate the establishment of a 'real link' without any connection with the geographical employment

²⁷⁶ Ibid paras 52-53.

²⁷⁷ Ibid para 54.

²⁷⁸ Ibid para 56.

²⁷⁹ Ibid para 57.

market, it still fails to provide a genuinely non-economic criterion for legitimate differential treatment between EU citizens.²⁸⁰

In the *Bidar* case, the Court rejected the national rules which 'preclude any possibility of a national of another Member State obtaining settled status as a student - - whatever his actual degree of integration into the society of the host Member State'.²⁸¹ In other words, the Court declared that such requirements cannot be objectively justified if they make it impossible for the applicant to satisfy those conditions whatever his actual degree of integration into the society of the host Member State is. It has been noted that the Court, thus, refused to view solidarity as 'a mechanism that only involves those who contribute to the society in economic terms' and opened the door for a 'larger notion of solidarity' under which EU citizens can demonstrate integration on the basis of mere residence.²⁸² However, in so far as the 'actual degree' of integration as a criterion for equal treatment has its origins in the idea that the applicant must not establish an unreasonable (economic) burden to the society of the host Member State, this idea of solidarity appears rather limited.

Förster: a formalistic interpretation of the 'real link' test

The complex issue of what belonging means under the 'real link' test was developed further in the *Förster* judgment. Ms Förster was a German national who moved to the Netherlands, first to train as a primary school teacher and then to pursue a university degree in educational theory. During her studies, she had 'various kinds of paid employment' and, on

²⁸⁰ Ibid paras 58-59.

²⁸¹ Ibid para 61.

²⁸² Lenaerts (n 210) 16.

this basis, she was considered to be a worker under Article 39 EC [now 45 TFEU] and 7(2) of Regulation 1612/68 as it was then and was, thus, awarded a maintenance grant under the same conditions as a student of Dutch nationality. However, Ms Förster did not take any employment during the final year of her studies and, on this basis, the Dutch authorities decided that she was no longer a 'worker' and the decision concerning her maintenance grant was annulled for a period of five months beginning from the month following the end of her last employment.

In this case, the Court concluded that as the applicant had ceased her employment without giving up her plan to continue her career in the Netherlands, where she also maintained her residence, she could not be regarded as a worker who has ceased his or her employment activity in the sense of Article 7 of Regulation 1251/70 and would not come under Article 7(2) of Regulation 1612/68 on this basis.²⁸³ The Court, then, proceeded to examine the question of when a Union citizen who travels to another Member State as a student can rely on what is now Article 18 TFEU in order to obtain a maintenance grant in the host Member State.²⁸⁴ The Court referred to the *Bidar* case in order to draw a distinction between those situations in which an economically inactive Union citizen can rely on what is now Article 18 TFEU based on the fact that she or he has already been lawfully resident in the host Member State 'for a certain time' and those situations in which '[a] student who travels to another Member State to start or pursue education' could benefit a right of residence on the basis of what are now Article 21 TFEU and Directive 2004/38/EC.²⁸⁵

²⁸³ Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, para 31.

²⁸⁴ *Ibid* para 34.

²⁸⁵ *Ibid* paras 39-40.

The Court was rather cryptic in holding that the fact that a student falls within the scope of Article 18 TFEU 'for the purposes of obtaining a maintenance grant' through lawful residence in the *Bidar* case 'does not establish any entitlement to the payment of maintenance grant by the host Member State on the part of students benefiting from the right of residence'.²⁸⁶ Secondly, however, the Court pointed out that none of this would prevent the student who is lawfully resident in the Member State under Article 21 TFEU 'from relying during that residence on the *fundamental principle* of equal treatment enshrined in the first paragraph of Article 12 EC [now 18 TFEU]'.²⁸⁷ The Court clarifies this statement further by pointing out that '[f]or that purpose, the fact that Ms Förster came to the Netherlands principally in order to study there is irrelevant'.²⁸⁸ But the actual implications of this distinction between the right to non-discrimination and equal treatment as expressed in Article 18 TFEU and the 'fundamental principle of equal treatment' that is enshrined in that article, but that can be relied on in other cases too, remain obscure in the Court's reasoning.

The Court simply moved on to consider the question of whether the fact that the requirement of minimum residence of five years prior to the application for a maintenance grant did not concern Dutch students could be considered discriminatory under what is now Article 18 TFEU.²⁸⁹ Without giving any further explanations, the Court concluded that the requirement of uninterrupted residence of five years was 'appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated

²⁸⁶ Ibid paras 41-42.

²⁸⁷ Ibid para 43. [italics added]

²⁸⁸ Ibid para 44.

²⁸⁹ Ibid para 45.

into the society of the host Member State'.²⁹⁰ With regard to the proportionality of this requirement, the Court decided that neither could it be held to be 'excessive having regard, inter alia, to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State'.²⁹¹ In practice, this approach would mean that Union citizens' fundamental right to equal treatment in those cases which fall into the scope of the derogations in Article 24(2) of Directive 2004/38/EC is only materialized once the conditions for permanent residence under Article 16 of Directive 2004/38/EC have been met.

The *Förster* judgment represents a purely formal approach to a 'real link' on the basis of a length of residence, whereas, in the *Bidar* case, the criterion of a length of residence was introduced as one possible way to prove a sufficient degree of integration on a more circumstantial basis. By choosing a strictly formalistic approach in *Förster*, the Court ignored the question of whether 'other factors' could indicate a 'substantial degree' of integration into the society of the host Member State, as Advocate General Mazák mused.²⁹² It has been noted that the Court used the exception clause in Article 24(2) of Directive 2004/38/EC to confirm the proportionality of the residence requirement, although it could have analysed in more detail whether the residence requirement and the derogation clause were compatible with the previous interpretation of Articles 18 and 21 TFEU.²⁹³ In academic commentary, this approach has been juxtaposed with the fact that, in the earlier *Bidar* and *Grzelczyk* cases, the Court's reasoning had suggested that its

²⁹⁰ Ibid para 52.

²⁹¹ Ibid para 54

²⁹² Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, Opinion of AG Mazák, para 41.

²⁹³ Síoifra O'Leary, 'Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34 ELRev 612, 622-23.

interpretation of the residence directives was 'mandated' by what are now Articles 18 and 21 TFEU.²⁹⁴

A more substantive approach to what is meant by a real and effective link was already discussed by Advocate General Mazák who would have accepted 'general conditions which require no further individual assessment' only in so far as they are 'indicative of the degree of integration into society'.²⁹⁵ According to Advocate General Mazák, the fact that Directive 2004/38/EC does not place Member States under any obligation to award a maintenance grant for students prior to their acquisition of permanent residence cannot 'detract' the analysis from the 'requirements flowing from' Article 18 TFEU and the general principle of proportionality.²⁹⁶ The Advocate General further suggested that a period of five years of continuous residence in the host Member State would only mark the 'outer limit within which it may still be possible to argue that a student pursuing studies in another Member State has not established a sufficient degree of integration into the society of that Member State to qualify for equal treatment'.²⁹⁷ This argument was based on the view that formalistic residence conditions might prevent applicants, such as Ms Förster, 'from benefiting from their right to equal treatment as citizens of the Union - - regardless of the actual link they may have established with the society of the host Member State'.²⁹⁸

²⁹⁴ Ibid 623.

²⁹⁵ Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, Opinion of AG Mazák, para 129.

²⁹⁶ Ibid para 131.

²⁹⁷ Ibid para 132.

²⁹⁸ Ibid para 130.

Commission v Austria and Prinz and Seeberger: a more substantive version of the 'real link' test

A critique of strictly durational residence requirements has now been accepted by the Court of Justice in the recent case-law. The Court has always held that the requirement of a 'real link' must be regarded as 'too general and exclusive in nature' if it 'unduly favours an element which is not necessarily representative of the real and effective degree of connection - - - to the exclusion of all other representative elements'.²⁹⁹ However, this approach has been given more substance in the recent case-law. In the *Commission v Austria* case, the Court decided that it would be against the EU principle of equal treatment to grant reduced transport fares to only those students whose parents received Austrian family allowances 'to the exclusion of all other representative elements' of a genuine link.³⁰⁰ Following Advocate General Kokott's analysis, the Court underlined that the definition of a link should not 'be fixed in a uniform manner' but it should depend on 'the constitutive elements of the benefit in question'.³⁰¹

The Court followed its reasoning in the earlier *Tas-Hagen* case in which it had confirmed that a residence requirement could not be considered as a 'satisfactory indicator' of the degree of connection between the applicant and his/her own Member State if it led to differential treatment in the case of 'persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable'.³⁰² Similarly, in the more recent *Prinz and Seeberger* case, the Court of Justice was asked to

²⁹⁹ Case C-224/98 *Marie Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191, para 39.

³⁰⁰ Case C-75/11 *European Commission v Republic of Austria* 4 October 2012, para 62.

³⁰¹ *Ibid* para 63.

³⁰² Case C-192/05 *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, para 38. See also Opinion of Advocate General Kokott in Case C-192/05 of 30 March 2006, paras 67 and 68.

assess a residence requirement which was imposed on the nationals of the Member State in question. In both of these joined cases, the applicants had been refused an educational grant for their studies abroad on the basis that they did not fulfil the requirement of a three-year uninterrupted residence in their state of origin before commencing their studies abroad.³⁰³

Following Advocate General Sharpston's opinion, the Court held in this case that a 'sole condition of uninterrupted residence' was 'too general and too exclusive' to be proportionate.³⁰⁴ Notably, the judgment provides a more detailed analysis of those economic and social factors which may count for 'other representative elements' when the Court needs to assess whether the applicant is 'sufficiently connected' to the Member State in question even in the absence of required residence. The list of relevant factors presented both by the Advocate General and the Court include nationality, prior education, family ties, employment, and language skills. However, the list is open-ended and 'other social and economic factors' may also gain relevance in the assessment. The Court also noted that these factors must be examined in the light of other provisions of the national legislation.³⁰⁵

This discussion is important because it gives more substance to the Court's earlier rulings over the legitimacy of social integration requirements. Moreover, it can be asked whether this analysis lays the ground for a more flexible approach to the requirement of a 'real link' on the basis of the EU principle of equality. The list of relevant factors must, nonetheless, be read in the overall context of the Court's reasoning. The Court's

³⁰³ C-523/11 and C-585/11 *Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg*, 18 July 2013.

³⁰⁴ *Ibid* para 40 and Opinion of AG Sharpston in joined cases C-523/11 and C-585/11 of 21 February 2013.

³⁰⁵ *Ibid* para 38.

interpretation of the 'real link' test is still based on the rationale that economically inactive and dependent EU citizens must not become an unreasonable financial burden on the welfare system in the Member State which awards the funding.³⁰⁶ In the words of Advocate General Sharpston, the Member States can 'limit the range of beneficiaries in order to achieve the economic objective; and it is acceptable for that purpose to use a criterion that establishes evidence of a degree of integration'.³⁰⁷

It is noteworthy that both the Court and Advocate General Sharpston took it for granted that the requirement of a minimum level of integration provides a legitimate way for the Member State to avoid an unreasonable financial burden.³⁰⁸ In its analysis of the proportionality of the residence requirement, the Court seems to follow Advocate General Sharpston's distinction between the 'economic objective', the 'integration objective', and the 'social objective'. In her opinion, the Advocate General emphasised that the 'integration objective', such as the requirement of a 'real link', can legitimately be used to 'achieve the economic objective', i.e. to justify a restriction on the freedom of movement and residence under Article 21 TFEU on the basis that it would lead to an unreasonable financial burden.³⁰⁹ The only reference to the more independent role of the 'integration objective' was a negative one. Namely, the Advocate General rejected the view that the integration objective 'would suffice of itself to justify the restriction on free movement rights'.³¹⁰

³⁰⁶ Ibid para 36.

³⁰⁷ C-523/11 and C-585/11 *Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg*, 18 July 2013, Opinion of AG Sharpston, para 70.

³⁰⁸ C-523/11 and C-585/11 *Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg*, 18 July 2013, para 36.

³⁰⁹ C-523/11 and C-585/11 *Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg*, 18 July 2013, Opinion of AG Sharpston, para 70.

³¹⁰ Ibid para 71.

However, her opinion did point out the 'false logic' under which the requirement of a 'real link' is often derived from the 'economic objective', while their proportionality is justified merely by referring to the 'integration objective'.³¹¹ By this, the Advocate General referred to the fact that the proportionality of the residence requirement cannot be justified by simply claiming that 'the required degree of connection is invariably demonstrated by residence for a certain numbers of years'.³¹² This criticism led both her and the Court to assess the proportionality of the residence requirement both in the light of the 'economic objective' and in the light of the 'integration objective', as well as to conclude that a 'single criterion' cannot, therefore, be proportionate in relation to the integration objective.³¹³ However, neither the Advocate General nor the Court developed further the analysis of what implications the definition of a 'real link' under these different objectives would have for the status of EU citizenship.

Moreover, it is worth noting that, in *Prinz and Seeberger*, both applicants were applying for a study grant for studies abroad from their own Member State. This meant that Article 24(2) of Directive 2004/38/EC was not applied in this case and their situations were only assessed under Article 21 TFEU. It remains to be seen whether a similar approach to the 'real link' test will now be adopted in those cases which concern 'needy' migrant EU citizens who apply for social benefits from their host Member State and not from their State of origin. This may well be the case, for the Court of Justice has underlined in its recent case-law that Article 24 of Directive 2004/38/EC is 'merely a specific expression' of the principle of equal treatment provided for in Article 18 TFEU and that derogations included in Article 24(2) must therefore be interpreted 'narrowly and in accordance with

³¹¹ Ibid para 77.

³¹² Ibid para 88.

³¹³ Ibid para 90.

the provisions of the Treaty, including those relating to citizenship of the Union and the free movement of workers'.³¹⁴ In practice, this has meant that Articles 24 of Directive 2004/38/EC and Article 18 TFEU can be applied 'cumulatively' and the former 'merely specifies' the legal effects of the latter.³¹⁵

Thus, it seems possible to argue that the same logic of a more substantive analysis will apply to justifications for differential treatment between EU citizens under Article 18 TFEU. However, even if that is the case, it would not change the fact that the *Prinz and Seeberger* judgment leaves the economic logic that underlies the 'real link' test unchallenged. To sum up, the recent 'real-link' case-law has been expanded beyond both the purely economic and the strictly formalistic definitions of what is meant by a 'real link'. Moreover, in her opinion in the *Commission v Austria* case, Advocate General Sharpston discussed in detail the difference between the 'economic objective' with reference to the *Bidar* judgment and the 'integration objective' with reference to the *Förster* judgment.³¹⁶ What is, nonetheless, missing from this case-law is the analysis of the relationship between the 'integration objective' and what I call the 'equality objective':

- 1) It remains unclear whether the more substantive approach to the requirement of a 'real link' would also apply to those instances in which the requirement of a 'real link' is weighted against the enjoyment of EU citizens' fundamental right to non-discrimination and equal treatment under Article 18 TFEU.

³¹⁴ E.g. Case C-46/12 *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, 21 February 2013.

³¹⁵ Case C-75/11 *European Commission v Republic of Austria* 4 October 2012, para 44.

³¹⁶ Case C-75/11 *European Commission v Republic of Austria* 4 October 2012, Opinion of AG Sharpston, paras 83-84. Advocate General has suggested that the 'integration objective' must be applied in compliance either (1) with the 'economic objective' which has its aim in ensuring that making a social benefit available does not unreasonably burden the stability of the public finances of the Member State in question or (2) with 'any other legitimate objective justified by overriding reasons of public interest'. *Ibid* para 85.

- 2) Moreover, the analysis of the 'equality objective' would also need to address the question of under what conditions the establishment of a 'real link' might have a positive, rather than a negative, role in securing the right to non-discrimination and equal treatment under Article 18 TFEU.

2.3.4 The lack of substantive criteria for differential treatment between EU citizens

The introduction of the 'real link' test by the Court of Justice has been welcomed by those authors who argue that supranational citizenship rights should depend on habitual residence.³¹⁷ Some even describe the reliance on residence conditions as a means of 'completion of non-discrimination' because these conditions can be applied to all non-residents and not just to foreigners.³¹⁸ At the same time, integration requirements, such as residence conditions, have been seen as necessary for maintaining national social assistance schemes.³¹⁹ It has been noted that the requirement of a 'real link' emerges from the fact that, while 'nationally defined exclusions' are still necessary, they must now be based on something else than nationality.³²⁰ The establishment of a real link has also been optimistically viewed as a sign of 'citizenship specificity' which 'both triggers and justifies equal treatment of migrant citizens'.³²¹ However, several authors have probed a clearer articulation of the legitimacy of such conditions.³²²

³¹⁷ See e.g. Bruno Nascimbene, 'Towards a European Law on Citizenship and Nationality?' in Síofra O'Leary and Teija Tiilikainen (eds), *Citizenship and Nationality Status in the New Europe* (Sweet & Maxwell 1998) 72 and 78.

³¹⁸ Davies (n 130) 49 and 53.

³¹⁹ Van der Mei (n 4) 75.

³²⁰ Charlotte O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity' (2008) 33 ELRev 643, 646.

³²¹ Borgmann-Prebil (n 211) 345.

³²² For instance, S. O'Leary writes: 'Vague references to Member States' legitimate concerns or to nebulous concepts centred on real and effective links with the host Member State are insufficient to justify, or even

Two opposing approaches to the requirement of a 'real link' can therefore be induced from academic commentary. On the one hand, the 'real link' test has been seen as a 'fair and effective way' for recognising the legitimate concerns of the Member States despite the fact that the actual content of a 'real link' has remained uncertain.³²³ On the other hand, it has been described as a way to allow the Member States to rely on 'potentially indirectly discriminatory precondition' in limiting EU citizens' access to social assistance.³²⁴ This duality in opinions for and against the use of the 'real link' test as a criterion for legitimate differential treatment between EU citizens shows that the 'real link' test can justify multiple different and even conflicting outcomes depending on how the substance of a 'link' is defined, i.e. what relevant belonging means in the context of EU law.

- In theory, the *establishment* of a 'real link' can provide a means of extending the right to residence and, thus, the right to equal treatment in the context of the 'unreasonable burden' test.
- In practice, the *absence* of a 'real link' test can provide a further limitation on EU citizens' right to equal treatment: a functional criterion of belonging becomes more important than the shared status of EU citizenship.

The crucial question is therefore what type of belonging can be regarded as a condition for equal treatment between Union citizens in the field of social rights.

As shown in the previous two sections, different factors may amount to the establishment of a 'real link' and a more substantive approach has recently replaced the

explain, a departure from the principles held dear by the Court when dealing with the rights to free movement and non-discrimination of the economically active'. O'Leary (n 251) 73.

³²³ E.g. White (n 117) 905.

³²⁴ O'Brien (n 320) 646.

strictly formalistic definition of a 'real link' in the case-law. However, the 'real link' test is still based on the rationale that economically inactive EU citizens must not become an unreasonable financial burden on the welfare system in the host Member State. Conversely, this means that the 'real link' test fails to provide independent/non-economic criteria for legitimate differential treatment between EU citizens and, thus, fails to provide any new insight into my research question of what equality means between EU citizens. The key to the 'real link' test lies in the premise that only 'proportionate' justifications for unequal treatment between Union citizens can be accepted under EU law. It has been noted that the 'real link' test 'represents a more conceptual than material shift' because in its current form it simply implies a 'right to be assessed, but no more'.³²⁵ It is therefore important to consider in more detail what the requirement of proportionality means in this context.

The introduction of EU citizenship as a standard for comparability has shifted the focus of discrimination analysis towards the host Member State's ability to present objective justifications for discriminatory restrictions on access to public benefits.³²⁶ Two roles of proportionality analysis can be drawn from secondary legislation and the case law. First, the '*unreasonable burden*' test under Article 7 of Directive 2004/38 defines the conditions under which the host Member State can terminate Union citizens' residence. This assessment is primarily economic, although the Court has clarified its conditions by holding that it must not become an automatic consequence of recourse to the host Member State's social assistance system. Secondly, the '*objective justification*' test refers to the Court's confirmation that it is legitimate for the host Member State to require a 'real link' or

³²⁵ Ibid 644.

³²⁶ Michael Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 ELRev 613, 631.

a 'certain degree of integration' between the applicant and their own society when deciding whether it is justified to exclude a migrant Union citizen from the scope of certain social benefits.

It is important whether and, if yes, under what conditions, a more independent 'equality objective' could be given weight in assessing the requirement of a 'real link' under the 'objective justification' test. According to the Court, objectively justified differential treatment would involve 'objective considerations independent of the nationality of the persons concerned' and 'proportionate to the legitimate aim'. However, it has been noted that 'in concrete cases the equal treatment test and the end of residence test might blend into one inquiry into proportionality'.³²⁷ It is this convergence between the 'real link' test and the 'unreasonable burden' test that captures the substantive dimension of the EU equality problem: both the case-law and the secondary legislation fall short of providing justificatory criteria for legitimate differential treatment between EU citizens, i.e. they fail to recognise the horizontal dimension of the 'equality objective'. On the contrary, the 'real link' test has its focus on the vertical link between a Union citizen and the host member State and it fails to consider adequately what implications these objective justifications may have for the equality of relationships between EU citizens and, thus, for the status of EU citizenship.

The relationship between the non-discrimination principle and proportionality is not a new issue in the context of EU law. It was originally raised in the aftermath of the so-called 'skimmed-milk powder cases' in the 1970s when prohibited discrimination was

³²⁷ Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (OUP 2008) 209. Note that Somek has distinguished between the two roles of proportionality analysis in the interpretation of Union citizens' right to equal treatment as follows: 'It is one question, hence, whether there is a non-discriminatory reason to treat non-nationals differently; and quite another question how much weight is to be accorded to the interest of a European citizen to reside in another Member State in contrast to the countervailing interest of this state not to be "unreasonably burdened" with having to pay out benefits to whoever happens to have successfully crossed the stateline.'

assimilated with disproportionality.³²⁸ Prohibited discrimination is usually regarded to be tantamount to arbitrary distinction.³²⁹ It is, nevertheless, unclear whether the objective justification test in defining the limits of prohibited discrimination should or could be assimilated with the general principle of proportionality. The counter-argument is that the 'test of discrimination' ought to be more about the 'effect' on relationships between persons and undertakings than about the relationship between the impact on the 'material sphere of the affected persons' and the 'aim underlying the measure'.³³⁰ Both the criteria of non-discrimination and the criteria of proportionality would, arguably, lose their specific character if they were entangled with each other.³³¹ Similarly, it seems important that the objective justification test would more clearly address the 'effect' of differential treatment on relationships between EU citizens.

The criticism of proportionality can also be derived from the failure to 'capture the agent-relative (subjective) aspects of human rights claims'.³³² It has been argued that the proportionality principle remains meaningless unless the 'supervision of the objectives' under the 'strong' version of proportionality is adopted in addition to the 'weak' proportionality analysis of the mere 'means chosen to pursue those objectives'.³³³ Similarly, the tendency to see equality as merely a 'duty to give reasons' is argued to be particularly

³²⁸ See e.g. Case 114/76 *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG*. [1977] ECR 1211, para 7. There are nevertheless other cases in which these two areas have been kept more strictly apart. See e.g. Case 15/83 *Denkavit Nederland BV v Hoofprodukschap voor Akkerbouwprodukten* [1984] ECR 2171, paras 22-23 and 24-25.

³²⁹ Matthias Herdegen, 'The Relation between the Principles of Equality and Proportionality' (1985) 22 CMLrev 683, 685.

³³⁰ *Ibid* 685.

³³¹ Nicholas Emiliou, *The Principle of Proportionality in European Law: a Comparative Study* (Kluwer Law 1996) 155.

³³² Basak Çali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251, 263.

³³³ Sheldon Leader, 'Proportionality and the Justification of Discrimination' in Janet Dine and Bob Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996) 115.

harmful 'when the reasons are not informed by fundamental substantive considerations'.³³⁴ Robert Alexy, the well-known advocate of proportionality analysis, claims that there is 'no morality without balancing'.³³⁵ The logical conclusion is that, equally, there is 'no balancing without morality'. More substantive constitutional values and principles than the mere principle of proportionality are needed to guide the Court of Justice through its difficult task of defining the limits of EU citizens' right to non-discrimination and equal treatment. I will return to the question of the normative hierarchy of EU constitutional principles³³⁶ at the end of this thesis. At this point, it is sufficient to conclude that the general principle of proportionality alone fails to provide an adequate solution to the substantive Equality Problem in EU law.

The question is not just how the right to equal treatment can be limited in an objectively justified manner but also whether the principle of equality could become one of the standards against which justificatory criteria for differential treatment between Union citizens must be reviewed (the 'equality objective'). In the relevant literature, it has been questioned whether the interpretation and application of concrete provisions of secondary legislation, above all Directive 2004/38/EC, should at all fall within the more abstract general principles of Union law.³³⁷ But it has also been noted that the notion of general principles will inherently carry over 'an abstract concept of law which cannot always be derived from the written rules laid down by the Member States or institutions and is

³³⁴ Kochenov (n 98) 23.

³³⁵ Alexy (n 232) 193 – 196 and 363. Alexy uses Dworkin's argumentation as an example. See Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 197-198.

³³⁶ See more about this in Katja Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory of International Law* (Elgar 2011).

³³⁷ Dougan (n 326) 616 – 617. According to Dougan, secondary legislation no longer offers definite conditions for Union citizens' rights to residence and equality but merely a 'framework' within which the lawfulness and proportionality of different conditions and limitations can be assessed 'having regard to their degree of integration into the host society' in the light of Article 21 TFEU (ex 18 EC). Ibid 621.

superior to those rules'.³³⁸ The general principles of Union law can only be limited by the objectives of the EU Treaties and, to this extent, even Union legislation must be applied and interpreted in compliance within the general principles of EU law.³³⁹ The right of non-discrimination and equal treatment is not absolute but any limitations and conditions on Union citizens' right to equal treatment must comply with the general principles of EU law, including EU citizens' fundamental right to equal treatment.

Traditionally, the general principles of EU law have been seen as an aid for interpretation or as a ground for judicial review.³⁴⁰ However, they may also play an important role in the 'allocation of powers' both between the Union legislature and courts and between the Union and the Member States.³⁴¹ Recourse to the general principles and, above all, the incorporation of fundamental rights in these principles can provide a way of proceeding towards a more substantive conception of the rule of law in EU law, as well as a clearer hierarchy of norms in EU law.³⁴² The Court of Justice has recently highlighted the 'constitutional status' of the general principles of EU law.³⁴³ This case-law has inspired

³³⁸ A. G. Toth, 'Human Rights as General Principles of Law, in the Past and in the Future' in Ulf Bernitz and Joakim Nergelius (eds), *General Principles of European Community Law* (Kluwer 2000) 78.

³³⁹ Loc.cit.

³⁴⁰ Academic debate has usually focused on the question of when a situation falls within the scope of application of the general principles of EU law. It has been argued that, besides the situations in which the Union institutions exercise their conferred powers or the Member States implement EU law or derogate from their obligations under EU law, the general principles can also apply on the basis that the action of the Member State overlaps with 'some substantive measure of Union law'. See e.g. Editorial Comments, 'The scope of application of the general principles of Union law: An ever expanding Union?' (2010) 47 CMLRev 1589, 1590 and 1594.

³⁴¹ Koen Lenaerts and José A. Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 CMLRev 1589, 1629.

³⁴² Ibid 1632 and 1636. On this basis, it has also been claimed that whether or not the general principles produce effects beyond the requirement of consistent interpretation is about the interpretation of primary EU law and, thus, falls within the jurisdiction of the Court of Justice. This argument is particularly relevant for the debate about whether the general principles of EU law can justify the direct horizontal effect of directives under EU law. Ibid 1649.

³⁴³ E.g. C-101/08 *Audiolux SA and Others vs Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others* [2009] ECR I-9823. See for older case-law e.g. Case C/46/93 and 48/93 *Brasserie du*

arguments that equality as a general principle of EU law could act independently in relation to 'constitutionally prohibited forms of discrimination', including nationality discrimination.³⁴⁴ In practice, this would mean that the principle of equality is used to identify the criteria on the basis of which differentiation between individual cases is justified.³⁴⁵

Underlying these arguments is the view that the 'constitutional function' of the general principles of EU law is called on to give more substance to the 'common European values' which are already embedded in the EU Treaties.³⁴⁶ The general principles of EU law have the tendency to create 'positive obligations' in the context of the non-discrimination principle in particular and in the context of the application of the proportionality principle in more general.³⁴⁷ This indicates that the application of general principles will necessarily push the Court to exercise balancing.³⁴⁸ However, it has been suggested that the balancing criteria can be 'enriched by different, albeit converging legal, moral, or political theories'.³⁴⁹ Moreover, it has also been suggested that the general principles can play an independent role in providing criteria for balancing along with 'constitutional fundamental rights guarantees'.³⁵⁰ These propositions support the argument

Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. [1996] ECR I-1029, para 25.

³⁴⁴ Lenaerts and Gutiérrez-Fons (n 341) 1662.

³⁴⁵ Ibid 1662. Lenaerts and Gutiérrez-Fons argue that 'when having recourse to general principles, the ECJ must distinguish between matters pertaining to the province of constitutional law and those which are subject to legislative discretion'. Ibid 1667.

³⁴⁶ Ibid 1667.

³⁴⁷ Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law 5, 14-15.

³⁴⁸ Lenaerts and Gutiérrez-Fons (n 341) 1650.

³⁴⁹ Ibid 1653.

³⁵⁰ Prechal (n 347) 21.

that a more thorough analysis of the philosophical foundations of the EU principle of equality is necessary for a better understanding of whether EU law could develop towards a more independent/non-economic 'equality objective' in the assessment of legitimate differential treatment between EU citizens.

2.4 Conclusion

This chapter addressed the structural and substantive dimensions of the EU Equality Problem by exploring how the emergence of EU citizenship as a new standard of comparability (i.e. the definition of EU citizenship as a 'fundamental status' of all Member State nationals) has affected the discrimination analysis under EU law. First, this chapter argued that it is problematic that not just the limitations but also the *de facto* scope of the right to equal treatment are now made dependent on the proportionality analysis (the structural Equality Problem). Secondly, this chapter engaged in a more substantive analysis of justificatory criteria for legitimate differential treatment between EU citizens both in the secondary law and in the case law of the Court of Justice of the EU. It concluded that the 'real link' case law has failed to provide a set of independent criteria for legitimate differential treatment or to consider what justifying legitimate differential treatment means for equality between EU citizens (the substantive Equality Problem).

This analysis points out that EU citizens enjoy a 'fundamental' right to equal treatment which derives its existence from other rights and whose exercise may lead to the termination of those very rights from which it derives its existence. What, then, does the word 'fundamental' mean in relation to the EU principle of equality as outlined by the Court of Justice? Is it just about judicial rhetoric? Or, is there indeed something fundamental in the EU principle of equality? In other words, can EU law develop towards a more independent 'equality objective' in its assessment of legitimate differential treatment

between EU citizens? These questions will be examined further in the remaining three chapters of this thesis.

3 EU Citizens' Duty to Be Active: A Basis for Critique

3.1 Introduction

The first two chapters of this thesis have discussed the EU Equality Problem by looking at legitimate differential treatment between EU citizens in the context of Article 18 TFEU. This chapter finishes the analysis of the 'Equality Problem' with a more theoretical argument which states that both the structural and the substantive indeterminacy of the Union test for nationality discrimination point towards a deeper philosophical problem: EU law is dominated by the activity-based conception of equality which has its roots in a reductionist view of human agency. The way in which legitimate differential treatment is justified between EU citizens under Article 18 TFEU implies that EU citizens' right to equal treatment is conditioned on the ideals of individual responsibility and activity. On this basis, it will be argued that **(1)** the current interpretation of the EU principle of equality fails to recognise equality as a 'normative ideal of human relationships'³⁵¹ and **(2)** an unfortunately narrow and individualistic view of agency underlies the EU principle of equality.

This analysis has its basis in the question of whether the normative choice in favour of some philosophical conceptions of equality at the expense of others is conscious and considered when it comes to the Court of Justice and the EU legislature. My hypothesis is that this might not always be the case and that a more articulate theoretical and philosophical analysis of the EU principle of equality is needed to assist these institutions in their difficult task of defining the substance of EU citizenship in the light of the objectives of European integration. In order to extract a relevant theoretical synthesis

³⁵¹ Samuel Scheffler, *Equality and Tradition Questions of Value in Moral and Political Theory* (Oxford University Press 2007) 234.

for this purpose, this chapter will discuss the relevance of different philosophical justifications of equality for EU law as widely as possible.

First, Sections 3.2 and 3.3. theorize the EU Equality Problem by developing the argument that an activity-based conception of equality prevails in EU citizenship law. I then move on to explore the EU principle of equality within the theoretical framework of contemporary philosophical egalitarianism. Section 3.4 suggests that the activity-based conception of equality makes the EU principle of equality vulnerable to the criticism that has been directed against the liberal egalitarian emphasis on the individual choice and responsibility on the basis that it fails to recognise equality as a relational ideal. However, in so far as the importance of just and equal relationships is derived from the ideal of democratic citizenship it has only limited applicability in the context of EU law. Section 3.5 will, therefore, develop the critique of the activity-based conception of equality further by discussing how the parameters for relevant agency³⁵² are defined in EU law. The section concludes that the activity-based conception of equality results in an unfortunately narrow and individualistic view of agency and that a more balanced view of agency would need to take more seriously the idea of EU citizens as full and equal subjects of EU law.

3.2 Social citizenship as a problem of belonging

To the extent that the enjoyment of EU citizens' right to equal treatment and, thus, the parameters for their agency depend on the establishment of social integration, as I argue below in this chapter, it is important to understand why the idea of belonging is relevant for social equality in the first place. Therefore, this section begins the theoretical analysis of the EU principle of equality by briefly discussing the role 'belonging'³⁵³ has traditionally

³⁵² By the term 'EU citizens' agency', I refer to their ability to enjoy EU citizenship rights, including the right to equal treatment. See further about this in Section 3.5.

³⁵³ The term 'belonging' is used in a dual meaning: (1) as being a member or part of something and (2) as a relationships of affinity.

been given in the context of social equality and how EU citizenship has challenged that role.

The right to social benefits has traditionally been connected with the ability to prove belonging. What is noteworthy, however, is that the evidence for relevant belonging can be derived from different sources, such as factual contributions, habitual residence, or citizenship.³⁵⁴ Moreover, the increasing movement of people across Europe has presented a compelling challenge to the traditional requirement of belonging in the context of social equality. The idea of limited (national) solidarity appears to be in conflict with a new principle of equality, according to which 'all who belong to a greater community are treated in an equal manner'.³⁵⁵ The fundamental question of EU law in the context of social welfare benefits is, therefore, when and where migrants should have access to social benefits outside their countries of origin and who should pay the bill – the host State or the home State.³⁵⁶

The principle of territoriality of social assistance is closely linked with immigration policy: States use the need of social assistance as a reason for not granting residence in their territory.³⁵⁷ However, later becoming in need of social assistance can no

³⁵⁴ Anna Christensen and Mattias Malmstedt, 'Lex Loci Laboris versus Lex Loci Domicilii – an Inquiry into the Normative Foundations of European Social Security Law' (2000) 2 *European Journal of Social Security* 69, 73.

³⁵⁵ *Ibid* 74.

³⁵⁶ The answer to this question must address both 'technical' and 'normative' conflicts. *Ibid* 75 This becomes obvious if we look at the current discourse between the European Union and the national welfare states which has two main dimensions. (1) Technical questions of what belonging means mainly appear in the context of the EU-wide co-ordination of social security schemes under Regulation 883/2004. (2) The accepted derogations under Directive 2004/38/EC on Union citizens' rights to free movement and residence give a more normative and principled definition for what relevant belonging means under EU law. It is this second dimension of belonging which is relevant for our analysis of EU citizenship.

³⁵⁷ No 'clear' or 'fixed' concept either of domicile or of residence exists in private international law to the extent which would be useful for the analysis of EU law. It has been argued that 'domicile' generally provides a more precise legal concept, whereas 'residence' is often factual, i.e. 'founded more solidly in reality given that it is the place with which a person actually possesses personal and occupational ties'. Garot (n 130) 237-

longer lead to the termination of the right to residence in the same way as before. Moreover, even those residence requirements which apply to both nationals and non-nationals can be indirectly discriminatory because it may be more difficult for non-nationals to meet them.³⁵⁸ It has been shown in the previous chapter that there is no absolute right to residence until the attainment of permanent residency under Article 16 of Directive 2004/38/EC, but the need for social assistance must not lead to the automatic loss of the right to reside.

Some authors speak in this context of the 'spatial challenges' of EU law towards national welfare systems.³⁵⁹ By this, they mean that European integration has led to the opening of the traditional boundaries of social citizenship.³⁶⁰ In practice, EU rules have challenged both the 'territorial' and the 'membership' boundaries of the national welfare systems.³⁶¹ These boundaries are thought to enforce 'affiliation to a sharing community'.³⁶² The worst-case-scenario is, therefore, that the fragmented welfare experience in the supranational context leads to a 'diminished sense of a link', first with private individuals

38. Moreover, residence is often qualified with the term 'habitual' which can be derived from 'the length of stay' or from 'other facts of a personal or professional nature which point to durable ties between a person and his residence'. This means that the notion of residence can be defined either by virtue of 'qualitative' or 'quantitative' elements. In determining the relevant indicators for residence, the priority can be given either for 'occupational' or for 'personal' ties. Even an 'intention to establish residence' could, arguably, have relevance as a qualitative element of residence. Ibid 240-42 and 247.

³⁵⁸ Van der Mei (n 4) 120-21. The right to social assistance can depend both on lawful residence and on the fulfilment of a minimum period of residence.

³⁵⁹ Maurizio Ferrera, 'Towards an "Open" Social Citizenship? The New Boundaries of Welfare in the European Union' in Gráinne de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005) 12.

³⁶⁰ Loc.cit.

³⁶¹ Ferrera (n 188) 619.

³⁶² Ferrera (n 359) 20. This same idea has been summarized by Síofra O'Leary as follows: 'the more redistributive and therefore morally demanding the nature of the social right or policy concerned, the more necessary it is thought for the basis of entitlement to be reflected in reciprocal ties of citizenship or some other form of diffuse solidarity'. O'Leary (n 251) 57.

and then with the national welfare state.³⁶³ Moreover, the potential of legal rules to create a 'sense of shared life' at the supranational level has been called into question.³⁶⁴ For many commentators, the concern is that the common market has led to a 'tendency to deconstruct' the protective welfare regimes at the national level.³⁶⁵

In the context of EU law, the instances of positive harmonization are still rare and the main impacts on national welfare systems have emerged in the realm of negative harmonization.³⁶⁶ The Member States are free to organize their welfare systems but, in doing so, they still have to respect the Treaty provisions of free movement and non-discrimination. This means that the legitimacy of national preferences is determined 'within the context of justification rather than within the context of applicability'.³⁶⁷ The best example of this criticism is Gareth Davies' argument that the Court of Justice uses 'functional justifications' for limitations on free movement and competition in so far as the

³⁶³ Gareth Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States' Jean Monnet Working Paper 02/2006, 49.

³⁶⁴ Ibid 62.

³⁶⁵ E.g. Manfred Weiss, 'Fundamental Social Rights for the European Union' (1997) 18 Industrial Law Journal 417, 420. Similarly, Gareth Davies argues that the fact that the Court's decision in *Kranemann* (C-109/04) held that 'purely economic' reasons cannot justify a restriction of free movement is 'devastating for welfare structures'. Davies (n 363) 30. Erica Szyszczak has formulated the same concern by noting that 'the process of creating an integrated European economy is one of de-regulatory re-regulation of national law' and that the Member States' competence 'has been negated, if not lost'. Erika Szyszczak, 'The New Paradigm for Social Policy: A Virtuous Circle?' (2001) 38 CMLRev 1125, 1128. It has also been argued that the 'legal constraints' of European integration mean in practice that, if the Member States wish to accommodate their welfare systems, they must lower their tax burdens or further deregulation or drive down labour conditions. Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 Journal of Common Market Studies 645, 649. A more theoretical articulation of the same problem is that the process of European integration in its current form 'drastically reduces the effectiveness of democratic self-determination at the national level'. Ibid 650 and Fritz W. Scharpf, 'Economic Integration, democracy and the welfare state' (1997) 4 Journal of European Public Policy 18, 26.

³⁶⁶ The mechanism by which the rules of competition and free movement have an impact on national welfare systems is two-fold. It can either be based on positive harmonization, i.e. 'replacement of national legislation by European', or on negative harmonization, i.e. 'the application of more general principles of EU law'. E.g. Davies (n 363) 12-13.

³⁶⁷ Ibid 25-26.

protection of 'solidarity-based' welfare systems is concerned.³⁶⁸ This claim leads to a more fundamental question of what justifications can still be accepted for selective solidarity claims under EU law. In other words, what reasons the Member States can present for limiting access to social benefits to some EU citizens while other holders of EU citizenship have no access to the same benefits?

As a reply to this question, it has been noted that it is not sufficient to invoke the political or social goals of European integration without first addressing the even deeper question of whether these non-economic rationales only arise from a 'functional necessity deriving from economic integration', or whether they can provide an 'independent political claim' for solidarity in Europe.³⁶⁹ The concern is that, at the level of European integration, social rights are 'narrowly defined' as mere 'derogations from economic rights'.³⁷⁰ More optimistic authors talk about the redistributive dimension of the internal market rules 'through the recognition of specific rights to determined categories of persons'.³⁷¹ In practice, however, social rights at the EU level often appear like a side product of regulatory policies rather than an independent goal of redistributive policies.³⁷² In academic commentary, this state of affairs has been framed by claiming that EU citizenship still has 'no real social content'.³⁷³

³⁶⁸ Gareth Davies, 'The Price of Letting Courts Value Solidarity', in Yuri Borgmann-Prebil and Malcolm Ross (eds), *Promoting Solidarity in the European Union* (OUP 2010) 107. By the term 'functional requirements', Davies refers to aspects such as 'quality of service, accessibility, price'. Ibid 118.

³⁶⁹ Miguel Poiates Maduro, 'Europe's Social Self: "The Sickness Unto Death"' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000) 326.

³⁷⁰ Sandra Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' (2006) 12 ELJ 41, 42.

³⁷¹ Vasilis Hatzopoulos, 'A (more) social Europe: a political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon' (2005) 42 CMLRev 1599, 1602.

³⁷² Golyner (n 265) 114.

³⁷³ Maduro (n 369) 340.

It is thus understandable that the problem of belonging manifests itself in the way in which different concepts of 'social citizenship'³⁷⁴ have been offered to advance the development of a more social Europe. At the same time, it is clear that their momentum for change remains vague if the principles of equal treatment and non-discrimination are not seen as integrative beyond the economic objectives of European integration. In the case of citizenship, the element of external exclusion is usually compensated by 'a very strong commitment to the idea of equality: once the status of citizenship is established, you are in'.³⁷⁵ But even when the definition of relevant difference no longer happens on the axis of workers and non-workers, it still happens between those Union citizens who belong and those who do not belong as has been seen in Chapter 2.

The remaining sections of this chapter will examine further what it means for the status of EU citizenship that the duty to establish social integration has become the main parameter for EU citizens' right to equal treatment and, thus, for their agency. As part of this task, it is important to recognise that belonging has traditionally been derived from 'nationality' and 'territoriality' in the context of social equality.³⁷⁶ At the same time, however, it is important to consider whether and to what extent the idea of 'comparability' between Union citizens under Article 18 TFEU can and should be independent of the parallel concept of 'belonging'. As part of this analysis, it will be seen that the potential of EU citizenship to transform what constitutes a 'meaningful relationships' under EU law is a decisive factor in replying to this question.

³⁷⁴ See e.g. Mark Bell, *Anti-Discrimination Law and the European Union* (OUP 2002) 32.

³⁷⁵ See e.g. Kochenov (n 98) 13. See also Section 2.6.

³⁷⁶ See e.g. Neil Walker, 'Denizenship and Deterritorialisation in the European Union' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion* (Hart 2009) and Michael Dougan, 'Expanding the Frontiers of European Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009) 119-120.

3.3 Proving belonging or ‘how activity trumps EU citizenship’

Since EU citizenship has brought the issue of access to social benefits under the EU non-discrimination principle, the Court of Justice has become responsible for deciding which degree of a 'political union' welfare integration may create.³⁷⁷ The spirit of this case-law has been captured in many of the recent commentaries on EU citizenship. It has been noted that at the heart of the 'judicial construction' of EU citizenship lies 'the will to facilitate movement if migration contributes to the realization of the individual's personal potential'.³⁷⁸ Similarly, it has been argued that EU citizenship rights 'serve to sever the individual's life choices' and 'encourage individuals to pursue their own interpretation of a “good life”, wherever that may lie'.³⁷⁹ Or, that the Court of Justice has adopted the notion of citizenship which affirms 'individual needs'.³⁸⁰ On this basis, it has been suggested that the Treaty provisions on EU citizenship can be referred to as an 'important source of rights for all those willing to use them'.³⁸¹

Despite this enthusiasm and optimism in the recent academic commentary on EU citizenship, it seems more appropriate to view the EU Treaties as an important source of rights for all those able to use them. This argument emerges from the fact that proving belonging in the form of social integration is accepted as a precondition for the enjoyment of those rights that follow from the status of EU citizenship and, thus, for the meaningful

³⁷⁷ Dragana Damjanovic and Bruno De Witte, 'Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty' in Ulla Neergaard and Ruth Nielsen and Lynn Roseberry (eds), *Integrating Welfare Functions into EU Law From Rome to Lisbon* (DJØF Publishing 2009) 73.

³⁷⁸ Anastasia Iliopoulou Penot, 'The Transnational Character of Union Citizenship' in Michael Dougan and Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 17.

³⁷⁹ De Witte (n 151).

³⁸⁰ Michelle Everson, 'A Very Cosmopolitan Citizenship: But Who Pays the Price?' in Michael Dougan and Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 147.

³⁸¹ Kochenov (n 86) 214.

agency on the basis of EU citizenship. Below in Sections 3.3.1 and 3.3.2, the analysis of the requirement of social integration, therefore, leads me to conceptualise the EU Equality Problem as follows: the EU principle of equality is contingent on 'activity', i.e. the ability to establish belonging and social integration in the host Member State, rather than on the 'status' of EU citizenship.

3.3.1 A critique of the requirement of *ex ante* integration

It has been noted that the requirement to prove belonging under the 'real link' test adds an 'element of transaction' to the citizen-state relationships.³⁸² First, the 'real link' test promises to rank residents according to the 'strength of their affiliation'.³⁸³ Secondly, it is based on the assumption that access to welfare benefits requires more than a mere 'physical presence' even in the case of Union citizens.³⁸⁴ On this basis, it has been suggested that EU citizenship together with a 'tangible shared experience between the individual and his/her host society' has now become a 'legitimate gateway' to national welfare communities.³⁸⁵ However, the problem of belonging which underlies the 'real link' case law cannot be solved so easily. In contrast, the reliance on the notion of a 'real link' too easily undermines the question of how the requirement of social integration as a condition for equal treatment qualifies the status of EU citizenship.

Some approach the requirement of *ex ante* belonging in the form of a 'real link' claiming that Union law cannot assimilate a 'legitimate connecting factor' for migrants with the host Member State with a 'valid severing factor' for migrants in relation to their State of

³⁸² Gareth Davies, 'Comment: The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 *Journal of Social Welfare and Family Law* 211, 214.

³⁸³ Golyner (n 265) 119.

³⁸⁴ O'Brien (n 320) 643.

³⁸⁵ Dougan (n 376) 158.

origin.³⁸⁶ This argument is based on the separation between 'full assimilationist' and 'incremental' approaches to equal treatment.³⁸⁷ However, the argument for different degrees of equal treatment has been softened by assuring that residence conditions are not self-contained but that a 'conventional discrimination analysis' is used to define their acceptability.³⁸⁸ In reality, this safeguard remains unfortunately vague because, as discussed in Chapter 2, the discrimination analysis both in relation to the scope of and the limitations on EU citizens' general right to equal treatment are contingent on the proportionality analysis. The economic considerations can, therefore, easily prevail over other elements of social and political integration and the case-law falls short of articulating adequate non-economic criteria for legitimate differential treatment between EU citizens.³⁸⁹

Along these lines, academic commentary has widely criticized the 'real link' case-law for the lack of substantive ambition. The core of this criticism is captured in the plea that 'there has to be room for considering other indications of integration, such as the individual circumstances of the applicant'.³⁹⁰ However, as shown in Chapter 2, the recent case-law has responded to this criticism by confirming that a 'sole condition of uninterrupted residence' cannot usually be regarded as proportionate under EU law. Does this mean that the EU Equality Problem is now solved? My answer is 'no' for the following two reasons:

³⁸⁶ Dougan (n 376) 135.

³⁸⁷ Catherine Barnard, 'EU Citizenship and the Principle of Solidarity', in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Hart 2005) 166.

³⁸⁸ Ibid 174.

³⁸⁹ In Chapter 2, the analysis of the Court's case-law showed that the requirement of a 'real link' provides an expression of belonging which cannot that easily be separated from the traditional attributes of economic activity as the main source of belonging under EU law.

³⁹⁰ Koen Lenaerts and Tinne Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 *European Constitutional Law Review* 101, 114.

- First, the fact that the 'real link' test is still reduced to the directly and indirectly economic considerations means that its potential to provide genuinely independent criteria for the assessment of objective justifications for legitimate differential treatment between EU citizens is wasted.
- Secondly, it is important to note that, as argued for instance by Charlotte O'Brien, the 'real link' case-law approaches integration 'as the duty of the migrant, whether economically active or not'.³⁹¹

Thus, it is not just the lack of ambition or substance that hampers the 'real link' case law. The more fundamental problem is that the very idea of 'proving belonging' as a condition of equal treatment has its roots in an activity-based conception of equality, as will be argued in Section 3.3.2.

Even if the right to non-discrimination and equal treatment under Article 18 TFEU is now disconnected from the individual's economic activity in the internal market, it has not been disconnected from the individual duty to prove value by being active in a more general sense. On the contrary, the common denominator for the different justifications for legitimate differential treatment is the strong reliance on the individual's responsibility to reach a sufficient level of (economic or social) integration to qualify for equal treatment. Chapter 2 discussed how a number of different 'economic and social factors' can contribute to this process. However, what combines these different factors is the fact that the rights attached to the status of EU citizenship can only be enjoyed by those EU citizens who have already proved their activity in the host Member State.

The status of EU citizenship, thus, becomes functional rather than constitutive. In order to enjoy their right to non-discrimination and equality, EU citizens must be active

³⁹¹ O'Brien (320) 663.

agents: they must, first, establish a 'connecting factor' with EU law and, then, a 'real link' with the society of the Member State in which citizenship rights are being claimed. The normative indeterminacy of the EU principle of equality follows from the fact that, at the same time, the right to equal treatment is rhetorically based on the 'fundamental status' of EU citizenship. It is, therefore, important to consider whether this normative indeterminacy between 'activity' and 'status' is necessarily embedded in the EU principle of equality or whether it could be overcome by re-interpreting the EU principle of equality in the light of the objectives of European integration. Section 3.3.2 will engage in this task by conceptualising the requirement of belonging theoretically.

3.3.2 Theorizing the requirement of *ex ante* integration

This section elaborates what the duty to prove belonging tells us about the EU principle of equality in the context of Article 18 TFEU. This will happen by discussing the role of individual responsibility in the discrimination analysis. The concern that the legal discourse on equality often 'places overwhelming emphasis upon the legal subject'³⁹² directs attention to what is the legitimate sphere of the agent's own responsibility in qualifying for equal treatment and non-discrimination. Moreover, the tension between equality and balancing which lies at the heart of discrimination analysis can arguably be addressed by exploring the extent to which the 'norm-addressees' are required to 'adjust their behaviour to circumstances in order to obtain a benefit or avoid a burden'.³⁹³ As shown above in this section, the way in which this question is currently answered in EU law seems to place the requirement of active agency above the idea of EU citizenship as an equal status.

³⁹² Broekman (n 29) 376 and 379.

³⁹³ Alexander Somek, 'A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law' (1999) 5 ELJ 243, 254.

The assumption that proving belonging must remain within the scope of the agent's own responsibility indicates that EU law undermines the integrative potential of equal treatment in the case of EU citizens *qua* EU citizens. In practice, the 'real link' case law has reduced the EU principle of equality to the assessment of existing belonging instead of giving weight to potential future integration on the basis of equal treatment. The establishment of a sufficient degree of belonging is currently approached as an individual responsibility rather than a positive aim of political and legal integration. This means that the Court of Justice still interprets EU citizenship in the light of its old activity-based notion of equality, instead of genuinely engaging in the debate on how EU citizenship must transform what is meant by equality in the context of EU law. Many of these questions have already been widely debated in the context of general non-discrimination law and it is important to consider what relevance, if any, these arguments can have in the context of EU citizenship law.

In his essay *Engineering Equality*, Alexander Somek argues that European anti-discrimination law is 'normatively deficient' because it is a project that 'tries to accomplish redistributive objectives by deontological means', i.e. by focusing on 'agents, their responsibilities, their failures, and intentions'.³⁹⁴ For Somek, 'the translation of distribution into deontology systematically invites misreading the law's redistributive thrust', i.e. its promise to provide a tool for social engineering.³⁹⁵ Somek concludes his analysis of EU

³⁹⁴ Somek (n 20) 93 and 117.

³⁹⁵ Ibid 93. This claim is based on the view that, even in the case of direct discrimination, the necessary failure of the 'extensional interpretation' to 'isolate normative intent ('x ought to count as y') leads to the 'intensional interpretation' which 'examines conceivable reasons for action and thereby has to open the door to the consideration of pre-normative intent'. This means that, for Somek, even 'direct discrimination is in fact best understood to be a special case of indirect discrimination'. Ibid 113. On this basis, Somek argues that 'a self-repairing anti-discrimination law would have to be more self-consciously political in the sense that the choice of the threshold standard need not be left to the regulatory market'. He also argues that a 'truly self-repairing' anti-discrimination law 'would lift disadvantages also from those who may well seem "undeserving" from a deontological point of view' and, in this sense, it 'would eventually merely be a misnomer for an alternative social model that promises to make social relations more hospitable to equality broadly understood'.

anti-discrimination law suggesting that giving 'accommodation' a more central role in anti-discrimination law 'reverses the deontological twist and *fully* reveals why discrimination is wrong'.³⁹⁶ Similarly, it is important to consider whether the 'deontological twist' of EU equality law in the case of needy EU citizens can be reversed by demonstrating that equal treatment can be integrative even in the absence of ex ante belonging.

It is clearly not enough to claim that the principle of equal treatment must now be regarded as a goal in itself. One must also reply to the question of why this is the case. What normative justifications, other than economic rationales, can be provided for the principle of equal treatment in European Union law? Is it enough to merely refer to the concept of EU citizenship? Or should one also be able to articulate why a concept of supranational citizenship would increase the 'substantial meaning'³⁹⁷ of the EU principle of equality and will, thus, grant the right to equal treatment in relation to social rights under national welfare systems, even in the case of economically inactive Union citizens? In other words, what legitimises the view of EU citizenship as a 'social citizenship'? Why should the idea of 'substantive' or 'redistributive' equality, i.e. 'social justice' have anything to do with EU citizenship and European Union law? These are the questions that underlie the activity-based conception of equality and they will direct my analysis of the EU principle of equality in what remains of this chapter.

3.4 What is wrong with the activity-based conception of equality?

The EU principle of equality is 'deontologically biased' because it is focused on EU citizens' *responsibility* to actively integrate themselves as a condition for equal treatment

³⁹⁶ Somek (n 20) 185. Somek wants to explain why 'protection from discrimination without accommodation is empty'. He also envisions how '[t]he relation between the redistributive perspective and de commodification alters' and '[t]he latter takes precedence over the former'. Ibid 182.

³⁹⁷ Jacqueson (n 205) 273.

under Article 18 TFEU. In this section, a philosophical analysis of equality is used to give substance to the argument that this bias in favour of activity is detrimental to EU citizenship because it fails to recognise the importance of equal relationships between EU citizens. First, a brief overview of the liberal theories of equality will show that the idea of responsibility is contested within philosophical egalitarianism (Section 3.4.1). Secondly, I will demonstrate how an alternative account of equality as a 'normative ideal of human relationships'³⁹⁸ emerges from the democratic critique of liberal egalitarianism (Section 3.4.2). Finally, the section will address the question of how a more relational view of equality could be justified in EU law even in the absence of a full democratic pedigree (Section 3.4.3).

3.4.1 Equality as a liberal ideal of equal opportunities

The basic assumption of moral equality is accepted by most major political theories, whether egalitarian or not.³⁹⁹ What is distinctively egalitarian is the idea that equality has not just instrumental but also intrinsic value. Philosophical egalitarianism can therefore be described as a belief that equality makes an outcome intrinsically better 'above and beyond whatever impact this might have on levels of well-being'.⁴⁰⁰ However, most contemporary egalitarians are ready to accept a certain form of pluralism under which equality is integrated with other values, such as 'choice', 'desert', or 'responsibility'. It is important to consider what these 'other values' are in the case of the EU principle of equality and how they are weighted against the status of EU citizenship. This section will engage in this task

³⁹⁸ Scheffler (n 351) 444.

³⁹⁹ E.g. Nils Holtug and Kasper Lippert-Rasmussen, 'An Introduction to Contemporary Egalitarianism' in Nils Holtug and Kasper Lippert-Rasmussen (eds), *Egalitarianism: New Essays on the Nature and Value of Equality* (Clarendon Press 2007) 1-2.

⁴⁰⁰ Shelley Kagan, 'Equality and Desert' in Louis P. Pojman and Owen McLeod (eds), *What Do We Deserve? A Reader on Justice and Desert* (OUP 1999) 298.

by discussing the convergence between the activity-based conception of equality in EU law and the liberal theories of equal opportunities.

The basic definition of egalitarian justice is derived from the claim that 'how much one person ought to receive of some important good can only be ascertained relative to what others can receive'.⁴⁰¹ This definition is based on two further principles: **(1)** the assumption of 'equal status of the persons' holds that there is something about that person in virtue of which one owes it to that person to treat them in a certain way and **(2)** the assumption of the 'absence of relevant differences' takes into account other considerations, such as the above-mentioned 'choice', 'desert', and 'responsibility'.⁴⁰² Thus, the egalitarian principle of justice presupposes that the limits of equal treatment depend on how the balance is struck between the assumption of 'equal status', on the one hand, and that of the absence of 'relevant differences', on the other. As seen in Chapter 2, the emergence of EU citizenship as an 'equal status' has been qualified by shifting the focus of discrimination analysis to the definition of 'relevant differences' under the objective justification test. In practice, the lack of belonging and social integration has become a relevant difference under EU equality law.

Equality is recognised as a general principle in EU law but it can have several different meanings. The potential for multiple different interpretations of equality indicates that more attention must be paid to the justification of equality in EU law. A common point of criticism is that egalitarians fail to pay enough attention to the more fundamental question of whether equality is 'desirable' in the first place.⁴⁰³ However, a response to this

⁴⁰¹ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2007) 52-3.

⁴⁰² *Ibid* 49 and 55.

⁴⁰³ Holtug and Lippert-Rasmussen (n 399) 15. See also J.-S. Gordon, 'Justice or Equality?' (2006) 7 *zfwu* 183, 183. A common argument against egalitarianism is the so-called 'levelling down' objection, i.e. the claim that egalitarians would need to accept levelling down of human welfare if it increases equality. One

criticism has been that one must understand what equality means in order to decide whether or not it is a legitimate goal.⁴⁰⁴ Similarly, the question of whether equality between EU citizens is desirable or legitimate under EU law can only be answered if we first gain a more thorough understanding of those philosophical ideas that underlie the current interpretation of the EU principle of equality and EU citizenship. In order to understand the philosophical origins of the activity-based conception of equality in EU law, it is important to discuss in more detail how the balance between the right to equal treatment and the ideal of individual responsibility is struck in the mainstream of contemporary philosophical egalitarianism.

Contemporary philosophical egalitarianism has its primary focus on the question of 'equality of what', i.e. on the question of what it is that needs to be equally distributed.⁴⁰⁵ However, egalitarians also need to answer the question of 'equality of whom' which requests a decision on 'who should stand in this relation of equality – in the favoured currency – to each other'.⁴⁰⁶ This question entails a further question of whether the ideal of equality applies only within politically unified societies (such as states) or also between them.⁴⁰⁷ This latter question is particularly relevant for our analysis of equality between

way to reply to this objection is to argue that all inequalities are unjust, 'but not all equalities are fully just' and that 'Pareto superior equalities are more just than Pareto inferior equalities'. See e.g. Thomas Christiano, 'A Foundation for Egalitarianism' in Nils Holtug and Kasper Lippert-Rasmussen (eds), *Egalitarianism: New Essays on the Nature and Value of Equality* (Clarendon Press 2007) 42.

⁴⁰⁴ Holtug and Lippert-Rasmussen (n 399) 15.

⁴⁰⁵ See more about this set of questions e.g. in Amartya Sen, *Inequality Reexamined* (Clarendon Press 1992). Competing suggestions for the 'currency' of egalitarian justice include welfare, resources and capacities. G. A. Cohen uses this term in his article 'On the Currency of Egalitarian Justice', (1989) 99 *Ethics* 906. Richard Arneson's theory of equality of welfare which can be contrasted with Ronald Dworkin's theory of equality of resources which is based on the ideas of an 'envy test' and a 'hypothetical auction' on the basis of which people can be made responsible for their 'option luck' but not for their 'brute luck'. Amartya Sen's theory can be seen as a form of welfare egalitarianism, but it emphasizes the capacities under which welfare becomes possible. See more about these theories below in this section.

⁴⁰⁶ Holtug and Lippert-Rasmussen (n 399) 5.

⁴⁰⁷ *Ibid* 7.

EU citizens. There is no need to go into the technical details of liberal egalitarian theories here. However, a brief overview of the main strands of these theories is necessary for understanding why they have encountered so much criticism from those egalitarians who underline the value of equal relationships and what makes this criticism relevant to EU citizenship.

In brief, contemporary liberal egalitarianism wants to challenge the idea of 'desert'⁴⁰⁸ as the basis of the principle of justice without compromising the idea of individual responsibility.⁴⁰⁹ What is common to these so-called responsibility-sensitive theories of equality and equal opportunities is the claim that John Rawls' famous rejection of the idea of desert does not pay enough attention to the question of what is under one's control versus what is one's genuine choice.⁴¹⁰ These theories are called 'responsibility-sensitive' because they derive the 'egalitarian intuition' from the responsibility principle

⁴⁰⁸ It has been noted that 'desert-claims' differ from 'rights' or 'entitlements' because there are situations in which desert-claims can only find their justification in the fact that 'there is value in the deserving party's having what he deserves'. E.g. George Sher, *Desert* (Cambridge University Press 1987) 195. This same idea has been expressed by claiming that, in order to deserve something, 'one must satisfy certain conditions of worthiness which are written down in no legal or official regulation'. E.g. Joel Feinberg, 'Justice and Personal Desert' in Louis P. Pojman and Owen McLeod (eds), *What Do We Deserve? A Reader on Justice and Desert* (OUP 1999) 71. The question of legitimate 'desert bases' is, therefore, crucial for the notion of desert. The academic commentary usually distinguishes at least between the following four major 'desert-bases': (1) 'effort', (2) 'achievement', (3) 'virtue', and (4) 'compensation'. E.g. Jonathan Wolf, 'The Dilemma of Desert', in Serena Olsaretti (ed), *Desert and Justice* (Clarendon Press 2003) 220-21.

⁴⁰⁹ The relationship between the concepts of 'equality' and 'desert' arguably depends on whether 'desert' is seen as a 'comparative' or 'non-comparative' concept. The traditional 'non-comparative' approach to desert maintains that equality is 'important simply as a part of the theory of desert' and that 'it would simply be that in some ways (though not in others) people are equally deserving'. E.g. Kagan (n 400) 312. The notion of 'comparative desert' as an idea that it is not possible to say what each person should get independently of what others get has been developed to prove that the idea of desert and the responsibility sensitive egalitarianism are not always mutually conflicting. As Serena Olsaretti has noted, the crucial question is 'whether comparisons are relevant for determining what each person's due is in the first place'. Serena Olsaretti, 'Distributive Justice and Compensatory Desert' in Serena Olsaretti (ed), *Desert and Justice* (Clarendon Press 2003) 19.

⁴¹⁰ In *A Theory of Justice*, Rawls argues that 'no one deserves his place in the distribution of native endowments' and that 'claims of desert are always dependent on a prior conception of justice'. From this starting point, Rawls' theory of justice conditions equal citizenship on the basic structure of society, i.e. 'the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'. Rawls formulates this as the two principles of justice which regulate how the distribution of basic social goods should be organized. As long as the principles of equal liberty and equal opportunity are satisfied, the Rawlsian difference principle rules out any inequalities which do not benefit the worst-off group. John Rawls, *A Theory of Justice* (Harvard University Press 1971).

which can be summarised as follows: '[i]f - - it is objectionable for some to suffer a harm or loss through no fault of their own, then it follows - - that it is objectionable to suffer an inequality through no fault of their own'.⁴¹¹ It remains, nonetheless, problematic what sort of responsibility should matter and why. This lack of clarity over when and why individual responsibility should matter also penetrates the EU principle of equality in so far as it is based on the ideas of individual activity and responsibility.

Most contemporary versions of liberal egalitarianism are concerned with neutralizing the effect of 'brute luck' and not with the equality of outcomes as such.⁴¹² This view is rooted in the argument that equal concern requires treating people as equals and not necessarily treating them equally.⁴¹³ In order to reach this goal, liberal egalitarians distinguish between 'preferences' and 'resources', between 'persons' and 'circumstances', and between 'option luck' and 'brute luck'.⁴¹⁴ The fundamental distinction between 'choice' and 'luck' was introduced as an alternative for Ronald Dworkin's original position which focused on distinguishing between 'preferences' and 'luck'.⁴¹⁵ Despite this common starting point, liberal egalitarians differ in their views on whether equal opportunities should be assessed in terms of 'resources' or in terms of 'welfare'.⁴¹⁶ Moreover, some frame their answer to the 'equality of what' question by emphasising the capability to achieve

⁴¹¹ Christopher Lake, *Equality and Responsibility* (OUP 2001) 1 and 14.

⁴¹² Peter Vallentyne, 'Brute Luck Equality and Desert' in Serena Olsaretti (ed), *Desert and Justice* (Clarendon Press 2003) 169.

⁴¹³ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

⁴¹⁴ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000).

⁴¹⁵ Cohen (n 405) See also G. A. Cohen, 'Where the Action Is: On the Site of Distributive Justice' (1997) 26 *Philosophy & Public Affairs* 3.

⁴¹⁶ Richard Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 *Philosophical Studies* 77 and Richard Arneson, 'Equality of Opportunity for Welfare Defended and Recanted' (1999) 7 *The Journal of Political Philosophy* 488. Arneson has moved from welfare egalitarianism towards prioritarianism in his latter writings. E.g. Richard Arneson, 'Luck Egalitarianism and Prioritarianism' (2000) *Ethics* 110 339.

functionings and the 'agency aspect'⁴¹⁷, while others see a conflict between the individual 'personal motivation' and 'egalitarian justification' as a 'problem of moral psychology' which needs to recognise both on 'agent-relative' and 'agent-neutral' reasons.⁴¹⁸

On the basis of this brief summary, it can be seen that the liberal egalitarian idea of equal opportunities promises to define the appropriate role of individual responsibility within the egalitarian theory by distinguishing between unchosen circumstances for which people cannot be regarded to be responsible and genuine choices for which people should bear full responsibility. However, this position has been criticized for adopting a view of responsibility which is 'narrowly economic, focusing on the responsibility to refrain from making demands on the resources of the state'.⁴¹⁹ It has also been noted that the 'inherently normative character' of the idea of responsibility raises 'other political possibilities'.⁴²⁰ Thus, somewhat ironically, the responsibility-sensitive theories of equality which are firmly rooted in Rawls' work are now criticized for ignoring the dimensions of political equality between citizens.⁴²¹

It is important to understand that this tension between the ideal of equal citizenship, on the one hand, and the requirement of individual responsibility, on the other,

⁴¹⁷ Sen (n 405).

⁴¹⁸ Thomas Nagel, *Equality and Partiality* (OUP 1991).

⁴¹⁹ Chris Armstrong, *Rethinking Equality: The challenge of equal citizenship* (Manchester University Press 2006) 98.

⁴²⁰ Ibid 98. Armstrong argues that ' - - - our ideas about responsibility will be unavoidably normative. They will reflect back to us dominant views on the boundaries of personhood, on the nature of citizenship, and dominant conceptions of rationality' and that 'the distinction is at the heart of our moral conception of what it means to be a person, and what the relation between individuals, and between individuals and the state, should be'. Ibid 106-107.

⁴²¹ It has been suggested that Rawls's theory of justice can be understood as an attempt to make the ideal of equal status of citizens more concrete. E.g. Samuel Scheffler, 'Equality as the Virtue of Sovereign: A Reply to Ronald Dworkin' (2003) 3 *Philosophy & Public Affairs* 199. Rawls' theory of justice has also been described as a theory of equal citizenship with the intention 'to model the relations between such citizens, and to identify the social and distributive preconditions necessary to sustain this ideal'. E.g. Armstrong (n 419) 27-28 and 49.

also defines the interpretation of the principle of equality under EU law. The requirement of economic or social activity as a precondition for the full enjoyment of EU citizens' right to equal treatment does not just protect the national welfare sovereignty but it also takes the EU principle of equality into the realm of some difficult philosophical choices. The analysis of the responsibility-sensitive theories of equal opportunities in this section has demonstrated that the ideal of individual responsibility as the basis of egalitarianism remains ambiguous and normatively vague. In practice, this means, as will be discussed in Section 3.4.2, that the current interpretative bias in favour of EU citizens' responsibility to be active at the expense of their status as EU citizens cannot avoid the criticism which has been directed against the responsibility-sensitive theories of equality on the basis that they fail to pay sufficient attention to the value of just and equal relationships.

3.4.2 Equality as a democratic ideal of human relations

The critics of responsibility-sensitive egalitarianism suggest that it is not enough for an account of egalitarian citizenship to deal with mere economic inequalities but that various types of social hierarchies and forms of oppression should also be addressed. Moreover, according to the critics, the liberal egalitarian ideal of equal opportunities relies on a 'broadly neoliberal sensibility'.⁴²² By this, they refer to the way in which the liberal egalitarian notions of choice and responsibility cement the dichotomy between 'the (bad) "dependent" and the good "independent" citizen', defining dependency 'as failure to support yourself economically' and independence as the ability of 'being economically self-supporting and suitably ambitious'.⁴²³ It is obvious that this criticism has a strong echo in EU law which, as discussed in Section 3.3, conditions the right to equal treatment on the individual responsibility to be active and prove belonging.

⁴²² Armstrong (n 419) 3.

⁴²³ Ibid 86.

The neoliberal view of active citizenship, which is arguably embedded in the responsibility-sensitive egalitarianism, has been described as follows:

[It] is overwhelmingly an economic category, rather than a political, social, cultural or ecological one. It is also an overwhelmingly personal, as opposed to interpersonal category: it primarily specifies vertical responsibilities vis-à-vis the state, not horizontal responsibilities towards fellow citizens.⁴²⁴

It has been noted that this way of defining equal citizenship fails to adequately address the question of 'what equality means for the way we relate to each other'.⁴²⁵ The attempt to shift the focus of philosophical egalitarianism to relationships builds on the claim that the 'presence of equal opportunity' does not indicate the 'presence of agency'.⁴²⁶ On this basis, it has been suggested that the idea of individual choice-making as a 'sociologically and economically naïve ideal of self-sufficiency' should be replaced by the concepts of 'self-direction' and 'political voice' within philosophical egalitarianism.⁴²⁷

Moreover, it has also been noted that even if the responsibility-sensitive theories of equality were able to curtail injustice, they might still 'sacrifice other egalitarian values'.⁴²⁸ The core of this criticism is that the ideal of individual responsibility as the 'centre of an egalitarian theory of justice' must be more explicitly weighted against 'other

⁴²⁴ Ibid 99.

⁴²⁵ Lake (n 411) 87. Lake has also noted that '[t]he fact that social institutions serve to enforce the relevant principles of mutual respect ought not to distract from us recognizing these principles to operate primarily between one individual and the next rather than between each individual and the state'. Ibid 38.

⁴²⁶ Ibid 89.

⁴²⁷ See Iris Marion Young's arguments as discussed in Armstrong (n 419) 87. However, some have expressed the concern that the idea of political equality has surpassed the idea of economic equality when the focus of egalitarian debate has shifted to the (cultural) recognition of social groups in the work of such authors as Nancy Fraser, Iris Marion Young and Martha Minow. E.g. Anne Phillips, *Which Equalities Matter* (Polity Press 1999) 13 and 20. Phillips notes that '[p]olitical reforms cannot substitute entirely for economic and social ones'. In her view, the politics of recognition will, thus, 'draw as back - - into unfinished business around the nature of equal citizenship'. Ibid 27 and 355.

⁴²⁸ Jonathan Wolff, 'Fairness, Respect, and the Egalitarian Ethos' (1998) 27 *Philosophy and Public Affairs* 97, 102.

egalitarian values'.⁴²⁹ Similarly, it needs to be asked what those 'other egalitarian values' are which are compromised under the activity-based conception of equality in EU law and whether the requirement of individual activity should more explicitly be weighted against these values in EU law. The theory of democratic equality which forms the basis of my critique of the EU principle of equality in this section can be seen as an attempt to define what these 'other egalitarian values' must entail. Its critical edge is based on the idea of citizenship as a central principle for egalitarian politics.

The underlying theme in this scholarship is the concern that the commitment to equality is not seen as an 'inherently democratic project' even if it produces a 'defence of formal democracy'.⁴³⁰ This view is articulated in Elizabeth Anderson's famous article 'What is the Point of Equality' which argues that the mainstream egalitarianism 'fails the most fundamental test any egalitarian theory must meet: that is its principles express equal respect and concern for all citizens'.⁴³¹ From this starting point, equality can be defined as follows:

The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what

⁴²⁹ Loc.cit. On this basis, Wolff argues that 'we must be open to the possibility that the task of the egalitarian political philosopher is not completed by finding the fairest principles of justice'. This idea is developed further in Wolff's own work which examines the extent to which 'fairness' and 'respect' can be in tension with each other. Wolff speaks of 'failures of trust' and claims that 'there are certain areas such that, if I feel I am not trusted in those areas I will also feel I am not respected'. Ibid 102, 106 and 108. However, it has been suggested that the conflict disappears if 'fairness is understood to consist of equality of status, which is concerned primarily with the moral attributes of the social and economic relations in which people stand'. E.g. Thomas Hinton, 'Must Egalitarians Choose Between Fairness and Respect?' (2001) 30 *Philosophy and Public Affairs* 72, 73.

⁴³⁰ Armstrong (n 419) 3.

⁴³¹ Elizabeth Anderson, 'What Is the Point of Equality' (1999) 109 *Ethics* 287, 289. Anderson insists that equality is not opposed to luck, as the responsibility-sensitive theories of equality suggest, but to oppression and heritable hierarchies of social status and the undemocratic distribution of power. Anderson also distinguishes between 'oppressive social relations' and '[l]ess extreme forms of group inequality'. For her, the former are unjust 'because they deprive members of the disadvantaged group of their basic human rights', whereas the latter are unjust 'because they violate a fundamental norm of democracy, which is social equality'. Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press 2010) 21.

they morally deserve, but to create a community in which people stand in relations of equality to others.⁴³²

This theory is called democratic because it claims that the 'construction of a community of equals' must integrate the principles of economic distribution with the 'expressive demands of equal respect'.⁴³³ A central idea in the theory of democratic equality is that citizens are entitled to make claims 'in virtue of their equality, not their inferiority, to others'.⁴³⁴

The reference to the citizens' right to make claims 'in virtue of their equality' can be contrasted with EU citizens' right to make claims on the basis of their activity. It is therefore important to examine further how the democratic egalitarians would solve the problem of 'rugged individualism' of contemporary philosophical egalitarianism by means of a more relational view of equality.⁴³⁵ Viewing equality as an 'ideal of social and political relations' indicates that the egalitarian concept of distributive justice must defend distributive principles, which, above all, are 'appropriate to a society of equals'.⁴³⁶ This principle of 'equality of relationships' has been crystallized by Samuel Scheffler who argues that the fundamental egalitarian question is not 'what it is for a government to treat

⁴³² Ibid 289.

⁴³³ Loc.cit.

⁴³⁴ Loc.cit. Anderson defines democratic citizenship by stating that it 'entails not only equality of legal rights, but public standing as fit for association with fellow citizens' and that '[e]quality is thus a cultural norm, not only a legal status'. Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press 2010) 102. Anderson also underlines that 'democratic equality guarantees not effective access to equal levels of functioning but effective access to levels of functioning sufficient to stand as an equal in society', although '[f]or some functionings, equal citizenship requires equal levels'. Elizabeth Anderson, , 'What Is the Point of Equality' (1999) 109 *Ethics* 287, 318. For Anderson, '[w]hat counts as "enough" varies with cultural norms, the natural environment, and individual circumstances'. Ibid 320.

⁴³⁵ Ibid 313.

⁴³⁶ Scheffler (n 351) 7.

people with equal concern', as Ronald Dworkin holds, but 'what it is for people to relate to one another as equals'.⁴³⁷

From this starting point follows Scheffler's central claim of equality as a 'normative ideal of human relations'.⁴³⁸ For him, the relational understanding of equality includes (1) a *moral* idea 'that all people are of equal worth and that there are some claims that people are entitled to make on one another simply by virtue of their status as persons', (2) a *social* idea of a human society as 'a cooperative arrangement among equals, each of whom enjoys the same social standing' and (3) a *political* idea of 'claims that citizens are entitled to make on one another by virtue of their status as citizens, without any need for a moralized accounting of the details of their particular circumstances'.⁴³⁹ Scheffler has summarised this account of relational equality by pointing out that 'it insists on the very great importance of the right to be viewed simply as a citizen'.⁴⁴⁰ Thus, according to the democratic theory of equality, affirming the status of citizenship goes hand in hand with placing more emphasis on just and equal relationships between citizens. This is a central point of my critique of EU citizenship in this section. Namely, the bias in favour of individual responsibility under the activity-based conception of equality undermines the importance of just and equal relationships for the status of EU citizenship.

⁴³⁷ Scheffler (n 421) 204-5. However, Scheffler acknowledges that 'Dworkin is exceptional among luck-egalitarian authors because he does seek to anchor his egalitarian distributive principles in a more general ideal of equality'. Ibid 203.

⁴³⁸ Scheffler (n 351) 234. It is important to recognize different implications of the word 'relational'. According to Scheffler, it is one thing to state that 'equality is an intrinsically relational notion; the fact that two people have equal amounts of some good constitutes a kind of relation between them' and another thing to see it as an 'ideal that governs the terms on which independently existing human relationships should be conducted: it is not the "relationship" that consists in two people's having the same amount of something'. Ibid 229, fn 26.

⁴³⁹ Ibid 191.

⁴⁴⁰ Loc.cit.

Despite its emphasis on the value of equal citizenship, the democratic ideal of equality does not aim at rejecting the distributive implications of equality altogether. On the contrary, it has been underlined that adopting the principle of equal relationships will necessarily have 'distributive implications.'⁴⁴¹ More attention should therefore be directed at how the distributive principles are related to equal social relationships.⁴⁴² What is clear is that distributive principles may be 'instrumental to securing such relationships, follow from them, or even be constitutive of them'.⁴⁴³ Similarly, it is important to consider how the importance of just and equal relationships between citizens could be accommodated within the EU principle of equality in so far as EU law interacts with the principles of distributive social justice. The next section will assess the relevance of these (critical/democratic) claims for the activity-based conception of equality in EU law – bearing in mind that, in many ways, EU citizenship in its current form falls short of the ideal of *democratic* citizenship.

3.4.3 Justifying a more relational view of equality in EU law

The idea of democratic equality points out how the liberal theories of equal opportunities focus on the ideas of individual choice and responsibility at the expense of the value of equal relationships between citizens. This critique is relevant to the analysis of EU citizenship because the enjoyment of EU citizens' right to equal treatment is currently conditioned on individual activity. The connection between the EU principle of equality and the democratic critique of liberal egalitarianism becomes obvious if we define the relational equality as a view that inequality arises when 'individuals or groups exist in

⁴⁴¹ Loc.cit.

⁴⁴² Ibid 228. For Scheffler, this means that the 'differing contingencies of individuals' situations' must be abstracted in so far as they 'claim equal rights as citizens' but that the 'interpretation and application of those rights will often depend on features of their individual circumstances'. Ibid 191-92.

⁴⁴³ Anderson (n 431) 314.

relations of hierarchy, or are prevented from standing together as peers'.⁴⁴⁴ What is still clearly lacking in EU law is the conviction that an independent standard for justifying equal treatment could be derived from 'the aim of enabling people to be fully cooperating members of society'.⁴⁴⁵ It is therefore important to examine in more detail whether and, if yes, how the idea of the importance of just and equal relationships between citizens could inform the interpretation of the EU principle of equality.

The crucial question for the purposes of this thesis is whether the relevance of equal relationships between citizens can only be rooted in an already existing democratic structure or, whether the 'equality route', as Dmitry Kochenov puts it, can provide a parallel way to enhance the rights of EU citizens, including their right to equal treatment. The democratic theory of equality fails to give an unequivocal answer to this question. It has been acknowledged amongst democratic egalitarians that the question of the relations between people who are not citizens in the same country or in the same political society is an 'important interpretative issue, about which there is no general consensus'.⁴⁴⁶ Some have also expressed the concern that the critical potential of democratic equality is undermined because democratic egalitarians are forced to extend their definition of relevant capabilities to cover many of those capabilities which we need 'as a human being' rather than as citizens.⁴⁴⁷ This ambiguity over the international or transnational implications of

⁴⁴⁴ Armstrong (n 419) 5.

⁴⁴⁵ Scheffler (n 351) 198.

⁴⁴⁶ Ibid 192, fn 42. For instance, Elizabeth Anderson only states in one of her footnotes that it is not possible to consider the 'international implications' of democratic equality within the scope of her current work. Anderson (n 431) 321. Anderson also speaks of an approach which 'narrows our focus to social relations within the borders of a democratic state but expands the demands of justice inside those borders'. She claims that '[t]he distinctive normative feature of democratic societies is social equality'. This, for its part, leads her to conclude that '[a]ll of the members of a democratic society have a just claim to stand in relations of equality with their fellow citizens'. Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press 2010) 18.

⁴⁴⁷ Wolff (n 428) 349. Anderson herself acknowledges that citizenship 'involves functioning not only as a political agent - - but participating as an equal in civil society' and that 'functioning these ways presupposes

democratic equality shows that, although the ideal of democratic equality provides a helpful critical tool for our analysis of the EU principle of equality, it cannot alone provide a sufficient justification for a more relational view of equality in EU law.

This thesis has built its analysis of EU citizenship on the premise that EU law lacks clarity in what equality means *between* EU citizens. This analytic approach has been developed further by asking whether a more independent 'equality objective' could complete the discrimination analysis under Article 18 TFEU.⁴⁴⁸ It is now time to re-conceptualise these arguments by suggesting that the EU Equality Problem is fundamentally a problem about *which relationships are meaningful under EU law*. This leads us back to the hard question of whether a 'society of equals' can be supranational and to what extent it must be politically constructed. However, underling this question is, again, a more philosophical question of why and how just and equal relationships between citizens gain value in the first place. It is this question of 'meaningful relationships' which informs my attempt to re-interpret the EU principle of equality.

It has rightly been noted that a mere reference to the higher importance of some comparisons or relationships fails to recognise that a non-egalitarian theory of justice is needed to define what these comparisons and relationships are.⁴⁴⁹ What, therefore, sounds

functioning as a human being'. Anderson (n 431) 317. But some argue that luck egalitarianism is, nonetheless, more cosmopolitan than any version of 'social interactionist' theories of equality which 'apply only among people who interact or are socially related in significant ways such as being members of a single political community'. E.g. Richard Arneson 'Luck Egalitarianism – A Primer', in Carl Knight and Zofia Stemplowska (eds), *Responsibility and Distributive Justice* (OUP 2011) 49.

⁴⁴⁸ See more about this in Chapter 2.

⁴⁴⁹ Christopher Peters, 'Equality Revisited' (1997) 110 HLRev 1210, 1250. The so-called "emptiness" of equality debate has its roots in this need to define a relevant comparison class. Peter Westen has famously distinguished between 'descriptive equality' as the idea that two things are 'identical in all significant descriptive respects' and 'prescriptive equality' as 'the idea that two or more persons or things ought to be treated as equal (or unequal)'. On this basis, Westen has concluded that 'equality is nothing but a rhetorical device for talking about legal and moral rules on how people should be treated'. Peter Westen, 'The Meaning of Equality in Law, Science, Math, and Morals: A Reply' (1983) 81 Michigan Law Review 604, 611, 614, 618-19 and 629.

convincing is the argument that, in order to understand the EU principle of equality, we must understand ‘what counts as “related” and why relationship matters as it does’.⁴⁵⁰ This emphasis on meaningful relationships finds an expression in Erwin Chemirensky's statement that equality is not only the 'concept that tells us that different treatment of people does matter' but it is also the 'concept that forces us to consider how society treats people in relationship to one another'.⁴⁵¹ The fact that EU citizenship is now regarded as a relevant 'comparison class' under Article 18 TFEU implies a change of perception regarding what relationships are meaningful from the perspective of EU law and European integration.⁴⁵² What still requires further analysis is to what extent and on what basis this has happened.

For the purposes of this analysis, it is important to bear in mind that to value one's relationships 'non-instrumentally' can provide a way of seeing them as 'sources of special responsibilities'.⁴⁵³ On this basis, it has been suggested that citizens must accept 'some level of burdensome other-regarding behaviour'.⁴⁵⁴ By analogy, justifying EU citizenship as an equal status of all Member State nationals depends on whether EU citizenship can provide a normative source of meaningful relationships and respect without collapsing into a cosmopolitan claim of the universal human condition. The central question for the

⁴⁵⁰ Greenawalt (n 28) 1289.

⁴⁵¹ Erwin Chemirensky, 'In Defense of Equality: A Reply to Professor Westen' (1983) 81 Michigan Law Review 575, 585. Similar thoughts in regard to (political) equality can also be found from other authors. Jeremy Waldron claims that equality 'is a useful term here all the same, rebutting as it does from the outset any suggestion that what matters in politics is the ranking or differentiation of human knowledge and intelligence'. Jeremy Waldron, 'The Substance of Equality' (1991) 89 Michigan Law Review 1350, 1362 and 1364. Kenneth Karst notes that equal treatment protects against 'derogation' or the 'imposition of stigma' and that 'the ideal of equal membership in the community' is, therefore, implicit in the values of citizenship and respect. Kenneth Karst, 'Why Equality Matters' (1983) 17 Georgia Law Review 245, 247-48.

⁴⁵² See more about this in Chapter 2.

⁴⁵³ Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (OUP 2001) 6.

⁴⁵⁴ Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 Philosophy & Public Affairs 205, 239.

remaining chapters of my thesis is, therefore, whether and, if yes, why just and equal relationships between EU citizens matter for EU law and European integration even in the absence of a single bounded democratic polity called the European Union.

Some suggest that the need for 'global background justice' could justify the principles of justice even in the absence of a 'politically constructed global basic structure'.⁴⁵⁵ Others, however, claim that relationships that can provide a basis for the principles of justice must be more limited. David Miller is one of those authors who argue that the principles of social justice cannot be widened beyond the boundaries of national political communities.⁴⁵⁶ However, Miller acknowledges that it is difficult to distinguish 'what is actually implicit in the idea of citizenship' from those claims which people are entitled to make on the basis of their membership in a national community.⁴⁵⁷ This difficulty of distinguishing the relevant relationships embedded in citizenship as citizenship from the relevant relationships embedded in the membership of a national community is central to the analysis of EU citizenship. At the heart of this difficulty lies the question of whether meaningful relationships for the purpose of EU citizenship can be independent of *ex ante* integration and belonging. In the next section, I will suggest that the notions of agency and subjectivity (and the connection between the two) can provide a helpful analytical key to answering this question.

⁴⁵⁵ See for different approaches e.g. Thomas Pogge (ed), *Global Justice* (Blackwell 2001).

⁴⁵⁶ David Miller, *Principles of Social Justice* (Harvard University Press 2001) 19. Miller bases this view on the claim that 'the idea of social justice makes sense only if we assume there is a broad consensus about the social value of a range of goods, services, and opportunities, some disagreement in private values notwithstanding'. Ibid 8.

⁴⁵⁷ Ibid 31. On this basis, Miller notes that '[o]riginally introduced as an expression of national solidarity, rights to welfare have over time entered into the definition of citizenship, so that someone whose welfare rights are not respected can claim with justice that he or she is not being treated as an equal citizen'. Loc.cit.

3.5. The crux of the Equality Problem: a reductionist view of agency

Due to its focus on individual responsibility and activity, the EU principle of equality falls short of recognising equality as a 'normative ideal of human relations'. This section takes the critique of the EU principle of equality further by arguing that the activity-based conception of equality is problematic because it leads to a narrow and individualistic view of EU citizens' agency. This analysis is based on the social realist account of agency, according to which the capacities of human agency are inherently inter-relational. The core of the social realist argument is that the notions of agency and subjectivity are intertwined and that it is impossible to understand one without understanding the other. On this basis, it will be suggested that the activity-based conception of equality and its narrow and individualistic view of EU citizens' agency are harmful because they fail to recognise the inherent connection between EU citizens' agency and subjectivity and, thus, leave EU citizens deprived as equal subjects of EU law.

This section is divided in two parts. First, Section 3.5.1 suggests that the crux of the EU Equality Problem lies in the reductionist way in which the parameters for relevant agency are currently defined in EU law. In it, I will argue that, in order to solve the EU Equality Problem, we must consider how a more balanced view of agency could be justified in the case of EU citizens. Secondly, Section 3.5.2 will engage in this task by using the social realist account of human agency to argue that EU citizens' agency cannot be separated from their subjectivity and that a search for a more balanced view of agency in EU law would need to construct EU citizenship as a source of subjectivity both in philosophy and in law.

3.5.1 EU citizens' agency: narrow and individualistic

The activity-based conception of equality is vulnerable to the criticism that it undermines the complexity of human agency beyond the capacity to make responsible and autonomous choices. In the case of EU citizens, this means that the enjoyment of their fundamental right to equal treatment is conditioned on individual responsibility to prove vertical belonging into the Member State in which access to social benefits is claimed. Academic commentary has noted that individual responsibility should matter for determining the boundaries of distributive justice and social equality only in so far as 'the capacities that are essential to the exercise of our responsible agency themselves matter for the standpoint of justice'.⁴⁵⁸ Similarly, justifying the EU principle of equality is intertwined with the parameters for relevant agency in EU law and more attention must be paid to the question of whether individual activity should be viewed as the primary parameter for agency in the case of EU citizens.

The governments of the host Member States may easily find reasons for not showing equal concern for Union citizens because they do not belong to the group of their citizens. However, the integration requirements seem different if the analysis focuses on the impact of unequal treatment on EU citizens' agency. The rest of this section will develop the argument that a richer account of relevant agency is needed in order to transform EU citizenship from a transitory status to a source of moral and legal subjectivity in EU law. This analysis focuses on the claim that a more relational view of agency is needed to recognize EU citizens as subjects of EU law and European integration.

⁴⁵⁸ Lake (n 411) 30. The responsibility-sensitive theories of equality have been criticized by calling into question the idea of free will which seems to be embedded both in the notion of desert and that of responsibility. In response to this criticism, some authors argue for a 'political conception of human agency, taking this to be the agency of a citizens rather than that of a fully formed metaphysical person'. Ibid 51. Others suggest that the line between choice and circumstances can be understood as normative rather than metaphysical along with the introduction of 'reasonableness test'. E.g. Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 1999) 292. Or, simply, that 'to treat someone as a responsible agent is to hold that person to a set of normative standards' Scheffler (n?) 72.

The relational nature of political agency is captured in the work of such authors as Michael Sandel, Michael Walzer, Charles Taylor, and Alasdair MacIntyre whose arguments are often grouped together under the notion of communitarianism.⁴⁵⁹ The common starting point for these authors is to claim that justifying rights must always presuppose a 'particular conception of the good'.⁴⁶⁰ The communitarian critique will not provide a sufficient basis for 'equality of relationships' in the supranational context because of its tendency to define the relevant 'community' narrowly, but it, nonetheless, provides a helpful insight into what is problematic in the overly individualistic and reductionist conceptions of agency in EU law.

In his classic book *Liberalism and the Limits of Justice*, Michael Sandel argues against what he calls 'deontological liberalism' and its claim for the 'primacy of justice'.⁴⁶¹ The central theme in this criticism is that liberalism presumes the idea of the human subject as 'a sovereign agent of choice, a creature whose ends are chosen rather than given'.⁴⁶² On this basis, it has been suggested that the liberal account of justice fails to recognise 'intersubjective' forms of self-understanding.⁴⁶³ In the context of distributive justice, this point of view has been developed further by noting that human agents depend

⁴⁵⁹ See e.g. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982), Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press 1989), Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981), and Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983).

⁴⁶⁰ Sandel (n 459) x.

⁴⁶¹ Ibid 1.

⁴⁶² Ibid 22.

⁴⁶³ Ibid 62. However, Sandel also discusses what he calls "intrasubjective" forms of self-understanding'. He suggests that 'to be capable of a more thoroughgoing reflection, we cannot be wholly unencumbered subjects of possession, individuated in advance and given prior to our ends, but must be subjects constituted in part by our central aspirations and attachments, always open, indeed vulnerable, to growth and transformation in the light of revised self-understanding.' Ibid 172. The connection between 'inter-subjective' and 'intra-subjective' subjectivity is discussed in more detail in the context of EU citizens' subjectivity in Chapter 4.

on society in order to be able to make any contribution to it.⁴⁶⁴ Charles Taylor has captured the essence of this argument in his statement that 'what man derives from society is not some aid in realizing his good, but the very possibility of being an agent.'⁴⁶⁵

What is central to these authors' ideas is their emphasis on the fact that full social and political agency is only possible 'intersubjectively', i.e. in relation to other agents. This critique lays the ground for the claim that every theory of justice must include 'a theory of the person, or more precisely, a theory of the moral subject'.⁴⁶⁶ This insight into the communitarian ideals of agency directs our attention to the question of what kind of view of the human subject is embedded in the EU principle of equality. The communitarian critique of liberal political theory builds upon the question '[w]hat then must be true for a subject for whom justice is the first virtue?'.⁴⁶⁷ By way of analogy, the critique of the EU principle of equality can be conceptualized by asking 'what must be true for a subject for whom activity is the first virtue?' And, furthermore, is this really what EU citizenship is meant to be all about? In other words, is it correct that the parameters for EU citizens' agency are currently reduced to the individual responsibility to be an active agent who can prove economic or social belonging?

3.5.2 Towards a more balanced view of agency in EU law

One approach to the 'transnational character' of European citizenship is to argue that the goal of EU citizenship is more about 'protecting the particular identity of the migrant' than about 'creating a European identity'.⁴⁶⁸ However, it is important to notice that the

⁴⁶⁴ Charles Taylor, *Philosophy and The Human Sciences – Philosophical Papers II* (Cambridge University Press 1985) 314.

⁴⁶⁵ Ibid 292.

⁴⁶⁶ Sander (n 459) 48.

⁴⁶⁷ Ibid 49.

⁴⁶⁸ Iliopoulou Penot (n 378) 26.

individualistic view of agency does not come without costs. The costly side of the things is captured, for instance, by Michelle Everson who has noted that 'the jurisprudence of the Court is founded within a particular personification of the European subject, that of the rationally confident and consuming individual'.⁴⁶⁹ It is, therefore, important to explore further what kind of theory of the person underlies the EU principle of equality and under what conditions it could be replaced with a more balanced and relational view of agency. This section will argue that an alternative way of understanding EU citizens' agency is to examine the conditions under which EU citizens can become full and equal subjects of EU law.

This critique of the parameters of EU citizens' agency has its basis in the social realist approach to human agency. The notion of 'agency' in its simplest form refers to 'the necessary pre-conditions for human activity rather than passivity'.⁴⁷⁰ In practice, however, the idea of agency is contested both in social theory and in philosophy. The main line of demarcation has traditionally been drawn between (1) the Enlightenment view of rational and metaphysical individual and (2) the social constructivist accounts of agency.⁴⁷¹ As a methodological alternative, social realism⁴⁷² promises to bring together the metaphysical and social constructivist dimensions of human agency by emphasising the continuity of

⁴⁶⁹ Everson (n 380) 160. Everson also argues that this approach 'isolates and atomises the individual as a homo economicus'. Ibid 165.

⁴⁷⁰ Margaret Archer, *Being Human: the Problem of Agency* (Cambridge University Press 2000) 2.

⁴⁷¹ Ibid 3-5. See also e.g. Anthony Giddens, *Central Problems in Social Theory: Action, structure and contradictions in social analysis* (The Macmillan Press Ltd 1979) 49 and 54 who argues that a notion of human agency must be connected with 'structural explanations' and 'problems of institutional transformation'. For Giddens, '[s]tructure forms "personality" and "society" simultaneously'. Ibid 70. On this basis, he argues that '[i]nstitutions do indeed "result" from human agency: but they are the outcome of action only in so far as they are also involved recursively as the medium of its production'. Ibid 95.

⁴⁷² 'Realism' in its simplest form insists that 'none of the properties and powers of subjects are understandable in isolation from reality'. Archer (470) 154. This approach understands humanity as something 'which develops through practical action in the world.' For instance, Archer argues on this basis that agency is 'stratified', meaning that the 'properties' of the human being are neither 'pre-given nor as socially appropriated, but rather they are emergent from our relations with our environment'. Ibid 87.

self-consciousness as something 'which is prior to, and primitive to, our sociality' but which, nonetheless, 'derives from our embodied practices in the world'.⁴⁷³ This approach is useful for our understanding of EU citizenship because it directs our attention to the necessary connection between 'agency' and 'subjectivity'.

Understanding the inherent connection between 'agency' and 'subjectivity', as well as the importance of social relationships for the constitution of 'subjectivity', is significant for our understanding of EU citizenship because the status of EU citizenship remains normatively indeterminate in so far as EU law both affirms and rejects EU citizens as subjects of European integration. This indeterminacy is at least partly due to the failure to discuss what equality means philosophically in the context of supranational law in general and that of European integration in particular. The liberal conceptions of equality and individual agency have too easily been accepted as a natural and indispensable interpretation of equality in EU law. This hides the need to explore the alternative/more relational justifications and definitions of equality as legitimate interpretations of the objectives and values of European integration. Thus, recognising the connection between EU citizens' agency and their subjectivity is important for our analysis of EU citizenship for the very reason that it can provide a justification for a more relational view of equality under EU law.

By the term 'subject', I refer to 'that which thinks or feels as opposed to the object of thinking; the self or the mind'. (Re)constructing EU citizens as subjects of EU law and

⁴⁷³ Ibid 7. First, the social realist account of agency builds on the idea of 'human beings as the bearers of a continuous sense of self' and emphasizes the 'active acquisition of a personal identity at maturity'. (Ibid 9) Secondly, it highlights 'embodied practices as the source of the sense of self' and, thus, the 'primacy of practice' in the development of subjectivity. (Ibid 8) By this, for instance, Archer refers to the fact that 'it is only as embodied human beings that we experience the world and ourselves'. (Ibid 145) On this basis, social realists argue for a 'stratified view of "the subject" whose 'properties and powers' emerge at the following levels: the 'self', the 'person', the 'agent' and the 'actor'. (Ibid 254) This allows them to claim that the emergence of our social selves is 'necessarily relational, and for it to be properly so, then independent properties and powers have to be granted to both "structures" and to "agents"'. (Ibid 255)

European integration would, therefore, mean that (1) they can be seen as constituting integration not just by acting and doing but also by 'having and being'⁴⁷⁴ and that (2) they must not be treated as a thing or an object but as persons. The intellectual credibility of the (non-economic) constitution of the EU depends essentially on whether EU citizens can be recognised as full subjects of EU law and European integration – as opposed to being its mere objects.⁴⁷⁵ This argument has its basis in the early case-law and the Court's famous declaration of the European Economic Community as a new legal order 'the subjects of which comprise not only Member States but also their nationals'.⁴⁷⁶ However, both the philosophical foundations and the practical applications of supranational subjectivity are currently underdeveloped.

The crux of the EU Equality Problem can now be conceptualized as follows: The way in which the parameters for EU citizens' agency are defined in EU law ignores that fact that **(1)** the development of social and political agency depends on subjectivity and **(2)** is, therefore, inherently relational.⁴⁷⁷ It has been shown in Section 3.4 that the bias in favour of individual activity in the interpretation of the EU principle of equality fails to recognize the relational value of equal treatment. It now becomes clear that this failure is significant because it neglects the relational dimension of EU citizens' agency and, thus, leaves them deprived as full subjects of EU law and European integration. Namely, as the social realist account of agency indicates and as will be discussed in more detail in Chapter

⁴⁷⁴ Gabriel Marcel, *Being and Having* (Dacre Press Westminster 1949).

⁴⁷⁵ See more about this in Chapters 4 and 5.

⁴⁷⁶ 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.

⁴⁷⁷ For instance, Margaret Archer argues that 'social agency' must always be viewed 'in terms of interrelations'. Archer (n 470) 283-84. At the same time, however, she also claims that 'without personification no social identity derives from any role'. Archer (n 470) 294.

4, agents can be recognised as persons and subjects only in and through their social relationships with other agents.

The analysis of EU citizenship in terms of subjectivity must not be understood as an argument against the active nature of citizenship⁴⁷⁸ as whole, but rather, as an argument against the conceptualisation of EU citizenship through a narrow and individualistic view of agency, i.e. through the duty to be (economically or socially) active in order to exist in any meaningful way within the legal system of the EU. The next chapter will develop this argument further by examining the conditions under which EU citizenship could be (re)constructed as a source of subjectivity instead of being a mere transitory status under which EU citizens can strive for the more genealogical and privileged status of a 'Union worker'. As part of this exercise, I will demonstrate that shifting the focus to subjectivity can justify the importance of 'equality of relationships' between EU citizens even in the absence of democratic pedigree as it is traditionally understood in the context of nation states and/or *ex ante* belonging.

3.6 Conclusion

This chapter asked what the conditions and limitations on EU citizens' general right to equal treatment, above all the requirement of social integration in the form of a 'real link', tell us about the EU principle of equality and the status of EU citizenship. First, it pointed out that the enjoyment of EU citizens' right to equal treatment is still dependent on the duty to be active either economically or socially. The common denominator underlying both the structural and the substantive Equality Problem is therefore the activity-based conception of equality. In practice, the requirement of activity still trumps the status of EU citizenship when it comes to the enjoyment of EU citizens' right to equal treatment. Secondly, a more

⁴⁷⁸ See e.g. Bryan Turner, 'Outline of A Theory of Citizenship' (1990) 24 Sociology 189 about conceptualizing citizenship on the passive/active and the public/private axes.

philosophical critique of the EU principle of equality was presented to show that the activity-based conception of equality is problematic because it fails to recognise equality as a 'normative ideal of human relationships', leaving unanswered the question of how EU citizenship transforms the idea of 'meaningful relationships' for the purpose of equal treatment in EU law.

The inquiry into philosophical egalitarianism helped me to frame my own argument as follows: The responsibility-sensitive theories of equal opportunities focus on the conditions under which the agent is regarded to be responsible for his/her choices. A similar tendency to focus on the agent's responsibility to be active at the expense of 'other egalitarian values' is a distinctive feature of the EU principle of equality. First, it is questionable whether EU citizens enjoy equal opportunities to integrate into the host Member State and, thus, to qualify for equal treatment under EU law. Secondly, even if that is the case, the current emphasis on the individual responsibility to be active in defining the limits of EU citizens' right to equal treatment leads to a narrow and individualistic view of agency in EU law. This is problematic because the reductionist view of agency leaves EU citizens deprived as persons and as full and equal subjects of EU law. A more balanced view of EU citizens' agency will need to reconstruct EU citizenship as a source of subjectivity. The next chapter will develop this argument further.

4 (Re)constructing EU Citizenship as a Source of Subjectivity

4.1 Introduction

The current focus on individual activity as a condition for equal treatment in EU law has its basis in a narrow and reductionist view of agency in the case of EU citizens. As shown in the previous chapter, a more balanced view of agency would need to recognize equality as an 'ideal of human relations'. However, this critical analysis raised the question of whether the idea of 'equality of relationships' can gain normative value outside the framework of a bounded democratic polity. This question can be re-framed by asking whether and, if yes, on what basis EU citizens are seen as being in a 'meaningful relationship' for the purposes of equal treatment under EU law. This chapter argues that we must explore the conditions and construction of subjectivity in law and legal philosophy in order to understand why just and equal relationships between EU citizens matter for EU law and European integration.

It is widely accepted that social relationships are relevant for the development of personhood and human dignity. However, it is important to consider whether, in the absence of full democratic pedigree, the argument for more just and equal relationships between EU citizens can be justified politically, while remaining independent of both the universalist argument of shared humanity and the particularist argument of cultural or ethnic belonging. This chapter shows that shifting the focus to EU citizens' moral and legal subjecthood as EU citizens can provide us with a mediating position between cosmopolitan universalism, on the one hand, and moral particularism, on the other, in justifying the equality of relationships between EU citizens. In other words, this chapter derives the normativity of just and equal relationships from the becoming of EU citizens as subjects of EU law rather than from the ideas of personhood or human dignity as such. At the same

time, however, it will be seen that treating EU citizens as persons is a necessary, even if not sufficient, precondition for their full subjectivity as EU citizens.

First, Section 4.2 considers in more detail the connection between citizens' agency and their subjectivity in the light of the feminist critique of citizenship. It will be seen how the feminist argument of 'citizenship as agency' builds on the view that the constitution of subjectivity through relationships at the early levels of human development informs the later constitution of political subjectivity and agency. Section 4.3, then, moves on to explore what it means for EU citizenship that the inter-relational constitution of human subjectivity is reflected at the later stages of political and legal identity-building. This analysis is based on a brief overview of subjectivity in developmental psychology. It will be suggested on this basis that the analytic categories of (1) a 'relational subject' and (2) a 'subject-in-process' are useful for understanding EU citizens as subjects of European integration if we accept the feminist premise that forming political identity is a complex cognitive process which depends on the self's relation to the 'Other' both consciously and unconsciously.

Section 4.4 concludes the chapter by discussing in more detail what it means to recognise EU citizens as subjects of EU law and European integration – as opposed to being its mere objects. First, the section draws on philosophical and political personalism to support the argument that it is a necessary precondition for EU citizens' subjectivity to treat them as persons. Secondly, this proposition will be developed further by discussing Emmanuel Levinas' philosophical argument that the subjects as persons can come into existence only through a 'second-person perspective' when they accept responsibility for the 'Other' who is still a stranger to the self. On this basis, it will be suggested that the becoming of EU citizens as full and equal subjects of European integration requires adopting a 'second-person perspective' which can create 'meaningful relationships' between

EU citizens even in the absence of a full democratic pedigree and which can, thus, legitimize a more relational interpretation of the EU principle of equality.

4.2 EU citizenship and agency: a feminist approach

This section introduces the feminist critique of citizenship as the analytic framework within which the idea of EU citizens as full and equal subjects of EU law and European integration can be developed further. First, Section 4.2.1 outlines how the feminist theory has conceptualised citizenship by emphasising that agency defines our citizenship. Section 4.2.2 will, then, discuss in more detail how the feminist critique indicates the way in which social relationships shape our agency and, thus, our citizenship in a fundamental way. First, it will be seen that to underline the inter-relational dimension of citizens' agency challenges the ideals of independence and self-sufficiency as central virtues of EU citizens. Secondly, the section explains how the feminist rethinking of citizenship and agency suggests that EU citizens' (political and legal) agency is fundamentally affected by the way in which subjectivity is constituted and constructed at the early levels of human development.

The feminist critique of citizenship is relevant to the analysis of EU citizenship both methodologically because of its constructive starting point and substantively because of its interest in the notions of agency and subjectivity, as well as the relationships between these two. **(1)** The feminist theory is particularly concerned with the ideas of agency, subjectivity, and social practices and structures, and what their mutual connections are.⁴⁷⁹ Below, I will discuss how the constructive potential of social relationships can provide a

⁴⁷⁹ E.g. Philipa Rothfield, 'Feminism, Subjectivity, and Sexual Experience' in Sneja Gunew (ed), *Feminist Knowledge: Critique and Construct* (Routledge 1990) 123. At the heart of the feminist critique of subjectivity lies the concern that the general, human standpoint is assimilated with the masculine viewpoint 'thereby confining the feminine to the structural position of the "other"', meaning that 'the masculine qua human is taken as the "norm", and the feminine qua other is seen as marking the "difference"'. Rosi Braidotti, *Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press 1994) 152.

basis for rethinking EU citizens as subjects of EU law and European integration. (2) At the same time, the feminist critique of assimilation and its emphasis on human interdependence will provide a basis for a more substantive critique of EU citizens' agency in so far as the latter builds on the ideas of individual activity, responsibility, and self-sufficiency.

4.2.1 Citizenship as agency

Most ideologies that emphasise the pre-political aspects of identity base equality on citizens' 'presumed commonality and sameness'.⁴⁸⁰ What is too often neglected in the nationalist or communitarian accounts of citizenship is that these identities can be transformed by 'the exercise of rights themselves and the practice of political agency'.⁴⁸¹ Moreover, the critics have noted that the 'equality of a shared identity', from which political solidarity emerges, is 'at least in part self-determined and chosen'⁴⁸² and that the 'communities of choice' can lead to the 'reconstitution' of subjects.⁴⁸³ These arguments about the constructed nature of political identity are particularly relevant for EU citizenship because it cannot rely on there being a sense of belonging based on the shared 'culture' or 'origin'. However, it is not enough to simply refer to the possibility of the 'choosing of a political identity',⁴⁸⁴ but we must also explore the conditions under which this choice becomes possible in the case of EU citizens, i.e. their agency.

⁴⁸⁰ Seyla Benhabib, *The Rights of Others – Aliens, Residents, and Citizens* (Cambridge University Press 2004) 62.

⁴⁸¹ Ibid 168.

⁴⁸² Adrian Oldfield, *Citizenship and Community – Civic Republicanism and the Modern World* (Routledge 1990) 7.

⁴⁸³ Marilyn Friedman, 'Feminism and Modern Friendship: Dislocating the Community' in Cass R. Sunstein (ed), *Feminism & Political Theory* (The University Chicago Press 1982) 157. Friedman also argues that 'resources and skills derived from communities which are not merely found and discovered may equally well contribute to the constitution of identity'. Ibid 153.

⁴⁸⁴ Oldfield (n 482) 8.

Feminist scholars have expressed the concern that the discussion on citizenship has focused on the 'questions of identity' at the expense of the 'questions of agency and morality'.⁴⁸⁵ According to them, it is questionable whether the concept of identity can provide an adequate basis for political action.⁴⁸⁶ At the same time, however, it has been noted that human identity cannot be reduced to 'its capacity for agency alone'.⁴⁸⁷ For instance, Seyla Benhabib concludes that '[i]dentity does not refer to my potential for choice alone, but to the actuality of my choices'.⁴⁸⁸ These arguments about the inadequacy of the traditional notions of identity to accommodate 'vulnerability, ambiguity and dependency'⁴⁸⁹ illustrate that the relationship between 'agency' and the 'conditions within which that potential originates' are central themes of the feminist understanding of citizenship.⁴⁹⁰

The ideal of agency lies at the heart of the feminist critique of citizenship. Feminist theory has sometimes criticized the vision of the citizen as the bearer of rights on the basis that it reinforces the liberal principles of individual freedom and formal equality.⁴⁹¹ However, it has been responded to this criticism that citizenship rights also

⁴⁸⁵ Selma Sevenhuijsen, *Citizenship and the Ethics of Care* (Routledge 1998) 25.

⁴⁸⁶ Ibid 14.

⁴⁸⁷ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Polity Press 1992) 161.

⁴⁸⁸ Ibid 161.

⁴⁸⁹ Sevenhuijsen (n 485) 57.

⁴⁹⁰ Shelley Budgeon, *Third Wave Feminism and the Politics of Gender in Late Modernity* (Palgrave Macmillan 2011) 139.

⁴⁹¹ For instance, May Dietz has noted that '[o]nce in the domain of "equal access talk", we are tied into a whole network of liberal concepts – rights, interests, contracts, individualism, representative government, negative liberty'. Mary Dietz, 'Context Is All: Feminism and Theories of Citizenship' (1987) 116 *Daedalus* 1. However, unlike both the Marxist and maternal feminists, Dietz argues for 'the virtues, relations and practices that are expressly political and, more explicitly, participatory and democratic'. (Ibid 452) Anne Phillips is another author who links feminism with democracy. She notes that '[f]eminism multiplies the places within which democracy appears relevant' Anne Phillips, *Engendering Democracy* (Polity Press 1991) 159.

enable people to 'act as agents'.⁴⁹² Historically, the relationship between feminism and citizenship has, nonetheless, been 'ambivalent'.⁴⁹³ The concern has been that the idea of citizenship might not adequately accommodate the human diversity.⁴⁹⁴ This concern for particularity has its roots in the old controversy over whether the claims for women's inclusion in public life should have been based on their equality with men or on their difference from men.⁴⁹⁵ In practice, the feminist interest in diversity and difference has meant that feminist theory directs attention to the question of 'otherness'⁴⁹⁶ which is undermined both in the liberal and the communitarian accounts of agency.

The way in which feminist scholarship has problematized the requirement of assimilation as part of the constitution of political identity provides an important tool for rethinking the boundaries of national and supranational citizenship. For the first feminist thinkers, the liberation of women was identified as access to civil and political rights on equal terms with men.⁴⁹⁷ However, the later feminist critique of political theory has distanced itself from the liberal and contractarian ideas of equality and rationality on the

⁴⁹² Ruth Lister, *Citizenship: Feminist Perspective* (Palgrave Macmillan 1997) 37. Lister underlines that '[c]itizenship as the expression of agency can contribute to the recasting of women as political actors'. Thus, for Lister, '[t]o be a citizen, in the legal and sociological sense, means to enjoy the rights of citizenship necessary for agency and social and political participation'. Ibid 39 and 42.

⁴⁹³ Birte Siim, *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge University Press 2000) 1. The feminist critique of citizenship rejects the 'false universalism' of the traditional citizenship theory. For instance, Ruth Lister explains how feminist scholars object 'the way in which abstraction has served to hide the essentially male characteristics of the individual qua citizen'. Lister (n 492) 68 and 71.

⁴⁹⁴ Lister (n 496) 89.

⁴⁹⁵ Ibid 93.

⁴⁹⁶ For instance, Seyla Benhabib has noted that the need to take the standpoint of the other in moral deliberation has been restricted to the 'generalized other' at the expense of ignoring the 'moral identity of the concrete other'. Seyla Benhabib, 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies* (Polity Press 1987) 91-92.

⁴⁹⁷ See more about this e.g. in Iris-Marion Young, 'Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies* (Polity Press 1987) 58.

basis that they are 'deeply marred by masculine biases about what it means to be human'.⁴⁹⁸ The feminist concern is that the liberal self as 'the equal and abstract bearer of rights' fails to pay adequate attention to the identity of this self 'as a gendered subject'.⁴⁹⁹ On this basis, it has been argued that the modern political theory advances an ideal of citizenship which fails to recognize 'most particular aspects of a person'.⁵⁰⁰ The analysis of EU citizenship has displayed that the assimilationist tendencies of a liberal conception of citizenship are not limited to the mere gender context. It is therefore important to consider the feminist claim that our understanding of citizenship must build on a more realistic view of a person whose existence is relational rather than atomistic.

The notions of agency which challenge the atomistic, individualized subject of liberal political philosophy can be derived from several different intellectual traditions, including social constructivism, communitarianism, feminist ethics of care, philosophical and political personalism, and developmental psychology. What is common to these different accounts is the idea that 'subjects come to understand themselves to an important degree through their relationships with others'.⁵⁰¹ In particular, feminism and communitarianism have a lot in common because both underline the importance of 'context, care, and community' and both adopt a critical stance towards many aspects of political liberalism.⁵⁰² However, there are also considerable differences in their

⁴⁹⁸ Ibid 58.

⁴⁹⁹ Ibid 10. See also Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Polity Press 1989) 220-221 and Susan Moller Okin, *Women in Western Political Thought* (Princeton University Press 1979).

⁵⁰⁰ Young (n 497) 74.

⁵⁰¹ Sevenhuijsen (n 485) 61.

⁵⁰² Penny A. Weiss, 'Feminism and Communitarianism' in Penny A. Weiss and Marilyn Friedman (eds), *Feminism and Community* (Temple University Press 1995) 161.

conceptions of the self, social relations, and political community.⁵⁰³ These differences have been sketched by noting that 'communitarians are concerned with the *loss* of “traditional boundaries”, while feminists are concerned with the *costs* of those boundaries'.⁵⁰⁴

The feminist interest in the 'cost' of the traditional boundaries explains why feminism as a critical theory is so well suited for analysing the research question of how EU citizenship transforms the idea of meaningful political and legal relationships and what this transformation means for the EU principle of equality. Chapters 2 and 3 showed that the issues of 'similarity vs. difference' and 'belonging vs. otherness' lie at the heart of the EU Equality Problem. In order to solve this problem, we must explore whether the status of EU citizenship can provide a source of meaningful relationships for the purposes of equal treatment. For this analysis, it is useful to bear in mind that most feminist scholars adopt a constructive perspective, according to which 'how things naturally are is instead an expression of a historically specific way of structuring some set of social interactions'.⁵⁰⁵ This emphasis on the constructive potential of social relationships for citizens' agency and their subjectivity is particularly interesting when we explore the status of EU citizenship which is clearly a constructed, rather than organic, source of identity.

From this common starting point, however, different feminist traditions have made radically different claims about the nature of citizenship, agency, and subjectivity –

⁵⁰³ Ibid 161-62. The ideal of community is not just a friend but also a foe for many feminist thinkers. It has been argued that instead of embracing a 'participatory democratic communitarianism' as the vision of the ideal society, feminists should argue for a 'politics of difference'. See e.g. Iris-Marion Young, 'The Ideal of Community and the Politics of Difference' in Linda J. Nicholson (ed), *Feminism/Postmodernism* (Routledge 1990) 301. At the core of Young's critique of community lies the claim that the ideal of community 'denies the difference between subjects'. Ibid 302.

⁵⁰⁴ Weiss (n 502) 167. See also Friedman (n 479) 147 about the critique of the communitarian emphasis on the 'specific communities of family, neighbourhood, and nation' as 'troubling paradigms of social relationship'.

⁵⁰⁵ Naomi Scheman, 'Individualism and the Objects of Psychology' in Sandra Harding and Merrill B. Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (D. Reidel Publishing Company 1983) 231.

as well as about the relationship between the three. A central distinction can be made between liberal feminism and the so-called maternalist communitarian approach. The former has focused on criticizing the classical notions of citizenship based on women's exclusion and male domination as integral aspects of modern political philosophy.⁵⁰⁶ The latter advocates caring and other 'practices of mothering'⁵⁰⁷ as central political values.⁵⁰⁸ Moreover, different forms of socialist,⁵⁰⁹ Marxist,⁵¹⁰ and radical⁵¹¹ feminism, as well as the postmodern theories⁵¹² that focus on deconstructing essentialist (gender) categories and differences, have also emerged within feminist theory. For the purposes of this thesis, it is important to note that, despite sharing the critical stance towards the unity of the liberal self, the feminist and postmodern philosophies differ radically in their approaches to the constitution of self and subjectivity.⁵¹³

⁵⁰⁶ E.g. Martha C. Nussbaum, *Sex & Social Justice* (OUP 1999).

⁵⁰⁷ E.g. Virginia Held, *The Ethics of Care – Personal, Political, and Global* (OUP 2006).

⁵⁰⁸ See e.g. Sara Ruddick, 'Maternal Thinking' in Marilyn Pearsall (ed), *Women and Values readings in recent Feminist Philosophy* (Wadsworth Publishing Company 1999) for the argument that 'maternal is a 'social category' and that is must shape a theory of justice. See also Nel Noddings, 'Ethics from the Standpoint of Women' in Marilyn Pearsall (ed), *Women and Values readings in recent Feminist Philosophy* (Wadsworth Publishing Company 1999) who argues for 'an ethics of care based on 'women's traditional role as nurturers'. A helpful summary of maternal feminism is included in Jane Mansbridge, 'Feminism and Democratic Community' in Penny A. Weiss and Marilyn Friedman (eds), *Feminism and Community* (Temple University Press 1995) 350.

⁵⁰⁹ The socialist feminist critique of citizenship builds on the thought that 'male dominance is intrinsic rather than accidental to classical capitalism' and that the concept of citizenship has, therefore 'an implicit gender subtext'. E.g. Nancy Fraser, 'What's Critical about Critical Theory? The Case of Habermas and Gender' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies* (Polity Press 1987) 45-46.

⁵¹⁰ See e.g. Zillah R. Eisenstein, *The Radical Future of Liberal Feminism* (Nothorn University Press 1986). The relationships between feminist theories and Marxism is complex and it remains controversial how far gender can be unified with class and whether the feminist concept of reproduction must also challenge the primacy of production within the Marxist theories.

⁵¹¹ E.g. Catherine MacKinnon, *Toward A Feminist Theory of the State* (Harvard University Press 1991).

⁵¹² E.g. Judith Butler, 'Contingent Foundations: Feminism and the Question of "postmodernism"' in Judith Butler and Joan W. Scott (eds), *Feminists Theorize The Political* (Routledge 1992).

⁵¹³ Jane Flax, *Thinking Fragments: Psychoanalysis, Feminism, and Postmodernism in the Contemporary West* (University of California Press 1990) 15. Postmodernists reject what they call the 'metaphysics of presence', including the 'philosophies of mind, truth, language, and the Real that underlie and ground any

Feminist authors, such as Judith Butler, distinguish themselves from the postmodern deconstruction of subjectivity by noting that 'to claim that the subject is constituted is not to claim that it is determined; on the contrary, the constituted character of the subject is the very precondition of its agency'.⁵¹⁴ This shift from 'deconstruction' to 'reconstruction'⁵¹⁵ makes the feminist critique of citizenship particularly relevant for the analysis of EU citizenship. Namely, unlike postmodernism, feminism cannot altogether deconstruct agency and subjectivity. In contrast, the need to deconstruct the essentialist (gender) categories and difference must be balanced against the danger of making the feminist agency to disappear. The feminist critique of citizenship can therefore provide the background against which the current parameters for EU citizens' agency can be critically assessed and redefined.

The attempt to reconstruct the parameters for relevant political and social agency has led feminist scholars to show particular interest in 'how social selves are constituted, toward what ends, and with what costs and benefits'.⁵¹⁶ The feminist critique of the self is usually directed against the ideal of '*homo economicus* – the free and rational chooser and actor whose desires are ranked in a coherent order and whose aim is to maximize desire satisfaction'.⁵¹⁷ A similar ideal of 'Economic Man' is familiar to us from EU law. It is problematic how this conception of the self disengages the individual both from 'personal

such transcendental or foundational claims'. Instead, postmodernists view self as a 'position in language' (Derrida) or as an 'effect of discourse' (Foucault). Ibid 35 and 231

⁵¹⁴ Butler (n 512) 12.

⁵¹⁵ Seyla Benhabib and Drucilla Corner, 'Introduction – Beyond the Politics of Gender' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies* (Polity Press 1987) 1.

⁵¹⁶ Weiss (n 502) 169.

⁵¹⁷ Diana Tietjens Meyers, 'Introduction' in Diana Tietjens Meyers (ed), *Feminist Rethinking the Self* (Westview Press 1997) 2.

relationships' and from 'social forces' in general.⁵¹⁸ One of the major contributions of the feminist critique of citizenship has therefore been to re-establish the link between social rights and the democratic citizenship.⁵¹⁹ This development is closely connected to the interest in women's agency in the feminist rethinking of citizenship.⁵²⁰ The notion of agency can arguably provide 'a bridge between the social and the political'.⁵²¹ By defining agency inter-subjectively, the feminist critique of citizenship can provide us with useful tools for rethinking the parameters for relevant agency in the case of EU citizens.

4.2.2 Agency as interdependence

In feminist theory, the idea of 'citizenship as agency' is connected to the argument that agency can only be developed in and through social relationships.⁵²² The feminist critique of citizenship attempts to challenge the vision of the 'unencumbered Self' that is arguably advocated by liberal political thought.⁵²³ According to this criticism, the ideals of 'separateness' and 'independence' embedded in the liberal view of the self have never been true for women to the same extent as to men.⁵²⁴ For feminists, the liberal contractual models of human relations are based on 'a certain historically specific conception of "economic man" as representative of humanity'.⁵²⁵ It is this attempt to reconceptualise the

⁵¹⁸ Loc.cit.

⁵¹⁹ Siim (n 493) 1.

⁵²⁰ Ibid 2. The feminist vision of agency has its roots in a 'normative vision that aims at increasing women's political participation and representation in politics'. Loc.cit.

⁵²¹ Ibid 158.

⁵²² Ann Ferguson, 'Can I Choose Who I am? And How Would That Empower Me? Gender, Race, Identities and the Self', in Ann Garry and Marilyn Pearsall (eds), *Women Knowledge, and Reality: Explorations in Feminist Philosophy* (Routledge 1996) 111.

⁵²³ Benhabib and Cornell (n 515) 10. This criticism has its roots in the claim that both the market liberals (e.g. Hayek and Nozick) and the welfare liberals (e.g. Rawls and Dworkin) 'proceed from a conception of the self as public persona, as a bearer of individual rights'. Loc.cit.

⁵²⁴ Ibid 12.

⁵²⁵ Virginia Held, 'Non-Contractual Society: A Feminist View' in Penny A. Weiss and Marilyn Friedman (eds), *Feminism and Community* (Temple University Press 1995) 209-10. This critique is based on the view

link between '(economic) independence' and 'citizenship' which can help us to reconceptualise the relevant parameters for EU citizens' agency.⁵²⁶

For feminists, the question is not one of 'dependence versus independence' because 'virtually no one in this society is totally independent in any meaningful sense'.⁵²⁷ In contrast, feminists argue that 'societies' consists of 'networks of relationships, characterized by *interdependence*'.⁵²⁸ What is problematic from the feminist perspective is 'not dependency, per se, but *unequal* dependence resulting in relationships of domination and subordination'.⁵²⁹ Similarly, it needs to be considered whether the stark dichotomy between 'dependence' and 'independence' could be replaced with the ideal of 'interdependence' when we consider EU citizens' agency and their right to equal treatment under EU law. What remains of this section will discuss in more detail how a more balanced view of agency in the case of EU citizens would complete the ideals of individual activity, responsibility, and economic self-sufficiency with a more realistic picture of human interdependence.

The feminist vision of social policy is focused on enabling people 'to achieve relationships of meaningful interdependence and mutuality'.⁵³⁰ It has been noted that excluding the relations of dependency from the 'circumstances of justice' will distort our

that the individualistic notion of the self is connected to the human development in 'a patriarchal culture where childcare is primarily in the hands of women'. See e.g. Scheman (n 505) 230.

⁵²⁶ Martha Ackelsberg, *Resisting Citizenship – Feminist Essays on Politics, Community, and Democracy* (Routledge 2010) 61. On this basis, it has also been argued that 'engaging in waged' must not be seen as 'a necessary condition for individuals to deserve the social standing and to warrant the rights and dignity associated with citizenship'. Uma Narayan, 'Towards a Feminist Vision of Citizenship: Rethinking the Implications of Dignity, Political Participation, and Nationality' in Mary Lyndon Shanley and Uma Narayan (eds), *Reconstructing Political Theory – Feminist Perspectives* (Polity Press 1997) 50-51.

⁵²⁷ Ackelsberg (n 526) 67.

⁵²⁸ Ibid 67.

⁵²⁹ Ibid 68.

⁵³⁰ Ibid 69.

understanding of 'the sort of individual who warranted the dignity of citizenship'.⁵³¹ Thus, the feminist theories of citizenship refuse to locate individual dignity and worth in the capacity to be 'autonomous' and 'self-governing'.⁵³² What is central to the feminist approach is the claim that human agency that is relevant for citizenship is constituted in 'social and cultural relations'.⁵³³ This tendency to see relationships as constitutive for agency lays the basis for a specific ideal of the 'ethics of care' which inspires many feminist accounts of citizenship.

Those feminists who defend 'care' as a practice of moral thinking argue that care involves a 'distinctive moral orientation' toward other persons.⁵³⁴ This approach is rooted in Carol Gilligan's contested argument that two different modes of moral reasoning are typically reflected in feminine and masculine thought.⁵³⁵ All of these accounts of 'caring' underline the importance of the 'ability to adopt the standpoint of others'.⁵³⁶ However, the major theorists of care have rejected the simplistic claim that the differences between the 'ethics of care' and the 'ethics of justice' could be derived from 'invariable differences' between the moral thinking of men and women.⁵³⁷ In contrast, the idea of care has been

⁵³¹ Narayan (n 526) 52.

⁵³² Ibid 53.

⁵³³ Lister (n 492) 38.

⁵³⁴ Alison Jaggar, 'Caring as a Feminist Practice of Moral Reason' in Virginia Held (ed), *Justice and Care – Essential readings in Feminist Ethics* (Westview Press 1995) 180.

⁵³⁵ Carol Gilligan, *In a Different Voice – Psychological Theory of Women's Development* (Harvard University Press 1982) 179. Carol Gilligan criticized Lawrence Kohlberg's theory of moral development by distinguishing between the ethical orientation of justice and rights and the ethical orientation of care. She argued further that women's moral development would in general come closer to a 'vision of moral maturity that views the self as a being immersed in a network of relationships with others'. See for further analysis and critique of Gilligan's argument e.g. in Benhabib (n 496) 149.

⁵³⁶ Lister (n 492) 103.

⁵³⁷ Jaggar (n 534) 182. One approach is to view them as 'different aspects of moral reasoning'. Another approach suggests that they 'originate from the experience of public and private life respectively'. (Ibid 185) It has been underlined that '[m]ost proponents of the ethics of care now dispute the possibility of any easy synthesis of care with justice'. (Ibid 187) Virginia Held is one of those feminist thinkers who argue that the

generalised and contextualised politically. For instance, Joan Tronto has suggested that caring as a political perspective can provide a new insight into the principles of justice because it requires us to start from the 'standpoint of the one needing care and attention'.⁵³⁸

To adopt a particular standpoint is both the most 'distinctive' and the most 'controversial' feature of care ethics.⁵³⁹ It has been noted that, although some theorists envision how the care-thinking could expand our 'moral imagination' and could thus apply to 'large-scale social or global issues', that would be in conflict with the importance of 'characteristically interactive and personal relation' which is characteristic of care-thinking.⁵⁴⁰ However, for instance, Tronto has replied to this criticism that adopting the practice of care as one of the 'qualities necessary for democratic citizens to live together well in pluralistic society' would change not just the 'conception of self' but also 'relations with others'.⁵⁴¹ On this basis, she claims that '[r]ather than assuming the fiction that all citizens are equal, a care perspective would have us recognize the achievement of equality as a political goal'.⁵⁴²

ethics of care is a 'distinct moral theory' and not 'a concern that can be added on to or included within other more established approaches'. Held (n 507) 3. But even she acknowledges that care may not in itself contain 'adequate theoretical resources for dealing with issues of justice'. However, according to Held, the idea of care can nonetheless be seen as 'the wider and deeper ethics within which justice should be sought'. Ibid 17.

⁵³⁸ Joan Tronto, *Moral Boundaries – A Political Argument for an Ethic of Care* (Routledge 1993) 19.

⁵³⁹ Jaggar (n 534) 180.

⁵⁴⁰ Ibid 197. It has also been noted that care ethics may struggle with distinguishing between 'felt or expressed needs' and 'genuine needs'. (Ibid 189) Moreover, care ethics often fails to establish 'how to identify' morally relevant care. (Ibid 192) Despite this criticism, for instance, Virginia Held has envisioned 'how caring relations extend - - to the social ties that bind groups together, to the bonds on which political and social institutions can be built, and even to the global concerns that citizens of the world can share'. Held (n 507) 31. Her argument is two-fold. First, she notes that '[c]aring relations form the small societies of family and friendship on which larger societies depend'. Secondly, she suggests that '[c]aring relations of a weaker but still evident kind between more distant persons allow them to trust one another enough to live in peace and respect each other's rights'. Ibid 43.

⁵⁴¹ Tronto (n 538) 161-62.

⁵⁴² Ibid 164.

It is clear that the relationship between justice and care ethics is more complex than some of its advocates might want to acknowledge. The values of impartiality and neutrality may often need to overcome the particularity of any specific situation in the application of the principles of justice. What is nonetheless interesting from the perspective of EU citizenship is the way in which the care-thinking underlines the reality of the human life as fundamentally interdependent. From this starting point, it can be argued that the current parameters for EU citizens' agency are distorted '[i]n equating dependence with weakness and incapacity for citizenship'.⁵⁴³ This defect becomes apparent if we consider the way in which the needy and economically dependent EU citizens are currently excluded from exercising their agency on the basis of the status of EU citizenship under the 'real link' test and the 'unreasonable burden' test.

The arguments for adopting the standpoint of the other have their roots in a relational view of agency. It is characteristic of care ethics that the 'interests of the self' are regarded as inherently connected to the interest of others.⁵⁴⁴ Social relations are seen as part of what constitutes identity and autonomy is defined as the capacity 'to reshape and cultivate new relations'.⁵⁴⁵ At the same time, it has been noted that the political idea of care cannot be equated with 'benevolence' because it describes 'a social relation' rather than 'an individual disposition'.⁵⁴⁶ In practice, the way in which agency is constituted under the ethics of care is connected with a specific view of moral subjectivity which leads to a 'relational image of human nature' which can be contrasted with the 'individualized subject of liberal political philosophy'.⁵⁴⁷ Thus, the ethics of care views persons as

⁵⁴³ Lister (n 492) 109.

⁵⁴⁴ Jaggar (n 534) 188.

⁵⁴⁵ Held (507) 14.

⁵⁴⁶ Ibid 42.

⁵⁴⁷ Sevenhuijsen (n 485) 34.

'interdependent'.⁵⁴⁸ This means that persons are 'at least partly constituted by their social ties'.⁵⁴⁹

In order to grasp how this argument is relevant for EU citizenship, it is important to bear in mind not just that agency is central for equal citizenship but also that there is an inherent connection between 'agency' and 'subjectivity', as was concluded in Chapter 3. The way in which the feminist critique of citizenship highlights the connection between the social and political dimensions of citizenship through the notion of agency provides a basis for a critique of individual activity and economic self-sufficiency as the main parameters for EU citizens' agency. However, for feminists, the importance of social relationships for citizens' agency is rooted in the view that the construction of subjectivity in relation to the 'Other' at the early levels of human development is reflected at the later stages of cultural, political, and legal identity-building. The chapter will, therefore, move on to examine EU citizenship in the light of the psycho-dynamic theories of subjectivity that underlie the feminist idea of 'citizenship as agency' as discussed in this section.⁵⁵⁰

4.3 EU citizenship and subjectivity: a psycho-dynamic approach

Developmental psychology has provided an important analytical tool for feminist political theory and philosophy in its attempt to view human nature as a 'product of social relations

⁵⁴⁸ Held (n 507) 46.

⁵⁴⁹ Ibid 46. For instance, Virginia Held captures this vision of relationality in the following statement: 'We can decide to treat such persons as individuals, to be the bearers of individual rights, for the sake of constructing just political and legal and other institutions. But we should not forget the reality and the morality this view obscures. Persons are relational and interdependent. Ibid 72.

⁵⁵⁰ The feminist scholarship originally disregarded psychoanalysis. Until the early 1970s, most feminist scholars were more likely to be influenced by the so-called 'ego psychology' which views the ego as the 'centre of the self' and underlines the positive adaptation between 'inner psychic organization' and 'outer social organization' than by the psychoanalytic theories of the self. See further e.g. in Hazel Rowley and Elizabeth Grosz, 'Psychoanalysis and Feminism' in Sneja Gunew (ed), *Feminist Knowledge: Critique and Construct* (Routledge 1990) 181. However, Juliet Mitchell's book *'Psychoanalysis and Feminism'* (1974) changed this by suggesting that 'psychoanalysis is not a recommendation for a patriarchal society, but an analysis of one'. Juliet Mitchell, *Psychoanalysis and Feminism: Freud, Reich, Laing and Women* (1974) xv.

in interaction with biology'.⁵⁵¹ Some feminist theorists claim that the constitution of gender in modern societies is split between 'unencumbered' male selves and 'situated' female selves. However, it is widely acknowledged that the relationship between the biological and the cultural attributes of gender is more complex than this. It has been noted that '[t]he simple identification of the subject with its social roles reinstates the very logic of identity that feminists have sought to critique in their examinations of the psychosexual constitution of the gender.'⁵⁵² Thus, questioning the unity of the subject is one of the central themes in the work of feminist theorists. On a more constructive note, the feminist theory has challenged the logic of binary oppositions between the self and the Other by using the psycho-dynamic theories of subjectivity as analytical tools.

Understanding the psycho-dynamic foundations of the feminist rethinking of citizenship is important for two reasons. First, shifting the focus to the connection between citizens' agency and their subjectivity demonstrates that the feminist critique of citizenship has relevance outside the gender context. Secondly, and more importantly, this analysis illustrates how several political theorists take the leap from the psychological to the political by arguing that the constitution of human subjectivity in and through intimate social relations at the early level of human development has implications for how social relations in general inform and shape political identity-building. Their concern is that, as the mother has been 'internalized' by the child in early infancy and, in so far as patriarchy requires the rejection of the m/Other,⁵⁵³ the relationship to the 'Other' becomes repressed

⁵⁵¹ Jane Flax, 'Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics' in Sandra Harding and Merrill B. Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (D. Reidel Publishing Company 1983) 249.

⁵⁵² Benhabib – Cornell (n 515) 13. Benhabib and Cornell also note that women have been more 'situated' than men in terms of social roles and expectations '[p]recisely because to be a biological female has always been interpreted in gendered terms as dictating a certain psychosexual and cultural identity' Ibid 12.

⁵⁵³ Flax (n 551) 246.

'as complete as possible so that this internal object can be kept separate from the conscious self'.⁵⁵⁴ From this follows the claim that later attempts of identity-building are affected by the unconscious responses to the early interaction between the 'self' and the 'Other'.

This section will examine psycho-dynamic theories of subjectivity in order to address the question of what it means for EU citizenship if our relationship to the 'Other' at the early level of human development is reflected in all later attempts of cultural, social, political, and legal identity-building, as some feminists claim. This analysis goes beyond the individual psychological need to examine **(1)** what theoretical principles of subjectivity can be drawn out of developmental psychology and **(2)** how these principles can be extrapolated to the supranational subjectivity and identity-building. On the basis of this analysis, it will be suggested that the analytic categories of a 'relational subject' and a 'subject-in-process', which emerge from the psycho-dynamic accounts of subjectivity, can shed more light on the role of just and equal relationships between EU citizens in re(constructing) EU citizenship as a source of subjectivity.

The classic psycho-dynamic theories of subjectivity have two main branches. The object-relation theories see the 'relational life of the infant' prior to any 'psychic development', whereas the Lacanian and post-Lacanian structural theorists emphasise the unconscious as a 'source of discontinuous and chaotic drives or significations'.⁵⁵⁵ The object-relations theorists have taken root in Anglo-American feminism, whereas the Lacanian tradition has been more prominent on the Continent, especially amongst French feminists. These two approaches to human development can be seen as opposites when it comes to the role of inter-subjective relationships in constructing human subjectivity and

⁵⁵⁴ Ibid 246-47.

⁵⁵⁵ See further e.g. in Judith Butler, 'Gender, Trouble, Feminist Theory, and Psychoanalytic Discourse' in Linda J. Nicholson (ed), *Feminism/Postmodernism* (Routledge 1989) 328.

identity. However, as analytical tools, both of them provide a valuable insight into the importance of the 'Other' for human subjectivity. Unlike developmental psychologists, political theorists do not need to choose between these two approaches. Instead, these two accounts of subjectivity together can help us to understand the constitution of supranational subjectivity as a complex cognitive process both *between* subjects and *within* the subject.⁵⁵⁶

First, it will be seen in Section 4.3.1 how the object-relations theory provides a basis for the concept of a 'relational subject' which suggests that the conditions for subjectivity are primarily relational and, to a large extent, socially constructed. The analytic category of a 'relational subject' can help us to understand better the *inter-personal* constitution of subjectivity in the case of EU citizens. Secondly, Section 4.3.2 will explain how the structural psychoanalysis allows us to conceptualize the supranational subject as a 'subject-in-process'⁵⁵⁷ whose relationship to the 'Other' is largely dominated by the unconscious. The notion of a 'subject-in-process' can therefore shed light on the *intra-personal* complexity of subjectivity in the case of EU citizens. Finally, Section 4.3.3 summarises what theoretical principles of political subjectivity can be derived from the analysis of psychological subjectivity. The section concludes that understanding political subjectivity as a process that is defined by the self's relation to the 'Other', both inter-personally and intra-personally, supports the argument that constructing EU citizenship as a source of subjectivity depends on more just and equal relationships between EU citizens.

⁵⁵⁶ These two psycho-dynamic accounts of subjectivity are discussed in this thesis because they inform the work of those political theorists who argue for more relational accounts of political subjectivity. It is important to note that they do not give a full or an up-to-date picture of debates on human subjectivity in developmental psychology.

⁵⁵⁷ Julia Kristeva, *Desire in Language – A Semiotic Approach to Literature and Art* (Blackwell 1980) 135.

4.3.1 The relational subject

A relational conception of the self suggests that our existence as subjects depends on our relations to others. The self 'as situated in a network of complex and ever-changing relationships' will arguably lead to a 'richer account of moral agents and agency'.⁵⁵⁸ Moreover, it has been noted that '[o]nce we see the natural as relational, the question becomes how the law absorbs these relations'.⁵⁵⁹ It will be argued in this section that understanding EU citizens as 'relational subjects' can justify a more positive approach to equal treatment and the focus of discrimination analysis can move from the negative relationship of dependence towards the positive relationships of interdependence. Recognising the connection between social relations and the constitution of subjectivity can therefore provide a justification for equality as a 'normative ideal of human relations' in the context of European Union law.

This analysis benefits from the analytic category of a 'relational subject' which has its roots in the object-relations theory of human subjectivity. Object-relations theorists underline the 'central importance of sustained, intimate relations with other persons or the repression of such relations in the constitution, structure, and ongoing experiences of a self'.⁵⁶⁰ The feminist claim is that the assumption of the man as 'a solitary creature by nature' in modern political philosophy follows from the denial of the 'primary relatedness' between the infant and the caretaker, as well as from the 'consequences of this denial for

⁵⁵⁸ Victoria Nourse, 'Law's Constitution: A relational Critique' (2002) 17 *Wisconsin Women's Law Journal* 23.

⁵⁵⁹ This analysis builds upon the claim that positivism has 'failed to grasp the generative powers of law' and that 'law's generativity can be seen in shifting relations'. For instance, Victoria Nourse argues that 'many of the concepts that we see in law, that seem mundane, natural or given, stand as proxies for normative relations'. It follows from this that 'no theory of law can be complete without accounting for law's constitutive/creative aspects'. Ibid 24. Moreover, this would also mean that our ideas of what is 'natural' are likely to change 'if we come to see the "natural" as a proxy for normative relations' and '[o]nly then can we begin to see how the law "constitutes" itself'. Ibid 27.

⁵⁶⁰ Flax (n 551) 229-30.

conceptions of human nature'.⁵⁶¹ Moreover, it has been suggested that philosophy in general and legal philosophy in more particular are not 'immune' from these consequences and the 'influence of the unconscious'.⁵⁶² It is, therefore, important to consider in more detail what this idea of 'primary relatedness' means when EU citizens develop their sense of political and legal subjectivity as EU citizens.

Some political theorists suggest that the development of political and legal subjectivity is linked to how human subjectivity is constituted psychologically. For instance, Jane Flax argues that 'childhood experience is repressed on a social and individual level' and that '[o]nly thus it is possible to deny the most fundamental proof of necessity of human bonding and its effects, which extend far beyond mere utility, and reverberate throughout adult life'.⁵⁶³ This leads her to conclude that 'true reciprocity' is not possible 'if the "other" must be dominated and/or repressed rather than incorporated into the self while simultaneously acknowledging the difference'.⁵⁶⁴ At the heart of this critique lies the claim that '[k]nowing other people in relationships' has a crucial role in the production of human subjectivity and that more attention should be paid to the 'epistemic significance of early experiences with other people'.⁵⁶⁵ Thus, the importance of primary relatedness for constructing political subjectivity needs to be taken into account when EU citizens develop their sense of subjectivity as EU citizens. In order to back up this argument, it is important to briefly discuss how the analytic category of the 'relational subject' emerges from the object-relations theory.

⁵⁶¹ Ibid 261.

⁵⁶² Ibid 255.

⁵⁶³ Ibid 268.

⁵⁶⁴ Ibid 269.

⁵⁶⁵ Lorraine Code, 'Taking Subjectivity into Account' in Ann Garry and Marilyn Pearsall (eds), *Women, Knowledge, and Reality: Explorations in Feminist Philosophy* (Routledge 1996) 287.

Object-relations theorists are interested in the period of psychological development during which children become aware of themselves as social persons who are distinct from all others.⁵⁶⁶ These theories account for the origin of a self 'in and out of relations with others' and they view human beings as 'object seeking' by nature.⁵⁶⁷ One of the best-known advocates of the object-relations theory has been Donald Winnicott whose work deals with the earliest stages of infancy, which are not subjected to repression because they relate to the pre-Oedipal stages of psychological development and the construction of the self.⁵⁶⁸ Winnicott proceeds in his analysis from the assumption that the infant and the parental care together form a 'unit'.⁵⁶⁹ This starting point allows him to envisage how the infant ego gradually becomes free from the parental 'ego-support', so that the infant achieves 'mental detachment' as a 'separate personal self'.⁵⁷⁰ According to Winnicott, the development of the ego can thus be described by means of 'the theory of the infant's journey from absolute dependence, through relative dependence, to independence'.⁵⁷¹

The central question for the object-relations theorists is how the infant develops his/her 'perception of objects as external to the self'.⁵⁷² For Winnicott, this development is

⁵⁶⁶ Scheman (n 505) 236.

⁵⁶⁷ Flax (n 513) 111. It is important to bear in mind that an 'object' in development psychology is a concept for experiences which refer to someone or something outside the self that has significance for the self. See e.g. Josephine Klein, *Our Need for Others and its Roots in Infancy* (Tavistock Publications 1987) 152. From this follows the argument that human beings 'seek objects for the intrinsic satisfaction of such relating, not merely to reduce drive tension'. On this basis, the object relations theorists argue that "'instinctual" impulses cannot be distinguished or treated apart from their relational aspects'. Flax (n 513) 111.

⁵⁶⁸ Donald Winnicott, *The Maturation Process and the Facilitating Environment – Studies in the Theory of Emotional Development* (The Hogarth Press 1965) 38.

⁵⁶⁹ Ibid 39. At the heart of Winnicott's theory lies the claim that the 'infant ego' becomes 'powerful and stable' by virtue of the 'parental ego' which implements it during this period. Ibid 41.

⁵⁷⁰ Ibid 41.

⁵⁷¹ Ibid 42.

⁵⁷² Ibid 44.

closely related to the infant's change from being merged with the giver of parental care to the state of relating to her/him as 'separate and “not-me”'.⁵⁷³ In other words, it is essential for Winnicott's argument that the constitution of human subjectivity consists of the development towards 'the subject's perception of the object as an external phenomenon, not as a projective entity'.⁵⁷⁴ On this basis, he concludes that '[i]ndependence is never absolute' and that '[t]he healthy individual does not become isolated, but becomes related to the environment in such a way that the individual and the environment can be said to be interdependent'.⁵⁷⁵ This capacity to relate to the 'Other' provides a key to the constitution of political subjectivity as will be discussed below in this section.

Similarly, for instance, Margaret Mahler has argued that the 'psychological birth of the individual' can be examined as a 'separation-individuation process' which focuses on the development of a 'sense of separateness from, and relation to, a world of reality'.⁵⁷⁶ Like Winnicott, Mahler suggests that the 'structural differentiation' which leads to the 'functioning ego' takes its place within the 'matrix of physiological and sociobiological dependency' on the giver of parental care.⁵⁷⁷ Interestingly, she underlines that '[l]ike any

⁵⁷³ Ibid 45. Winnicott argues that it is only through the phase of 'structured integration' that the infant becomes able to 'experience anxiety associated with disintegration'. Ibid 44. This means that the capacity for genuine object relationships, i.e. for relationships in which the subject is capable of distinguishing between the self and the Other, develops when 'the infant changes from a relationship to a subjectively conceived object to a relationship to an object objectively perceived'. Ibid 45. This emphasis on object relations leads Winnicott to argue that successful parental care will 'built up in the infant a continuity of being which is the basis of ego-strength'. Ibid 52. Winnicott also notes that 'ego-functioning needs to be taken as a concept that is inseparable from that of the existence of the infant as a person' and that 'the ego offers itself for study long before the word self has relevance'. Ibid 59-60.

⁵⁷⁴ Donald Winnicott, *Playing and Reality* (Routledge 1971) 120.

⁵⁷⁵ Ibid 84.

⁵⁷⁶ Margaret Mahler, *The Psychological Birth of the Human Infant – Symbiosis and Individuation* (Hutchinson of London 1975) 3. By the term separation, Mahler refers to 'the child's emergence from a symbiotic fusion with the mother'. By the term individuation, she means 'those achievements marking the child's assumption of his own individual characteristics'. Ibid 4.

⁵⁷⁷ Ibid 45.

intrapsychic process, this one reverberates throughout the life cycle. It is never finished; it remains always active; new phases of the life cycle see new derivatives of the earliest processes still at work.⁵⁷⁸ This emphasis on the way in which the self's early relationships with objects shape its later developments explains why these theories are relevant for a more general analysis of the conditions of political agency and legal subjectivity.

What is common to all of these accounts is to claim that the capacity to establish 'genuinely reciprocal relationships' with others at the later stages of human development has its roots in the gradual separation-individuation process in early childhood.⁵⁷⁹ Moreover, it is important to note that this common starting point leads most object-relations theorists to argue that '[m]aturity is not equated with independence though it includes a certain capacity for independence.'⁵⁸⁰ For instance Harry Guntrip has framed this principle as follows:

Mature dependence is characterized by full differentiation of ego and object (emergence from primary identification) and therewith a capacity for valuing the object for its own sake and for giving as well as receiving; a condition which should be described not as independence but as mature dependence.⁵⁸¹

In other words, the account of human subjectivity under the object-relations theory connects the mature subjectivity with the ability to be relational and to recognise the value of interdependence for the subject's coming into existence.

The idea of psychological maturity as interdependence is particularly clear in D.W. Fairbairn's account of ego-development through the following three stages: (1)

⁵⁷⁸ Ibid 3.

⁵⁷⁹ Flax (n 551) 252.

⁵⁸⁰ Harry Guntrip, *Personality Structure and Human Interactions – The Developing Synthesis of Psychodynamic Theory* (The Hogarth Press 1961) 293.

⁵⁸¹ Ibid 291.

'infantile dependence', (2) a 'transitional stage', and (3) 'mature dependence'.⁵⁸² It has been noted that Fairbairn's theory of psycho-dynamic development presents normal development 'as that of growing out of the starting-point of infantile dependence on the mother to a capacity for the mature dependence of "equals" in an adult relationship'.⁵⁸³ It seems important to consider whether and, if yes, how this argument of 'mature dependence' can inform the theories of subjectivity outside developmental psychology. By analogy, it can be suggested that defining the political subjectivity through the lens of 'mature dependence' presumes the analytic category of a 'relational subject' to describe the subject that has reached maturity through recognising the necessity of interdependence in the constitution of its subjectivity and the sense of self.

As seen above, for object-relations theorists, the acknowledgement of external reality and the discovery of the Other through 'separation' and 'individuation' are not seen as primarily painful or a product of frustration.⁵⁸⁴ On this basis, it has been suggested that the object-relations psychology is able to explain 'the different fundamental ways in which human beings relate themselves to one another, both as disturbed and as mature persons'.⁵⁸⁵ Recognising the positive value of interdependence for constructing political subjectivity would imply that the establishment of *ex ante* belonging is not the only available

⁵⁸² W. R. D. Fairbairn, *Psychoanalytic Studies of the Personality* (Routledge 1952) 162-63. Fairbairn argues that '[a]ny theory of ego-development that is to be satisfactory must be conceived in terms of relationships with objects, and in particular relationships with objects which have been internalized during early life under the pressure of deprivation and frustration.' However, it has been noted that, under Fairbairn's account 'what are primarily repressed are neither intolerably guilty impulses nor intolerably unpleasant memories, but intolerably bad internalized object'. E.g. Guntrip (n 580) 323.

⁵⁸³ Guntrip (n 580) 321.

⁵⁸⁴ Flax (n 513) 114-15. Unlike in the case of the 'orthodox' Freudian psychoanalysis, the main focus is on the mother-child relationship rather than on the father-child relationships. The object relation theories do not make a rigid distinction between primary and secondary processes and this arguably allows them to view reason as an 'innate potential capacity' rather than a 'faculty painfully acquired through the internalization of the authority of the father'. Flax (n 551) 249.

⁵⁸⁵ Guntrip (n 580) 357.

justification for a more relational conception of equality in EU law. Instead, an alternative justification is to focus on how more just and equal (legal) relationships between EU citizens can increase the sense of 'mature interdependence' between EU citizens which enables the full subjectivity of EU citizens as EU citizens.

The analytic category of a 'relational self' underlines that 'subjects come to understand themselves to an important degree through their relationships with others'.⁵⁸⁶ The relevance of this argument for the EU discrimination analysis and the EU principle of equality is captured in the statement that our "sameness-and-difference" depends upon the relations in which we stand'.⁵⁸⁷ It has been argued that 'the descriptive question of identity (whether our labels correspond with reality) is less important than the relational question (how law and life generate and transform relations)'.⁵⁸⁸ Similarly, comparability between EU citizens can find its justification from the claim that the relationships of equality between EU citizens enable EU citizens to become 'mature' subjects of EU law. First, this would mean that the focus of discrimination analysis must be shifted towards enhancing the equality of relationships between EU citizens. Secondly, it would become easier to justify the claim for strong comparability between all EU citizens, notwithstanding their seeming differences and/or neediness.

4.3.2 The 'subject-in-process'

The view of human beings as fundamentally rational and conscious is questioned by the structural psychoanalytic theory which stresses the role of the unconscious in constructing subjectivity.⁵⁸⁹ The central finding of the psychoanalytic theory is the idea of 'differences

⁵⁸⁶ Sevenhuijsen (n 485) 61.

⁵⁸⁷ Nourse (n 558) 27.

⁵⁸⁸ Ibid 28.

⁵⁸⁹ The so-called humanist accounts of subjectivity build upon the idea of human beings as 'fundamentally equal, rational, conscious beings, whose autonomy incorporates the potential to make informed, free choices',

within each subject'.⁵⁹⁰ What is important for EU citizenship is the way in which these theories direct us to consider the construction of subjectivity as a process. Our understanding of EU citizenship as a source of political subjectivity can benefit from the analytic category of a 'subject-in-process' which is rooted in the structural psychoanalysis. **(1)** The complexity and fragmentation of subjectivity is axiomatic for supranational identity-building which cannot argue for a unified/categorical subject. **(2)** Moreover, recognising the intra-personal complexity of human subjectivity helps us to understand better why just and equal relationships between EU citizens matter for constructing subjectivity in the supranational context. Namely, the fact that the development of subjectivity is partly repressed means that the unconscious levels of subjectivity can only be accessed indirectly, i.e. in so far as they are reflected in the self's relations to the 'Other'.

The psychoanalytic theory builds on Freud's iconic and controversial ideas of the Oedipus complex and the castration complex which he saw as being the core of human identity.⁵⁹¹ However, despite Freud's emphasis on the human development as a biological process, post-Freudian psychoanalysts tend to view the ability of 'significance attaching' as a social rather than a biological construction.⁵⁹² One example of this more structural

whereas the subject within anti-humanism is always 'secondary for any social explanation'. E.g. Rothfield (n 479) 123-25. It has also been noted that the notion of 'subject' is sometimes used in psychoanalytic theory to simply 'avoid running into the very concepts of selfhood, personhood, and individuality'. Rowley and Grosz (n 550) 183.

⁵⁹⁰ Braidotti (n 479) 166.

⁵⁹¹ See for a summary of Freud's arguments e.g. in Rowley and Grosz (n 550) 178. For Freud, the super ego is formed when the Oedipus complex is resolved and its task is to ensure that values it represents are internalized, i.e. that they will regulate the subject from within. Its repressive force reflects the struggle against the temptation of the Oedipus complex. Freud argues that the Oedipus complex is stronger in men than women and it is also resolved more definitely in their case when they identify with the father's law.

⁵⁹² See e.g. Diana Tietjen Meyers, *Self, Society, and Personal Choice* (Columbia University Press 1989) 136. However, it has also been suggested that Freud did not use the terms 'masculine' and 'feminine' as 'anatomical terms' but conceived of them in terms of the following three oppositions: 'active and passive', 'subject and object', and 'phallic and castrated'. Rowley and Grosz (n 550) 178. Rowley and Grosz note: 'Masculine and feminine are thus not tied to the child's biological sex, but to the ways in which the child is able to resolve, and identify with, the social expectations surrounding the meaning of its sex'. Ibid 179.

approach is Jacques Lacan's work which has placed the psychoanalysis within the framework of linguistics. For Lacan, both the unconscious and sexuality are 'products of the subject's constitution in language' through what he calls the 'imaginary' and 'symbolic' orders, rather than 'natural or biological essences'.⁵⁹³ Lacan's work is relevant for the analysis of EU citizenship in so far as it has provided the basis for Julia Kristeva's argument of the 'subject-in-process' which is used to explain the multiple and fragmented nature of subjectivity in the case of EU citizens.

For Lacan, the symbolic order, which constitutes social law and language, is the domain in which the child can reach the ability to 'signify' and can, thus, refer to itself as an 'I'.⁵⁹⁴ The child becomes a subject through a specific social intervention when it simultaneously becomes a 'social and speaking subject' and a 'being separated from others'.⁵⁹⁵ After the emergence of the subject through the ability to signify, "'other scene" of thought and desire' is limited to the operation of the unconscious.⁵⁹⁶ The subject, therefore, becomes 'split' between its unconscious 'identification with the image of another as the model for itself' and its conscious 'ability to signify' within the symbolic order of law, language, and social exchange.⁵⁹⁷ The 'split' of subjectivity arguably leads to repression within which consciousness cannot explain the 'whole of subjectivity'.⁵⁹⁸

⁵⁹³ Rowley and Grosz (n 550) 183.

⁵⁹⁴ Ibid 185.

⁵⁹⁵ Lacan argues that the 'function of symbolic identification' requires the recognition of the 'Name of the Father' or 'paternal function' which concentrates in itself both the 'Imaginary' and 'Real' relations and which is, therefore, always 'more or less inadequate' to the 'Symbolic' relation which constitutes it. Jacques Lacan, *The Language of the Self – The Function of Language in Psychoanalysis* (The John Hopkins University Press 1968) 41. This inadequacy of the 'Symbolic' relation, i.e. language or social law, to constitute the 'Imaginary' relation between the subject and the 'Other' indicates that the subject can emerge only when it is first disassociated from its primary identification with the '(m)other'. See further in Rowley-Grosz (n 550) 186.

⁵⁹⁶ Rowley and Grosz (n 550) 186.

⁵⁹⁷ Ibid 185-186. For Lacan, the distinction between the 'Imaginary' and 'Symbolic' orders has its roots in the so-called mirror stage of child development. It has been noted that, for Lacan, the mirror stage is the root of all later identifications' as 'the ego depends upon this primary identification'. See more about this in

The separation between the child and the (m)other is experienced by the child both as a loss of the sense of wholeness, as well as the gaining of an identity.⁵⁹⁹ In other words, the constitution of subjectivity leaves the subjects as 'the victims of the desire for the other – which is also a part of ourselves – that can never be satisfied'.⁶⁰⁰ Lacan himself argues that 'the first object of desire is to be recognized by the other'.⁶⁰¹ The unconscious can, therefore, be conceptualised as a repressed 'discourse of the other'.⁶⁰² What is interesting for the analysis of EU citizenship is the way in which Lacan's theory models the self through its unconscious identifications with others/the 'Other'.⁶⁰³ The subject is marked by its desire for the Other, but this desire is to a large extent repressed and unconscious. This complexity in the subject's identification with the 'Other' is particularly interesting for our analysis, if, as will be argued in the next section, the relationships between EU citizens can be seen as an archetype of the relationships between the self and the 'Other'/stranger.

Lacan's approach challenges the presumption of an autonomous subject. Instead, the subject is seen as fundamentally socio-linguistically constituted. However, although the

Introduction in Jacques Lacan, *The Language of the Self – The Function of Language in Psychoanalysis* (The John Hopkins University Press 1968) xiii.

⁵⁹⁸ Rowley and Grosz (n 550) 186. It has been noted that: 'Repression removes unconscious memories and wishes from access to consciousness; at the same time, it permanently preserves unconscious contents'. Ibid 187.

⁵⁹⁹ Drucilla Cornell and Adam Thurschwell, 'Feminism, Negativity, Intersubjectivity' in Seyal Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies* (Polity Press 1987) 146. Cornell and Thurschwell have summarized the consequences of this process as follows: 'The pain of this loss results in a primary repression that on one hand buries the memory of the relationship to the archaic mother in the unconscious, and on the other hand catapults the infant into the symbolic realm of meaningful discourse, in order to fulfil its desire to reestablish a relationship with an Other. But once projected into language this desire can never be satisfied in the unmediated form of the primary identification with the mother, and so for speaking subjects our discourse is always marked by a lack.' Loc.cit.

⁶⁰⁰ Ibid 146.

⁶⁰¹ Lacan (n 595) 31.

⁶⁰² Ibid 27.

⁶⁰³ Elizabeth Grosz, 'Contemporary Theories of Power and Subjectivity' in Senja Gunew (ed), *Feminist Knowledge: Critique and Construct* (Routledge 1990) 76.

Lacanian subject is always 'based on identifications with others', it arguably remains a 'paranoid and alienated construct' because the subject is always split between the conscious 'stability and unity' of the self in relation to the Other and the unconscious fear of the 'power of the other in defining the self'.⁶⁰⁴ Moreover, the critics have argued that Lacan's 'narcissistic premise' under which the 'Other' is only seen as a model for the self is mistaken because it claims that the process of signifying has no connection to the 'relations with actual "others"' but only with the 'child's image of the other as self'.⁶⁰⁵ This criticism explains why it is necessary to move beyond Lacan's analysis in order to grasp the potential of a 'split subject' for the analysis of EU citizenship without altogether denying the possibility of 'reciprocal social relations'⁶⁰⁶ in constructing EU citizenship as a source of subjectivity.

Lacan's re-reading of Freud has played a central role in the French feminist tradition. Authors such as Julia Kristeva, Luce Irigaray, and Hélène Cixous have referred to Lacan in their analysis of subjectivity. Julia Kristeva's reinterpretation of Lacan is particularly interesting for the analysis of EU citizenship because it combines the argument of a 'split subject' with a more diverse picture of the self's relations to the Other. Like Lacan, Kristeva suggests that the symbolic and social orders are 'maintained by virtue of a sacrifice' because the emergence of the subject through the signifying process happens 'at the cost of repressing instinctual drive and continuous relation to the mother'.⁶⁰⁷ On this basis, Kristeva, too, argues that the becoming of the subject requires 'a stance involving

⁶⁰⁴ Ibid 74.

⁶⁰⁵ Flax (n 513) 92.

⁶⁰⁶ Ibid 106.

⁶⁰⁷ Kristeva (n 557) 136 and 138.

otherness, distance, even limitation'.⁶⁰⁸ However, for Kristeva, the (speaking) subject is constituted not just by the 'Symbolic' order but also by what she calls the 'Semiotic' processes.⁶⁰⁹ She envisages the 'semiotic body' which '[b]efore recognizing itself as identical in a mirror and, consequently, as signifying, - - is dependent vis-à-vis mother'.⁶¹⁰ Envisaging the 'dialectical opposition' between the semiotic processes and the symbolic order allows Kristeva to assign a more positive role to the self's relation to the 'Other' in constituting subjectivity than what is possible under Lacan's account.⁶¹¹

Thus, Kristeva's theory of subjectivity does not collapse into 'narcissism' in the same way as Lacan's theory seems to do. The idea of the 'semiotic heterogeneity' makes it possible to include the reality of the intra-personal complexity of human subjectivity in the account of subjectivity without rejecting the constructive potential of inter-subjective relationships in constituting subjectivity. This is important for the analysis of EU citizenship as a source of political subjectivity because it indicates that recognising the reality of 'split subjectivity' does not automatically undermine the possibility of 'reciprocal social relations' between the subject and the Other. Moreover, the assumption of

⁶⁰⁸ Ibid ix.

⁶⁰⁹ Kristeva's analysis builds upon the attempt 'to describe the signifying phenomenon' by means of what she calls 'semanalysis'. The goal of 'semiology' is to scrutinize 'the most deeply buried logic of those unities and ultimate relations that weave an identity for subject, or sign, or sentence'. From this follows her focus on the 'underlying speaking subject'. Kristeva (n 557) vii – viii and x. It has been noted that the object of the analysis is not language in itself but the 'discourse of a split subject'. See Introduction in Julia Kristeva, *Desire in Language – A Semiotic Approach to Literature and Art* (Blackwell 1980) 6. By 'semiotic' (le sémiotique), Kristeva refers to 'a distinctiveness admitting of an uncertain and indeterminate articulation because it does not yet refer (for young children) or no longer refers (in psychotic discourse) to a signified object for a thetic consciousness'. Ibid 133. By 'symbolic' (le symbolique), she refers the 'attribute of meaning, sign, and the signified object for consciousness'. Ibid 134.

⁶¹⁰ Ibid 136. These processes are significant because they will 'prepare the future speaker for entrance into meaning and signification (the symbolic)'. Kristeva argues on this basis that the 'semiotic heterogeneity' is 'inseparable' from 'the symbolic function of significance' and that language as social practice always presupposes both of these two dispositions. Ibid 134. See further in Julia Kristeva, 'The System and the Speaking Subject' in Moi T (ed), *The Kristeva Reader* (Basil Blackwell 1986).

⁶¹¹ See Introduction in Julia Kristeva, *Desire in Language – A Semiotic Approach to Literature and Art* (Blackwell 1980) 19.

heterogeneity leads Kristeva to conclude: 'If it is true that there would unavoidably be a speaking subject since the signifying set exists, it is nonetheless evident that this subject, in order to tally with its heterogeneity, must be, let say, a questionable *subject-in-process*.'⁶¹²

Kristeva's argument of the 'subject-in-process' provides an interesting vantage point for the analysis of supranational subjectivity. The theory of a signifying subject as presented in her work associates the signifying phenomenon with 'the *crisis* or the *unsettling process* of meaning and subject' rather than with the 'coherence or identity of either *one* or a *multiplicity* of structures'.⁶¹³ These references to multiplicity and fragmentation seem particularly relevant in the EU context in which the sense of subjectivity and identity-building need to accommodate several different levels or layers. Kristeva emphasises that 'what is censured at the level of semantic complexity re-emerges in the form of a becoming'.⁶¹⁴ Similarly, it needs to be considered how the unconscious and repressed sides of the subject's relationships to the 'Other' re-emerge when subjectivity is constituted at the supranational level, i.e. when EU citizens becomes subjects on the basis of EU citizenship.

The central question is, again, whether the way in which the relationship between the self and the Other is formed through the intimate relationships at the early level of human development should inform our understanding of political agency and legal subjectivity. Kristeva's work has inspired comments stating that 'any politics will fail unless it takes the presymbolic realm into account'.⁶¹⁵ Kristeva herself has framed this

⁶¹² Ibid 135. Kristeva suggests that the speaking subject 'maintains himself or herself as such to the extent that he/she allows for the presence of two brinks'. By this, she means that one both 'recognizes oneself as subject of (others') discourse, hence tributary of a universal Law' and finds 'oneself different, irreducible, for one is borne by a simply singular speech, not merging with others'. Ibid x.

⁶¹³ Ibid 125.

⁶¹⁴ Ibid 127.

⁶¹⁵ Rowley and Grosz (n 550) 194.

thought by stating that 'the economic-political differences refer not only to visions of society but, more precisely and in the last resort for me as a psychoanalyst, to very different conceptions of the *human person* or *subject*'.⁶¹⁶ Moreover, she claims that it is important to 'envisage the differing conceptions of the human person and of subjectivity that are asserted and contested in this European space'.⁶¹⁷ It is therefore important to consider in more detail how the analytic category of a 'subject-in-process' provides us with a tool for including the unconscious and repressed relationship to the 'Other' in our account of EU citizens' subjectivity.

First, seeing subjectivity as a process shifts the focus of analysis to the 'concrete' conditions which 'structure' subjectivity.⁶¹⁸ Secondly, the argument that subjectivity has 'levels' implies that these different levels or 'self-aspects' may also be in conflict.⁶¹⁹ Thus, the account of subjectivity as a process that functions at multiple levels indicates that what is meant by 'identity' needs to be reconsidered. On this basis, it has been suggested that subjectivity can be seen as a 'multiple and discontinuous process of becoming'⁶²⁰ that can best be understood in a 'nonhierarchical way'⁶²¹. By analogy, this argument for a 'non-hierarchical' identity supports the claim that 'singling out'⁶²² just one aspect of self-identity, whether national or supranational, is unnecessary in the light of the intra-personal

⁶¹⁶ Julia Kristeva, *Crisis of the European Subject* (Other Press 2000) 115.

⁶¹⁷ Loc.cit.

⁶¹⁸ Braidotti (n 479) 98.

⁶¹⁹ Ferguson (n 522) 117.

⁶²⁰ Braidotti (n 479) 110. From this starting point, identity can be defined as 'a play of multiple, fractured aspects of the self; it is relational, in that it requires a bond to the "other"; it is retrospective, in that it is fixed through memories and recollections, in a genealogical process' and, at the same time, as something that is 'made of successive identifications, that is to say unconscious internalized images that escape rational control.' Ibid 166.

⁶²¹ Ibid 146.

⁶²² Ferguson (n 522) 122.

complexity of human subjectivity. Instead, viewing EU citizens as 'subjects-in-process' allows a more complex and multi-layered conception of what subjectivity means in the case of EU citizens.

It is clear that the concept of identity that 'bears a privileged bond to unconscious processes' cannot be assimilated with political subjectivity as 'a conscious and wilful position'.⁶²³ At the same time, however, it can be argued that 'both levels are the site of political agency' and that they are 'different but interrelated moments of in the process of defining a subject position'.⁶²⁴ Recognising this connection between the complexity of human subjectivity, on the one hand, and political identity and agency, on the other, supports the view that the 'politics of subjectivity' must amount to the rejection of 'assimilation'.⁶²⁵ (1) It is therefore important to consider how understanding EU citizens' subjectivity as a process would challenge the assimilating tendencies of the discrimination analysis under EU law when the parameters for EU citizens' agency are concerned. (2) Moreover, the idea of internal 'self-difference' as part of subjectivity supports the argument that the construction of subjectivity at the multiple levels (e.g. both national and supranational) becomes easier when the subject accepts its 'self-difference' and recognises the 'Other' as something not entirely external to its own subjectivity.

4.3.3 Political subjectivity as a dyadic process of inter-subjective relations and intra-subjective complexity

The analysis of subjectivity in Sections 4.3.1 and 4.3.2 has contributed a perspective which is generally not there when EU citizens' subjectivity and agency are considered. By outlining some basic convergences between the psycho-dynamic theories of subjectivity and the constitution of political subjectivity, this analysis extrapolated a set of theoretical

⁶²³ Braidotti (n 479) 166.

⁶²⁴ Ibid 196.

⁶²⁵ Ibid 160.

principles which can be relevant to supranational subjectivity. The object-relations theory stresses the importance of inter-personal relationships for constituting a 'relational subject', while the structural psychoanalytic theory introduces a cognitively complex and diverse conception of a 'subject-in-process'. These two insights into developmental psychology can help us to understand better EU citizenship as a source of subjectivity because they direct our attention to the following two premises: (1) '[s]ubjects come to understand themselves to an important degree through their relationships with others' and (2) 'the fragmented and multiple subject has more possibilities of experiencing the other within the self'.⁶²⁶

In the light of this analysis, constructing EU citizenship as a source of subjectivity can be seen as a two-fold process which must recognize both **(1)** the constructive potential of inter-personal relationships between those who share the status of EU citizenship and **(2)** the intra-personal complexity within the subject who needs to mediate between the local, national, and transnational attributes of subjectivity. The validity of this account depends on whether the psycho-dynamic theories of subjectivity, which are primarily focused on intimate relations and the individual psychological need, can have wider relevance for political identity and legal subjectivity. There are two levels to look at when this question is addressed. First, the need for a conceptually coherent account of subjectivity can justify the argument that the different forms of subjectivity are composed of similar elements. Secondly, however, it has been seen above that there are political theorists who take the leap from the psychological to the political and the legal, not just at the level of conceptual coherence, but also by arguing for a more substantive connection between different manifestations of human subjectivity. This thesis follows in their footsteps to see how these ideas of subjectivity can be applied to EU citizenship.

⁶²⁶ Sevenhuijsen (n 485) 60-61. On this basis, it has been suggested that an alternative account of the self must recognize 'the multiple, sometimes fractious sources of social identity', as well as 'the complexity of the intrapsychic world of unconscious fantasies, fears, and desires'. Meyers (n 517) 2.

It is important to emphasize that the 'inter-subjective' and 'intra-subjective' dimensions of subjectivity are closely intertwined and one cannot exist without the other. Namely, in so far as subjectivity emerges in the unconscious, there is no direct access to that process via the conscious because of the repression mechanisms that regulate the subject's identification with the m/Other. The fact that the unconscious sides of subjectivity cannot be accessed directly turns the focus back to the fact that the constitution of subjectivity crucially depends on whether new cognitive patterns can emerge in and through inter-subjective relations and whether these relationships can indirectly affect the subject's identification with the 'Other' at the level of the unconscious. This line of reasoning means that, if EU citizens' sense of subjectivity as EU citizens is informed by the unconscious relationship between the self and the Other, these cognitive processes may be reached only indirectly through advancing more just and equal (legal) relationships between EU citizens.

It has sometimes been argued that, by probing the 'intra-psychic evolution of personality', the psycho-dynamic theories neglect the 'broad social setting' in which the constitution of subjectivity takes place.⁶²⁷ However, this pessimism does not seem justified in the light of the feminist re-readings of these theories. As seen in the previous section, Julia Kristeva's account of the (speaking) subject allows us to engage with the intra-personal complexity of the subject without rejecting the potential of genuine inter-personal relations to constitute subjectivity. On this basis, it can be claimed that any account of subjectivity fails to fully grasp 'our constitution as split subjects'⁶²⁸ in so far as it 'denies access to the "other" in each of us'⁶²⁹. In practice, this means that the relevance of social

⁶²⁷ Meyers (n 592) 139.

⁶²⁸ Cornell and Thurschwell (n 599) 151.

⁶²⁹ Ibid 157.

relations to subjectivity will only get further support from the internal complexity of the subject.⁶³⁰

Thus, the argument that the equality of legal relationships between EU citizens is relevant for EU citizens' subjectivity as EU citizens has its basis in the (feminist) assumption that the subject's relationship to the 'Other' at the early levels of human development informs the later constitution of cultural, political, and legal identity. The analysis of EU citizens' subjectivity in what remains of this chapter is based on the view that the psycho-dynamic accounts of subjectivity are particularly relevant in the case of EU citizens, because, in the absence of ex ante belonging, the relationship between EU citizens can be seen as an archetype of the relationships between the self and the 'Other'/stranger. Including the unconscious 'other scene' in our understanding of what identity and subjectivity mean at the supranational level will direct our attention to the following questions which will be discussed in more detail in the next section:

- 1) How is EU citizens' subjectivity shaped and constituted by their relationships to the 'Other' which gets its expression in a stranger who does not yet belong?
- 2) How does the importance of this relationship for EU citizens' subjectivity transform our understanding of what constitutes a 'meaningful relationship' for the purposes of equal treatment under EU law?

To sum up, the psycho-dynamic accounts of subjectivity highlighted the following three conditions of subjectivity: **(1)** its complexity, i.e. 'the self is always an other', **(2)** its emergence as a process at several different levels, and **(3)** its dependence on social relationships/interactions. My argument of 'subjectivity through relationships' emerges from these three principles. By understanding EU citizens' subjectivity as a complex and

⁶³⁰ For instance, Cornell and Thurschwell suggest that 'genuine difference is inseparable from a notion of relationality'. Ibid 159-161.

partly internalized/unconscious process, we are able to grasp why just and equal relationships between EU citizens are so important for their subjectivity as EU citizens. The essence of this argument is captured in Jane Flax's reference to 'multiple, fluid subjectivities' which are contingent on both the 'intrasubjective and intersubjective relations among subjectivities'.⁶³¹ Similarly, it has been suggested in this section that (re)constructing EU citizenship as a source of subjectivity is a complex process which can only partly be accessed through conscious cognitive processes. From this follows the central argument that the intra-personal sense of identity on the basis of EU citizenship can only develop in and through inter-personal relations with those who share the status of EU citizenship.

This analysis indicates that to defend EU citizenship as a source of subjectivity is more complex than the mere argument of the 'choosing of a political identity' would imply. Instead, the key to the conscious and unconscious construction of subjectivity lies in social relationships. This section has suggested that EU citizens become subjects of EU law and European integration in relation to other EU citizens (horizontally) and not just in relation to the Member States or the Union (vertically). It follows from this conclusion that the 'equality of relationships' between EU citizens forms a necessary, even if not sufficient, condition for EU citizens' status as subjects of EU law and European integration. Moreover, as will be discussed in the next chapter, these relationships between EU citizens need to be constructed by EU law because they do not emerge organically on the basis of ethnic or cultural or democratic belonging. First, however, the next section will present a more philosophical argument in support of the 'subjectivity through relationships'.

⁶³¹ Jane Flax, *Disputed Subjects: Essays on Psychoanalysis, Politics and Philosophy* (Routledge 1993) 102 and 106. Flax suggests that subjectivity has a 'social dimension' as it develops in and through our relationships with other people but that it is also constituted 'in and through networks of relations, fantasies, and expectations among and about internal objects'. Ibid 119.

4.4 EU citizenship and the 'Other': towards a second-person perspective

EU citizens can be considered both (1) as 'relational subjects' whose sense of subjectivity as EU citizens is constituted in and through their relations with other EU citizens and (2) as 'subjects-in-process' whose relations to the 'Other' are affected by unconscious processes. Bringing these two dimensions of subjectivity together indicates that any attempt to construct EU citizenship as a source of subjectivity, either politically or legally, must advance just and equal legal relationships between EU citizens both **(1)** as a means of creating and protecting the space in which the inter-relational construction of subjectivity becomes (even in theory) possible and **(2)** as a means of creating and protecting the space in which the unconscious relation to the 'Other' can be reshaped indirectly in so far as the 'Other' now takes its form in the non-national and needy EU citizens who do not yet belong to the society of the host Member State.

This section will support the idea of 'subjectivity through relationships' with a more philosophical argument about just and equal relationships between EU citizens as the basis for their subjectivity. The basic principles of philosophical and political personalism are used to show that treating EU citizens as persons is a necessary, even if not sufficient, precondition for their subjectivity (Section 4.4.1). This analysis will, then, be developed further by discussing how a genuine 'second-person perspective' as a condition for the full personhood and subjectivity can only emerge in relation to the 'Other' or stranger or 'Thou' for whom the subject needs to accept responsibility (Section 4.4.2). Finally, this section draws these philosophical reflections together by suggesting that the fact that a 'second-person perspective' can create an independent source of responsibility indicates that constructing EU citizenship as a source of subjectivity will create new 'meaningful

relationships' for the purposes of equal treatment under European Union law (Section 4.4.3).

4.4.1 EU citizens: persons or non-persons?

The psycho-dynamic theories of subjectivity have challenged the 'unified character' of the subject by showing that human subjectivity consists of several different 'levels', some of which are unconscious.⁶³² However, it has been noted that any attempt to deconstruct or reconstruct 'essential identities' needs to grasp the 'variety of social relations' which are relevant for applying the principle of equality.⁶³³ Both the object-relations theory and the structural psychoanalysis share the assumption that 'the subject comes to be(ing) in the field of the Other'.⁶³⁴ This interest in 'otherness' and the self's relationship to the 'Other' explains why the psycho-dynamic theories of subjectivity are relevant for political thought in general,⁶³⁵ as well as for the analysis of EU citizenship in particular.

It has been noted that 'a process whereby the identity of European citizens is negotiated in emotional reflex with a concrete other, is not easily explained in formal legal

⁶³² Chantal Mouffe, 'Feminism, Citizenship and Radical Democratic Politics' in Judith Butler and Joan W. Scott (eds), *Feminists Theorize the Political* (Routledge 1992) 370.

⁶³³ Ibid 371-72.

⁶³⁴ Flax (n 513) 126.

⁶³⁵ Drucilla Cornell, 'Gender, Sex, and Equivalent Rights' in Judith Butler and Joan W. Scott (eds), *Feminists Theorize the Political* (Routledge 1992) 284 The psychoanalytic insight into social theory can arguably grasp 'a broader concept of relevant figures of Otherness'. Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) 134. Lacey suggests that '[w]hat is central is that the logical relation of identity to otherness has to be denied, but constantly threatens to surface again'. On this basis, she argues that there is 'a very close connection between the project of psychoanalytic interpretation and that of reflection upon the institutional structure of social orders'. Ibid 134-135. Lacey explains this by noting that: 'In the quest for identity, the Other thus becomes an object of hatred and fear; but this hatred of the Other is in fact a displaced hatred of the self'. Ibid 135. However, some have noted that '[b]y claiming that some identifications are more primary than others', the psychoanalytic theories may also fail to recognize discriminating practices which are embedded in 'that particular narrative of identity formation'. Butler (n 555) 330. For instance, Judith Butler suggests that the method of existential critique can, therefore, provide analytical tools for understanding subjectivity through 'the metaphysical order of becoming' instead of the 'metaphysical order of being'. Judith Butler, 'Variations on Sex and Gender: Beauvoir, Witting, and Foucault' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: Essays on the Politics of gender in Late-Capitalist Societies* (Polity Press 1987) 141.

categories'.⁶³⁶ Moreover, it has also been argued that reshaping essentialist identity categories must locate the self 'in concrete social relations, not only in fictive or purely textual conventions'.⁶³⁷ What these two statements have in common is their attempt to challenge the 'categories of the person' which define narrowly 'what would constitute equality'.⁶³⁸ At its simplest, the notion of 'identity' refers to the self 'as reflexively understood by the person'. However, it has been noted that becoming a person 'is not just to be a reflexive actor, but to have a concept of a person (as applied both to the self and others)'.⁶³⁹ Similarly, the becoming of EU citizens as subjects of EU law depends on their treatment as persons, which, as will be discussed in this section, can only happen in relation to the 'Other'.

The idea of the person as the starting point for understanding the world can be derived from philosophical, political, or theological personalism. Philosophical personalism developed in the nineteenth century as a counter-reaction to the allegedly depersonalizing elements of Enlightenment rationalism and pantheism,⁶⁴⁰ whereas

⁶³⁶ Everson (n 380) 636.

⁶³⁷ Flax (n 513) 232.

⁶³⁸ Cornell (n 635) 293.

⁶³⁹ On this basis, it has also been argued that '[t]o be a 'person' is not just to be a reflexive actor, but to have a concept of a person (as applied both to the self and others)'. E.g. Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press 1991) 53. Cf. Foucault's argument of the 'techniques of the self' as procedures that 'determine', 'maintain', and 'transform' individual identity. Michel Foucault, 'Technologies of the Self' in Paul Rainbow (ed), *Ethics: Subjectivity and Truth (Essential Works of Michel Foucault, 1954-1984)* (Penguin 2000).

⁶⁴⁰ Philosophical personalism originally emerged in the writings of such philosophers as Jacobi, Schelling, Lotze and Pringle-Pattison as a critical reaction to the arguably impersonalistic or depersonalizing ideas of the Enlightenment and Romanticism (e.g. the rationalistic and romantic forms of idealism and pantheism, above all Comte's philosophical positivism and Hegel's absolute idealism). These first advocates of personalism argued for 'idealistic personalism', although the European personalism in the twentieth century turned away from idealism towards phenomenological, existential and Thomistic foundations. See further in Jan Olof Bengtsson, *The Worldview of Personalism: Origins and Early Development* (OUP 2006).

theological personalism has its roots in medieval Christianity.⁶⁴¹ Thus, personalism is not a single theory or philosophical school but it consists of several different versions, some of which may be mutually conflicting.⁶⁴² European personalism⁶⁴³ draws on existentialism, phenomenology, and Thomism, whereas its American counterpart is more directly based on the thoughts and legacy of so-called 'speculative theists', including Jacobi, Schelling and Lotze, and their idealism.⁶⁴⁴ It is, nonetheless, possible to outline certain

⁶⁴¹ The concept of a person as we know it was first developed in the theological context. The concept of a person and the relationship of between a 'person' and a 'nature' needed more precision in order to clarify the following two theological doctrines: the Trinity (i.e. three persons in one God) and the incarnation of the second person of the Trinity (i.e. two natures- divine and human – in one person). The purely philosophical definition was first outlined by Boethius who stated that persons are individuals possessing a rational nature ('persona est naturae rationalis individua substantia'). However, the concept of personhood has travelled a long way from the above 'Trinitological' or Boethian conceptions. The modern idea of personhood is now based on the concepts of subjectivity and self-consciousness. In this regard, Immanuel Kant's emphasis on both the subject and the object of knowledge paved the way for the idealistic forms of personalism. See further in Robert Spaemann, *Persons – The Difference between 'Someone' and 'Something'* (OUP 2006).

⁶⁴² Emmanuel Mounier speaks of 'a plurality of personalism' and Jacques Maritain writes: 'Yet nothing can be more remote from the facts than the belief that "personalism" is one school for doctrine'. Emmanuel Mounier, *Personalism* (Routledge & Kegan Paul Ltd 1950) viii and Jacques Maritain, *The Person and The Common Good* (Geoffrey Bles 1948) 10. Personalism draws its foundations both from human reason and from human experience. Although many personalist thinkers have been realists and theists, equally many are idealists who believe that reality is constituted by human consciousness. In other words, personalism can be either theistic or atheistic. Moreover, it is common to distinguish between the strict and broad senses of personalism. Strict personalism has its roots in phenomenology and existentialism and it views the person as the centre of a philosophical system that originates from an intuition, self-awareness, and experience of the person herself. (e.g. Mounier) In contrast, personalism in its broader sense gives the person the central place in philosophical discourse, but it does not conceive of philosophical discourse as a development of immediate personal experience or intuition (e.g. Maritain, Spaemann, Wojtyła) See further Thomas D. Williams, *Who Is My Neighbor?* (The Catholic University of America Press)

⁶⁴³ The school of European personalism developed in the aftermath of the First World War to suggest the human person as a criterion according to which the economic and political crisis could be solved. Some of the French personalists, for instance Emmanuel Mounier, argued for a radical 'spiritual' revolution, claiming that even liberal democratic values might have impersonalistic tendencies and might not, therefore, suffice to protect society against totalitarianism. Mounier's thoughts influenced other thinkers such as Gabriel Marcel, Denis de Rougemont, Jacques Maritain and Paul Ricœur. Existentialism was typical of the French personalism, whereas most German personalists adopted the phenomenological realism as their methodological approach. In Germany, Edmund Husserl's phenomenological realism influenced such thinkers as Max Scheler, Dietrich von Hildebrand, Edith Stein and Roman Ingarden. Realist phenomenologists focused on exploring the ultimate structures of being through human experience with the aim to reconnect philosophical reflection and discourse with objective reality. However, for instance Husserl adopted later in his life a more idealist approach to phenomenology. See further in Williams (n 642).

⁶⁴⁴ What is called American personalism developed at the end of the nineteenth century and in the beginning of the twentieth century under the influence of such thinkers as Borden Parker Bowne, George H. Howison and Edgar Sheffield Brightman. This philosophical school differs from European personalism in the sense that, instead of presenting a critique of idealism, it has provided its own model of idealism by defining being as personal consciousness ('personal idealism'). See further in Thomas D. Williams and Jan Olof Bengtsson, 'Personalism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition) <http://plato.stanford.edu/archives/sum2013/entries/personalism/>

commonalities and basic principles which are shared by all the main forms of personalist thought. Above all, personalists are interested in the experience, status, and dignity of human beings as persons. These principles provide a point of comparison for a concept of a person which underlies the status of EU citizenship.

The common denominator for different branches of philosophical and political personalism is the idea of personhood as the ultimate reality and value. Personalism builds on the proposition that the difference between persons and non-persons is 'one of kind' and not just 'one of degree'.⁶⁴⁵ This idea of the uniqueness of the person in relation to the material world leads to the argument that the person alone is 'someone' rather than 'something'.⁶⁴⁶ Besides the difference between persons and non-persons, personalism distinguishes between the two ways in which one can relate to the reality: the 'I-Thou' relationships are open to the Other, whereas the 'I-It' relationships lead to the objectivization of the Other.⁶⁴⁷ Thus, although personalism defends an understanding of personhood as a unique and inviolable status, it is not so much a theory of the person, but a theory of how persons interact, communicate, and relate to one another.

The challenge imposed on EU citizenship by political and philosophical personalism is whether EU citizens are *de facto* treated as subjects, rather than the mere objects, of European integration. For personalists, a genuine understanding of the person and the recognition of her as a personal subject are closely intertwined. In its modern sense, subjectivity is thought to consist of such elements as self-consciousness, interiority, freedom, and personal autonomy. This means that subjectivity appears as something more

⁶⁴⁵ Along with the subjectivity, man's ability to reason is thought to differentiate him from objective entities. See further in Williams and Bengtsson (n 644).

⁶⁴⁶ Spaemann (n 641).

⁶⁴⁷ Martin Buber, *I and Thou* (1923, translated in English in 1937). Buber also argues that the fundamental difference between these two relationships draws from a man's attitude towards the reality, even if the sphere in which the relationship arises may also affect the form it takes.

than the mere ability to act which can equally be assigned to non-personal beings. Personalism underlines the fact that a person experiences herself as a subject from the inside, i.e. it 'signifies interiority to self'. From this starting point follows that self-determination in relation to the 'I' of the acting subject and person is viewed as the 'efficient cause' of action. Self-determination is therefore argued to lead to a deeper sense of responsibility for action.⁶⁴⁸

Thus, personalists underline that the causality of action presumes the equal status which allows the subject to act freely and to exercise his/her self-determination. It is for this reason that the idea of personhood can provide a mediating factor between the ideal of 'active agency', on the one hand, and that of a 'fundamental status', on the other. What is important for the analysis of EU citizenship is the argument that the equal status, including freedom and self-determination, is a precondition of responsible actions. That the responsible agency can only emerge from subjectivity is captured in the statement that '[f]reedom means that one is responsible for one's choices but also for one's self'.⁶⁴⁹ In other words, the status of equality does not exist in isolation or simply for the sake of its own existence but, rather, it enables agency and places responsibility on the agent by drawing him/her into the 'process of becoming'.

Accordingly, it is the person's subjectivity (and not his agency) which conditions other's ethical responsibility towards him. The idea of the uniqueness of persons is intertwined with the argument that dealings with persons must depend on a 'different ethical paradigm'. The dignity of the person is argued to give rise to particular moral requirements or standards. First, the claim for dignity rejects the possibility of valuing

⁶⁴⁸ E.g. John Macmurray has argued that '[t]he Self must be conceived not theoretically as subject, but practically, as agent'. John Macmurray, *The Self as Agent* (Faber and Faber 1957) 38.

⁶⁴⁹ Williams and Bengtsson (n 644).

persons on the basis of their 'utility'. Secondly, the person can never be assimilated with or subordinated to the collectivity. Thirdly, what one deserves under the principles of justice is thought to primarily depend on one's personhood.⁶⁵⁰ These considerations imply that the status of EU citizenship in its current form is not a status based on the idea of personhood. To the extent that EU citizens' right to equal treatment is conditioned on the establishment of a connecting factor and a real link, the value attached to the status of EU citizenship seems to remain utility-based.

Affirming EU citizens as subjects, and thus as persons, can be seen as a crucial step for implementing the objectives of European integration in the post-Lisbon climate, where emphasis is increasingly placed on the democratic values of integration. Deciding which aspects of agency are regarded as relevant for the comparisons between nationals of the Member State and nationals of other Member States vitally depends on our reply to the question 'what is a person' for the purposes of European integration.⁶⁵¹ This section has demonstrated how the basic proportions of philosophical and political personalism can provide a normative framework within which the ideal of active and responsible agency can co-exist with that of the constitutive status and EU citizens' subjectivity. Affirming EU citizens as subjects of EU law and European integration will require recognising their capability of self-determination and, thus, their capability for responsible actions – however, not responsible for the exercise of 'active agency', as discussed in Chapter 3, but for the *becoming of subjects* as outlined in this chapter.

The personalist accounts of subjectivity reject the dualism between the material and non-material dimensions of the world and the person. Instead, they maintain that the

⁶⁵⁰ See in more detail in Williams (n 462).

⁶⁵¹ For instance, Andrew Evans writes: 'persons from the various Member States will usually be alike in some respects and different in other respects. Hence, criteria are necessary to determine which similarities demand like treatment and which differences demand differential treatment'. Evans (n 130) 95.

biological and economic explanations of the reality cannot be understood apart from the moral values, systems, and doctrines within which the biological and economic necessities function.⁶⁵² It seems to me that here the project of European integration cannot but agree with the claim that '[t]he difficulty is how rightly to think this notion of transcendence'.⁶⁵³ The creation of supranational citizenship is clearly a transcendental project but it has not always been clear, and may still not be, which system of values underpins the goal of the 'movement transcendence'⁶⁵⁴ in the case of EU citizens. In the words of Advocate General Mengozzi in the recent *Dereci* case, 'This situation is, I confess, not very satisfactory from the point of view of legal certainty'.⁶⁵⁵

The analysis of EU citizenship can no longer avoid the question of which philosophical conception of personhood and subjectivity is embedded in the interpretation of EU citizenship rights. However, it has been noted that the debate about 'personhood' is inadequate for addressing the specific concerns related to citizenship.⁶⁵⁶ The (political) agency of citizens cannot be reduced to the mere claim of personhood if we do not want to collapse into cosmopolitanism and universalism. It has even been argued that 'the Self has its being only in its agency'.⁶⁵⁷ However, this connection between subjectivity and agency makes it all the more important to understand what the conditions of subjectivity are in the case of EU citizens, i.e. under what conditions the 'Self' which can be an agent exists. Namely, Chapter 3 has already shown that it is the presence of subjectivity that makes the

⁶⁵² Mounier (n 642) 8-9.

⁶⁵³ Ibid 5.

⁶⁵⁴ Ibid 68.

⁶⁵⁵ C-256/11 *Murat Dereci*, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké, Dragica Stevic v Bundesministerium für Inneres 15 November 2011, Opinion of AG Mengozzi, para 49.

⁶⁵⁶ John Shotter, 'Psychology and Citizenship: Identity and Belonging' in Bryan S. Turner (ed), *Citizenship and Social Theory* (SAGE Publications 1993) 116.

⁶⁵⁷ John Macmurray, *Persons in Relation* (Faber and Faber 1961) 15.

(political) agency in its full potential possible. Or, as John Macmurray has put it, 'an agent is also a subject'.⁶⁵⁸ At the same time, it is important to bear in mind that, as discussed in this section, treating someone as a person is a precondition for their full subjectivity and, thus, for their agency.

4.4.2 Subjectivity and the second-person perspective

Political personalism can provide an important critical tool for the analysis of EU law in so far as relationships are constitutive both for personalism and for European integration. As a political theory, personalism is strongly relational. The central paradigm is that persons never exist in isolation. Political personalism rejects both radical individualism and radical collectivism.⁶⁵⁹ Instead, it views persons as 'beings-for-relation'. Relationships form the essence of personhood and the claim for responsibility follows from this, as discussed below in this section. The idea of constitutive relationships speaks directly to the objectives of European integration as expressed in the founding treaties of the EU. However, the unique insight of personalism is that '[r]elation is proper only to the person'.⁶⁶⁰

The inherent connection between 'personhood' and 'relationships' is beautifully articulated in Emmanuel Levinas' phenomenological account of our original experience of the other person. This analysis is relevant for the thesis because Levinas' argument about the 'second-person perspective' can provide the philosophical basis for 'subjectivity through relationships' as outlined in this chapter. According to Levinas, our 'metaphysical desire' is always directed toward 'the absolutely other'.⁶⁶¹ From this starting point, he envisions how the choice for communication allows us to welcome the stranger and to 'receive from the

⁶⁵⁸ Ibid 160. Macmurray argues not just that the Self 'can be subject only because it is agent' but also that the Self 'can be agent only by being also subject'. Macmurray (n 648) 100-02.

⁶⁵⁹ See e.g. Maritain (n 642).

⁶⁶⁰ Williams and Bengtsson (n 644).

⁶⁶¹ Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Duquesne University Press 1969) 33.

Other beyond the capacity of the I, which means exactly: to have the idea of infinity'.⁶⁶² Moreover, Levinas also suggests that 'I has access to the Other 'not through a comparison of myself with the other' but 'from the society I maintain with him'.⁶⁶³ The possibility of communication and discourse, thus, implies that the self can have 'an existence that is more than his interior existence'.⁶⁶⁴

This metaphysical starting point leads Levinas to suggest that the subject's 'interiority' is something which is 'at the same time closed and open'. The subject's capability of being is therefore partly defined by the Other who is always 'exterior' to the subject.⁶⁶⁵ By making this connection between the interior and exterior constitution of subjectivity, Levinas is able to claim that only 'in approaching the Other I attend to myself'.⁶⁶⁶ Moreover, he argues further that the 'urgency of response' to the Other induces responsibility and 'as responsible I am brought to my final reality'.⁶⁶⁷ On this basis, Levinas concludes that '[t]o be in oneself is to express oneself, that is, already to serve the Other'.⁶⁶⁸ What is equally important, however, is that the Other does not 'negate' the subject in

⁶⁶² Ibid 51. Levinas' vision is that the Other does 'reveal himself in his face'. For Levinas, '[t]he face to face' represents 'an ultimate situation' which 'involves a calling into question of oneself, a critical attitude which is itself produced in face of the other and under his authority'. Ibid 75 and 81.

⁶⁶³ Ibid 121. For Levinas, 'pluralism' refers to 'an attitude of an I with regard to the Other' which 'implies a radical alterity of the other, whom I do not simply conceive by relation to myself, but confront out of my egoism'. Levinas develops this thought further by noting that '[t]he alterity of the Other is in him and is not relative to me; it reveals itself'. Loc.cit.

⁶⁶⁴ Ibid 182.

⁶⁶⁵ Ibid 147 and 149. It also means that '[t]he I is not a being that always remains the same, but it is the being whose existing consists in identifying itself, in recovering its identity throughout all that happens to it.' Ibid 36.

⁶⁶⁶ Ibid 178.

⁶⁶⁷ Loc.cit.

⁶⁶⁸ Ibid 183.

'calling it to responsibility', but, on the contrary, the subject is 'found and justified' in that call to responsibility for the Other.⁶⁶⁹

The analysis of EU citizenship as a source of subjectivity can benefit from considering how Levinas' ideas of subjectivity and infinity are produced 'in sociality'.⁶⁷⁰ The central idea in Levinas' account of subjectivity is that meeting the Other in his/her 'alterity' constitutes the self. What he calls the 'resistance' of the Other is, therefore, given 'a positive structure: ethical'.⁶⁷¹ Namely, the relation with the Other in the form of discourse will assign the self to responsibility.⁶⁷² Subjectivity can then be understood as 'the coming to pass of responsibility itself' when 'the "I" is singled out by the other'.⁶⁷³ This same intuitive idea is articulated more clearly in John Macmurray's argument that, in order to grasp the essence of subjectivity and, thus, agency, it is important to bear in mind that 'the Self exists only in dynamic relation with the Other', i.e. 'the Self is constituted by its relation to the Other'.⁶⁷⁴

⁶⁶⁹ Ibid 194 and 197. Levinas suggests that '[t]he other precisely reveals himself in his alterity not in a shock negating the I, but as the primordial phenomenon of gentleness'. This means that the very 'dwelling which makes the separation of the human being possible' will already 'imply a first revelation of the Other'. Ibid 150-51.

⁶⁷⁰ Loc.cit.

⁶⁷¹ Loc.cit.

⁶⁷² Ibid 213.

⁶⁷³ Williams and Bengtsson (n 644).

⁶⁷⁴ Macmurray (n 657) 17. MacMurray distinguishes between 'personal' and 'impersonal' relations and 'direct' and 'indirect' relations. Ibid 30. He argues that only 'direct relations' may be 'personal'. Ibid 43. He also distinguishes between the negative idea of 'society' and the positive idea of 'community' on the basis of whether the bond of human association is 'impersonal' or 'personal'. Ibid 147. For Macmurray, a community is 'a unity of persons as persons' and it 'cannot be defined in functional terms'. Ibid 157. This leads Macmurray to argue that 'the unity of a community of persons, each in personal relationship with all the others' can only be represented symbolically through 'the idea of a personal Other who stands in the same mutual relation to every member of the community. Macmurray notes that '[i]n its full development, the idea of a universal personal Other is the idea of God'. Ibid 164. However, Macmurray also considers the implications of his argument for 'indirect' relations in the field of politics. He writes: 'Where relations are indirect it can only be potential; and this means that if we did come into direct relation with another person the relation would be positively motivated'. Ibid 189. This is where 'law' steps in. Namely, Macmurray notes that 'where our practical relations are indirect, - - the justice of our actions depends upon a system of law'.

When we consider how the relationship to the 'Other' shapes EU citizens' subjectivity as EU citizens, it is good to bear in mind that Macmurray's relational account of subjectivity and identity emphasises that while '[e]ach realizes himself in and through the other', 'the other remains really other'.⁶⁷⁵ What is important is that 'they are then related *as equals*' but 'equality is intentional: it is an aspect of the mutuality of the relation'.⁶⁷⁶ The argument of just and equal relations as a source of subjectivity has, therefore, nothing to do with 'assimilation'. On the contrary, it simply indicates that persons 'know themselves to be persons among persons' by using the 'second personal pronoun'.⁶⁷⁷ For instance, Annette Baier has captured this connection between the self and the 'Other' in her statement that '[p]ersons essentially are second persons who grow up with other persons'.⁶⁷⁸ On this basis, she concludes that 'we are second persons before we are first or third persons'.⁶⁷⁹ Similarly, recognising and deepening the connection between the first-person and the second-person perspectives is crucial for the emergence of EU citizens' subjectivity as EU citizens.

It has been argued in this chapter that a more balanced view of agency in EU law would require a more thorough understanding of how the agent's subjectivity develops both inter-personally and intra-personally. It can now be concluded that ignoring the 'second-person perspective' amongst the parameters of relevant agency leaves EU citizens

Ibid 196. On this basis, he underlines that '[t]he primary presupposition of law is then the will of justice in society'. Ibid 202.

⁶⁷⁵ Ibid 158.

⁶⁷⁶ Ibid 158. Macmurray concludes on this basis that '[t]he unity of the personal is, then, to be sought in the community' and that 'since persons are agents, this community is not merely matter of fact, but also matter of intention'. Ibid 27. This emphasis on 'intention' leads Macmurray to suggest that 'the conception we have of our relations to one another determines the relations themselves'. Ibid 148.

⁶⁷⁷ Annette Baier, *Postures of the Mind – Essays on Mind and Morals* (Methuen 1985) 89.

⁶⁷⁸ Ibid 84. According to Baier, 'a person, perhaps, is best seen as one who was long enough dependent upon other persons to acquire the essential arts of personhood'. Loc.cit.

⁶⁷⁹ Ibid 90.

deprived as persons and, thus, prevents EU citizenship from developing as a source of subjectivity. At the same time, however, this analysis leads to a more positive conclusion: If the genuine second-person perspective is possible, as has been discussed in this section, and if it follows from the way in which the subject emerges from its relationships to the Other through accepting responsibility for the Other, a new source of 'meaningful relationships' for the purposes of equal treatment will arise from recognizing EU citizens as full subjects of EU law and European integration.

4.4.3 A meaningful relationship to the 'Other'

The subject as a person can only come into existence in and through its relations to the 'Other'. In particular, the previous section showed that those relationships within which subjectivity finds its existence require a 'second-person perspective' in relation to the 'Other'. This section will return to the research question by discussing in more detail how the connection between (political) subjectivity and the 'second-person perspective' informs our understanding of what constitutes a 'meaningful relationship' for the purposes of equal treatment in EU law. It will be suggested that the emergence of EU citizens' subjectivity through a second-person perspective will transform 'meaningful relationships' because it creates a new sense of responsibility in relation to the 'Other' who is still a stranger and who now appears as a non-national Union citizen who is both needy and dependent.

Accepting responsibility for the 'Other' is a necessary precondition for a genuine 'second-person perspective' and, thus, for full personhood and subjectivity. This means that relationships which would not exist otherwise can become relevant as part of the discrimination analysis because they would strengthen EU citizens' subjectivity by enabling the 'second-person perspective' in relation to the 'Other'. On this basis, it can be concluded that a more relational interpretation of the EU principle of equality can be justified by referring to how just and equal relationships between EU citizens are necessary

for constructing their subjectivity as EU citizens. However, it is important to consider in more detail how the general premise that social relationships are important for the constitution of political subjectivity can justify the argument that *special legal relationships* between EU citizens will advance their subjectivity as EU citizens.

It is widely recognised that (1) law can give birth to relations that did not exist before and (2) these relations may be discriminatory.⁶⁸⁰ However, it still needs to be asked *what kind of relationships law ought to create and why*. The analysis of subjectivity can contribute to a better understanding of its political and legal 'consequences'.⁶⁸¹ Similarly, the critical (Section 4.2), the theoretical (Section 4.3), and the philosophical (Section 4.4) analysis of subjectivity in this chapter can help us to articulate what kind of relationships EU law ought to create in order to (re)construct EU citizenship as a source of subjectivity. It has been noted that 'subjects are formed through exclusionary operations'.⁶⁸² Underlying this claim is a social constructivist viewpoint, according to which our relations 'are open to revision through the modification of powerful social institutions such as law'.⁶⁸³ The law can therefore be seen as an 'important discursive apparatus' which may have 'enabling and/or constraining effects on human agency'.⁶⁸⁴

The necessity of a constructive approach becomes clear if we define EU citizenship as a legal status which can, nonetheless, create a sense of identity/subjectivity beyond the traditional patterns of cultural and ethnic belonging. In this chapter, the analysis of EU citizenship has built on the connection between citizens' agency and their

⁶⁸⁰ See e.g. Nourse (n 558) 30. By discrimination, Nourse refers to 'discrimination of relation, a rule that reenacts a relation of inferiority and invisibility'. Ibid 39.

⁶⁸¹ Flax (n 631) 109.

⁶⁸² Butler (n 512) 14.

⁶⁸³ Lacey (n 635) 3.

⁶⁸⁴ Sevenhuijsen (n 485) 31.

subjectivity. This analytic approach has its roots in a social constructivist view which directs our attention to the question of how agency and subjectivity are constituted in relation to the external world. Instead of adopting the view of the 'third-person, external observer standpoint', a constructivist perspective both allows and requires us to approach political subjectivity as 'the situation between the first and the second-persons'.⁶⁸⁵ From this starting point, it seems logical to argue that the relationships which matter most for EU citizens' subjectivity as EU citizens are those (specific) social and legal relationships that are formed in relation to other holders of the status of EU citizenship.

For instance, Nicola Lacey has suggested that we must pay more attention to how law promises 'identity for those who are both eligible for and willing to accept membership of its community'.⁶⁸⁶ From this starting point, she claims that the 'challenge of reconstructing a notion of legal subjectivity or subjecthood' is closely connected to 'the possibility of extending law's communities – in terms of both of access to powerful interpretative communities and of examining substantive questions about the meaning of membership of law's community as subject'.⁶⁸⁷ A similar argument has been presented in the context of European and international law by those who underline the need to consider 'why and for whom do such legal systems exist'.⁶⁸⁸ On this basis, it has been suggested that more attention needs to be paid to how the 'paradigm subject of law' is defined.⁶⁸⁹

⁶⁸⁵ Shotter (n 656) 119 and 121.

⁶⁸⁶ Lacey (n 635) 125.

⁶⁸⁷ Ibid.

⁶⁸⁸ Christopher Harding, 'Legal Subjectivity as a Fundamental Value: the Emergence of Non-State Actors in Europe' in Kim Economides and Lammy Betten and John Bridge and Andrew Tettenborn and Vivien Shrubbsall (eds), *Fundamental Values* (Hart 2000) 115.

⁶⁸⁹ Lacey (n 635) 14.

The need to rethink the legal subject is particularly strong in the field of anti-discrimination law, where the traditional rights discourse tends to emphasise the 'sameness' between people.⁶⁹⁰ It has been noted that a 'reconstruction of equality' needs to address those 'limitations' which follow from the accepted standard of comparability.⁶⁹¹ This concern is also captured in the statement that '[b]etter theories of justice will require different accounts of what subjectivity might be'.⁶⁹² Thus, although the analysis of subjectivity in this chapter cannot give a direct answer to the question of how the principle of equality should be defined between EU citizens when it comes to their access to social benefits in the host Member State, it provides a justification for recognizing equality as a 'normative ideal of human relationships' even in the absence of a full democratic pedigree in EU constitutional law and, thus, introduces one solution to the EU 'Equality Problem', as discussed in Chapter 2.

It can be concluded that the relationship between 'us' and the 'Other' defines the whole project of European integration in a fundamental way because that relationship makes possible the becoming of EU citizens as full subjects of European integration – as opposed to being its mere objects. This statement has its basis in the view that EU citizens must be treated as persons before they can become full and equal subjects of EU law and European integration. This argument for the equality of relationships between EU citizens is important because it does not collapse into cosmopolitanism or universalism. In contrast, the normativity of just and equal relationships under this account is derived from the becoming of EU citizens as subjects of EU law as EU citizens rather than from their mere

⁶⁹⁰ Martha Minow, *Making All the Difference – Inclusion, Exclusion, and American Law* (Cornell University Press 1990) 146 and Lacey (n 635) 28.

⁶⁹¹ E.g. Lacey (n 635) 30. See also Minow (n 690) 174 and 213. Minow argues that what she calls the 'social-relations approach' enables 'critiques of the ways issues about difference have been framed'.

⁶⁹² Flax (n 631) 111.

humanity - but, as mentioned above, this sense of subjectivity is only possible if EU citizens are first treated as persons.

This is not to say that horizontal relations between EU citizens would form the only relevant category of inter-relations for the project of European integration. Other types of relations, such as intergovernmental relations, are equally important. However, horizontal relations between EU citizens are argued to be constitutive relations in a unique way because only they will enable the becoming of EU citizens as full and equal subjects of EU law and European integration. Moreover, if just and equal relationships between EU citizens are crucial for their subjectivity as EU citizens, as has been claimed in this chapter, they must be constructed by law in the absence of cultural or ethnic belonging or full democratic pedigree. The practical and theoretical implications of this suggestion for the constitutional order of the EU will be explored further in the final chapter of the thesis (Chapter 5).

4.5 Conclusion

This chapter used the feminist critique of citizenship to back up the claim that the idea of subjectivity is central for a more balanced view of agency in the case of EU citizens. It then moved on to explore how the conditions of subjectivity are defined in those psycho-dynamic theories of human development which underlie the feminist arguments of agency and subjectivity. On the basis of this analysis, the chapter suggested that the two historical psychoanalytic traditions, the object-relations theory and the structural model, can provide useful analytical tools for understanding EU citizens as subjects of EU law and European integration. The findings of this analysis were conceptualised by suggesting that EU citizens must be understood both (1) as 'relational subjects' whose sense of subjectivity depends on inter-subjective relations with other EU citizens and (2) as 'subjects-in-process'

whose sense of subjectivity is marked by the unconscious and fragmented intra-personal relationship to the 'Other'.

This chapter concluded that EU citizens can become full and equal subjects of European integration only in and through relationships in which they accept responsibility for the 'Other', i.e. for the stranger who does not yet belong. Recognizing EU citizens as subjects of EU law and European integration could therefore legitimise a more relational view of equality in EU law even in the absence of a full democratic pedigree. And, if we can agree that the equality of relationships does matter for EU citizens' full subjectivity, that implies that those relationships must be constructed by law because they will not emerge organically. The EU principle of equality can, then, provide the main tool for granting that those relationships are just and equal. The final chapter of this thesis will focus on the question of what theoretical and practical implications this premise will have on the interpretation of the EU principle of equality, both as a constitutional principle and a fundamental right.

5 EU Citizens as Equal Subjects of EU Law: Practice and Theory

5.1 Introduction

EU law needs to adopt a more balanced view of agency if it aims to live up to its recent commitments to fundamental and human rights at the level of primary law. This thesis has demonstrated how the current activity-based conception of equality leads to paralysing self-contradictions in the interpretation of EU citizenship rights. An alternative, more status-based, view of agency can follow from a more serious engagement with EU citizens as full and equal subjects of EU law and European integration. The previous chapter introduced a set of theoretical principles which are relevant to the construction of political subjectivity in the transnational context. In this chapter, these principles will be applied to EU constitutional law and theory.

This chapter will conceptualise the argument that EU citizens' subjectivity as EU citizens requires just and equal relationships between those who share the status of EU citizenship by introducing what is called the 'equality of relationships' paradigm (Section 5.2). It will then move on to discuss what implications this paradigm will have for the constitutional order of the EU both in practice, that is, at the level of discrimination analysis, and in theory, that is, at the level of integration theory. First, I will explain how the 'equality of relationships' paradigm defines just and equal relationships as the essence of EU citizens' general right to equal treatment and, thus, introduces a new substantive test for legitimate differential treatment between EU citizens (Section 5.3). Secondly, the chapter will return to the philosophical analysis of European integration by briefly discussing which hermeneutical principle of interpretation would best support the argument of 'subjectivity through relationships' as outlined in this thesis (Section 5.4).

5.2 The 'equality of relationships' paradigm: a constitutional constructive perspective on EU citizenship

Constructing political subjectivity is a process which is shaped by those social and legal relationships in which citizens interact with one another. Similarly, the becoming of EU citizens as more noticeable subjects of EU law depends on the quality of social and legal relationships between EU citizens. These theoretical findings about how central just and equal relationships between EU citizens are for constituting EU citizens' full subjectivity under EU law can be conceptualised by means of the 'equality of relationships' paradigm as a new tool of interpretation for EU citizenship rights. This paradigm derives its normative force from the constructive argument that the relationships in which EU citizens can become full and equal subjects of EU law and European integration must be constructed by EU law because they will not emerge on the basis of ethnic or cultural ties or on the basis of a full democratic pedigree.⁶⁹³

Some argue that the EU's constitutional development should focus on reshaping relations amongst the states, and not on empowering individuals vis-à-vis the states.⁶⁹⁴ This means that the 'individual's existence' is understood as secondary to the 'union of peoples' and the underlying rationale of individual rights is seen as purely 'teleological' and 'institutional'.⁶⁹⁵ This thesis has adopted the opposite view of transnational constitutionalization by claiming that what is genuinely novel in EU citizenship is its promise to fulfil the Court's early references to private individuals as full and equal subjects of political and legal integration.⁶⁹⁶ However, as will be discussed in this section,

⁶⁹³ See more about this argument in Section 4.4.3.

⁶⁹⁴ Gianluigi Palombella, 'Whose Europe? After the constitution: A goal-based citizenship' (2005) *International Journal of Constitutional Law* 357, 374.

⁶⁹⁵ *Ibid* 358-59.

⁶⁹⁶ E.g. 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.

materializing this promise requires a constructive approach to EU constitutional law as the analytical framework within which the idea of EU citizens as subjects of EU law can be implemented.

As a methodological approach, social constructivism does not present any substantive demands for EU law or European integration.⁶⁹⁷ But, in order to fulfil its promise to proceed from 'critique' to 'construct', a constructive theory must develop new 'conceptual tools' to demonstrate that the existing rules and principles are not the 'only possibilities' but that they can be replaced with alternative norms and ideals.⁶⁹⁸ Similarly, the philosophical analysis of the EU principle of equality in this thesis has looked for new conceptual tools which can help us critique the EU equality problem as outlined in Chapters 2 and 3, as well as to construct a solution to it. The analysis of human subjectivity in Chapter 4 introduced a set of theoretical principles which form the basis for political subjectivity. As a step from critique to reconstruction, it is important to examine how these principles can be applied to the legal analysis in EU law. This section will therefore discuss how a constructive approach to EU constitutional law supports the argument that the 'equality of relationships' between EU citizens is needed to give more substance to their subjectivity as EU citizens.

⁶⁹⁷ Thomas Risse, 'Social Constructivism and European Integration' in Antje Wiener and Thomas Dietz (eds), *European Integration Theory*, 2nd ed (OUP 2009) 144.

⁶⁹⁸ Grosz (n 603) 59-60. It has been noted that, as part of this endeavour, theory must develop a capacity to recognize both the 'underlying' and 'more apparent' forms of commitments that are embedded in the prevailing norms and ideals. Loc.cit. A more 'critical' or 'problematizing' theoretical approach to European integration does not just differ from the traditional forms of integration theory (such as neo-functionalism or different governmental theories) on the basis of its methods but the idea of why European integration needs to be theorized is also different. See more about this e.g. in Thomas Dietz and Antje Wiener, 'Introducing the Mosaic of Integration Theory' in Antje Wiener and Thomas Dietz (eds), *European Integration Theory*, 2nd ed (OUP 2009) 3 and 10.

Social constructivism as a theory of European integration focuses on the question of how social actors constitute social reality.⁶⁹⁹ Instead of identifying reality with what is thought to be 'objectively knowable', social constructivism suggests that our attributions of reality can be conferred 'by virtue of some relevant social fact'.⁷⁰⁰ First, social constructivists claim that social reality is constructed and reproduced by human agents through social practices.⁷⁰¹ Secondly, they claim that the existence of human agents is not independent of 'social environment and its collectively shared systems of meaning'.⁷⁰² Thirdly, the emphasis on the 'mutual *constitutiveness*' between social structures and agents forms a central premise in research informed by social constructivism.⁷⁰³ For social constructivists, the central question is 'how things are related to us'.⁷⁰⁴ On this basis, 'human beings and their interactions' are seen as central to understanding reality.⁷⁰⁵ It follows from this starting point that the question of European identity appears as one of those areas to which social constructivism can particularly contribute.⁷⁰⁶

Thus, to shift the focus towards more critical and constructive approaches to European integration means that the 'European identities' and not just 'institutions and policies' become the target of theoretical analysis.⁷⁰⁷ When the idea of theory 'as critique

⁶⁹⁹ E.g. Dagmar Schiek, 'Re-embedding economic and social constitutionalism: Normative Perspectives for the EU' in Dagmar Schiek and Ulrike Liebert and Hildegard Schneider (eds), *European Economic And Social Constitutionalism After The Treaty of Lisbon* (Cambridge UP 2011) 22.

⁷⁰⁰ Sally Haslanger, 'Objective Reality, Male Reality, and Social Construction' in Ann Garry and Marilyn Pearsall (eds), *Women, Knowledge, and Reality: Explorations in Feminist Philosophy* (Routledge 1996) 101.

⁷⁰¹ Risse (n 697) 145.

⁷⁰² Loc.cit.

⁷⁰³ Loc.cit.

⁷⁰⁴ Haslanger (n 700) 101.

⁷⁰⁵ Schiek (n 699) 22.

⁷⁰⁶ Risse (n 697) 144.

⁷⁰⁷ Dietz and Wiener (n 698) 11. It is possible to distinguish between the 'structural-institutionalist' and the 'normative' social constructivist approaches. The former has its focus on institutional developments in a

and normative intervention'⁷⁰⁸ enters into the field of constitutional law, it makes sense to speak of *constitutional constructivism* as a specific mode of scholarship on EU law. This thesis has applied the constitutional constructivist approach to one specific norm and practice of EU law, namely that of EU citizenship. This analysis is based on the assumption that the European Union has been a constructive project from the outset. The constitutionalization of EU law is understood as a process that is focused on instituting and defining the 'conceivability' of the social practice it sets up.⁷⁰⁹ This view has recently been articulated, for instance, by Dagmar Schiek who suggests that a 'successful societal dimension' of European integration requires that the issues of solidarity and social justice have a specific European dimension.⁷¹⁰ In respect of EU citizenship, this question can be re-framed by returning to the original research question of whether and, if yes, on what basis EU citizenship has potential to transform those relationships within which the principles of social justice are materialized in EU law beyond the requirement of *ex ante* integration.

If EU citizens can become full and equal subjects of European integration only in and through their relationships with other EU citizens, as has been argued in Chapter 4, and if these relationships, to an important extent, derive their existence from EU

particular social context, while the latter underlines the ways in which European constitutionalisation is 'shaped by law'. Ulrike Liebert, 'Reconciling market with Social Europe? The EU under the Lisbon Treaty' in Dagmar Schiek and Ulrike Liebert and Hildegard Schneider (eds), *European Economic And Social Constitutionalism After The Treaty of Lisbon* (Cambridge UP 2011) 73. However, what is common to both of these approaches is that the focus of analysis is on how structure and agency interact. Jeffrey T. Checkel, 'Social Construction and European Integration' in Thomas Christiansen and Knud Erik Jørgensen and Antje Wiener (eds), *The Social Construction of Europe* (SAGE Publications 2001) 62.

⁷⁰⁸ Dietz and Wiener (n 698) 18.

⁷⁰⁹ Palombella (n 694) 362.

⁷¹⁰ Schiek (n 699) 29. Schiek has argued that the tension between the European economic and social constitutions can best be addressed by shifting the focus to 'a constitution of social governance' which can be embedded in EU constitutional law but which also requires wider policy developments. Schiek (n 18) 242-244.

constitutional law, the equality of those relationships must be seen as an independent objective of EU law, rather than a mere tool for advancing other goals of integration. (1) Namely, recognising EU citizens as full subjects of European integration indicates that their very subjectivity constitutes integration. (2) Therefore, the equality of their relationships can be seen as an independent objective of integration on the basis that it provides a precondition for their full subjectivity under EU law. This argument can be conceptualised as the 'equality of relationships' paradigm which requires that just and equal (legal) relationships between EU citizens must be given more weight in the discrimination analysis under Article 18 TFEU, because they provide a central way to (re)construct EU citizenship as a source of subjectivity.

In considering the practical consequences of the 'equality of relationships' paradigm on discrimination analysis, it is important to bear in mind that the term 'relational' can have several different meanings. One way to understand relationality is to derive it from the idea that the people are identified as equals on the basis of a certain 'standard of comparison'.⁷¹¹ Chapter 2 has demonstrated how EU citizenship seemingly provides a new standard of comparability under EU law. However, the EU equality problem emerges from the fact that the initial comparability between EU citizens qua EU citizens remains weak because of EU citizens' general right to equal treatment under Article 18 TFEU lacks independence both at the level of its (de facto) scope and at the level of limitations which have been accepted on that right.⁷¹²

⁷¹¹ Christine M. Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Rowman & Littlefield Publishers Ltd. 1998) 2.

⁷¹² The analysis of the EU 'Equality Problem' in Chapter 2 referred to (1) the lack of (de facto) independent scope of EU citizens' general right to equal treatment under Article 18 TFEU which may cause circularity because the reliance on the right to equal treatment can lead to termination of lawful residence which, at the same time, is a necessary precondition for the enjoyment of the right to equal treatment (the structural Equality Problem) and (2) to the lack of independent, non-economic, criteria for legitimate differential treatment between EU citizens because the 'real link' test is merged with the 'unreasonable burden' test in the case-law (the substantive Equality Problem).

Another way of understanding relationality is to value equal relationships more intrinsically, in which case equality is no longer about identifying comparability/similarity but about the realization of equal relationships irrespective of certain differences. The argument for more just and equal (legal) relationships between EU citizens on the basis of the 'equality of relationships' paradigm will come closer to this latter view of relationality. This means that the 'equality of relationships' paradigm (which has its roots in the argument of EU citizens as subjects of European integration) can provide a theoretical solution to the EU equality problem by justifying a more independent, status-based, right to equal treatment in the case of economically inactive and dependent EU citizens. In practice, as will be seen in the next section, the 'equality of relationships' paradigm requires considerable changes in the accepted justificatory criteria for legitimate differential treatment between EU citizens.

The initial research question promised to address the scope of EU citizenship in relation to the 'inner limits' of Article 18 TFEU. However, adopting the 'equality of relationships' paradigm as an interpretative key to EU citizens' right to equal treatment might also have implications on the 'outer limits' of Article 18 TFEU. The fact that the focus here is on the 'equality of relationships' and not on equality *per se* means that those relationships which contain no cross-border element might still be excluded from the scope of Article 18 TFEU. This could occur on the basis that they are not as likely to advance EU citizens' sense of subjectivity as EU citizens as those relationships which emerge after the Union citizen has already exercised his/her right to free movement and residence as an EU citizen. In the long run, the emphasis on just and equal relationships between EU citizens might, nonetheless, make it more difficult to justify why 'purely internal situations' could be irrelevant for the project of European integration in so far as they include relations

between EU citizens which might increase their sense of subjectivity as subjects of EU law and European integration. However, further studies on this question must be left for others to conduct.

5.3 EU citizens' subjectivity in action: towards more just and equal relationships in EU law

The constructive perspective on EU citizens as subjects of EU law directed our attention to the way in which law in general and the discrimination analysis in particular create and shape those relationships in which EU citizens can become full and equal subjects of EU law.⁷¹³ The previous section displayed how the 'equality of relationships' paradigm opens the door for a more independent equality objective in EU law and, thus, sheds new light on the EU equality problem. In practice, however, implementing the 'equality of relationships' paradigm in EU law requires fundamental changes in the interpretation of EU citizens' general right to equal treatment under Article 18 TFEU. This section will discuss in more detail what these changes are and how the legal analysis is affected.

The 'equality of relationships' paradigm holds that EU citizenship creates meaningful relationships for the purposes of equal treatment between those who share that status, i.e. between EU citizens. This emphasis on just and equal (legal) relationships between EU citizens shifts the focus of discrimination analysis from individual activity and responsibility to the quality of relationships between EU citizens. The quality of these relationships is affected when the limits of legitimate differential treatment between EU citizens are defined. The current difference between economically active and inactive EU citizens is likely to become less significant if it is accepted that EU citizens constitute integration also as the subjects of EU law and European integration and not just on the basis of their economic and social activity. In practice, this would mean that EU citizens

⁷¹³ See more about this in Section 4.4.3.

are granted a more status-based right to equal treatment under which justifications for legitimate differential treatment must be interpreted narrowly.

It seems likely that the (de facto) scope of EU citizens' general right to equal treatment will remain to depend on lawful residence and, thus, the proportionality analysis under the 'unreasonable burden' test in the foreseeable future. The effects of the 'equality of relationships' paradigm are therefore more likely to materialize in the assessment of justifications for legitimate differential treatment between EU citizens under the objective justification test than at the level of structural reforms. What remains of this section will consider in more detail how the argument of EU citizens as full and equal subjects of EU law can affect the substantive criteria under which legitimate differential treatment between EU citizens is defined even if the structural Equality Problem continues to exist in EU law. I will show that the 'equality of relationships' paradigm can provide a new, more substantive, test for how legitimate differential treatment is justified between EU citizens, and thus a way to tackle the substantive Equality Problem.

Chapter 3 demonstrated that the accepted justifications for legitimate differential treatment are currently based on the activity-based idea of equality which has reduced EU citizens' agency to individual responsibility to prove economic or social integration. The 'equality of relationships' paradigm requires that the criteria for legitimate differential treatment must become interpersonal rather than purely individualistic. The 'interpersonal test' can have a dual justificatory role both as a source of individual responsibility for 'action that affect other members' and as a test for 'whether all people are treated as members of a community'.⁷¹⁴ The latter of these two roles implies that the way in which 'needy' migrant EU citizens are treated by social institutions and in relation to those social

⁷¹⁴ Koggel (n 711) 120.

institutions (e.g. in their access to welfare benefits) must not be examined merely in terms of the vertical relationship of belonging between an individual and the State. Instead, more weight must be given to the impact which this treatment may have on the equality of horizontal relationships between EU citizens.

It has been noted that the case-law on social rights has already redefined the 'vertical' relationship' between the individuals and the Member States but the same process of reconstruction has not yet happened 'at the *horizontal* level, ie between states or between European citizens in terms of European solidarity spaces'.⁷¹⁵ However, there is an increasing need to go beyond the ideas of 'vertical integration' as means of identity-building to explore 'a more horizontal and dynamic theory of political recognition'.⁷¹⁶ According to this approach, being a European citizen is not about 'feeling European' but about 'having a bond of mutual recognition with nationals of other Member States'.⁷¹⁷ What is promising in the 'equality of relationships' paradigm is the way in which it provides a justification for a more horizontal understanding EU citizens' general right to equal treatment and the status of EU citizenship.

Under the 'interpersonal test', assessing justificatory criteria for legitimate differential treatment needs to consider whether the refusal to grant equal treatment creates an obstacle to the Union citizen's ability to integrate into the society of the host member State as an equal member and to relate to the nationals of that State on an equal basis. Moreover, the refusal to grant equal treatment needs to be weighted against the fact that it may deprive a Union citizen of his/her full subjectivity as an EU citizen. However, the aim

⁷¹⁵ Wolfram Lamping, 'Mission Impossible? Limits and Perils of Institutionalizing Post-National Social Policy' in Yuri Borgmann-Prebil and Malcolm Ross (eds), *Promoting Solidarity in the European Union* (OUP 2010) 70.

⁷¹⁶ Paul Magnette, 'How can one be European? Reflections on the Pillars of European Civic Identity' (2007) 13 ELJ 664, 665-68.

⁷¹⁷ *Ibid* 668.

is not to secure the equality of outcomes between EU citizens in every possible respect. Rather, what is seen as decisive is the promotion of the equality of those relationships which can strengthen and advance EU citizens' status as subjects of European integration. In order to grasp how this argument affects the discrimination analysis under Article 18 TFEU, it is helpful to compare these suggestions to the current 'real link' case law as discussed in Chapter 2:

- The 'equality of relationships' paradigm challenges the current symbiosis between the 'real link' test and the 'unreasonable burden' test by shifting the focus of discrimination analysis from the vertical belonging between a Union citizen and the Member State to the question of how equal treatment (or the lack of it) affects the equality of relationships between EU citizens. Formal criteria, such as the length of residence, or economic criteria, such as prior economic activity, may gain relevance in this assessment. Moreover, the 'equality of relationships' paradigm will not solve the problems related to the *ad hoc* character of discrimination analysis in general. However, the analysis of justificatory criteria becomes more flexible because the 'equality of relationships' paradigm justifies the more extensive use of non-economic criteria. The Court's reference to 'other social and economic factors' in *Commission v Austria* and *Prinz and Seeberger* can be seen as a sign of increasing willingness to explore this field.⁷¹⁸ But the 'equality of relationships' paradigm underlines that these 'other social and economic factors' are valid considerations and must be given more weight in the discrimination analysis because they provide a substantive indicator of those social/horizontal relationships in which EU citizens'

⁷¹⁸ Case C-75/11 *European Commission v Republic of Austria* 4 October 2012, paras 62-63 and Cases C-532/11 and C-585/11 *Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg* 18 July 2013, paras 36-38.

subjectivity is constituted as EU citizens and not just because they prove *ex ante* integration or activity.

- The 'interpersonal test' which emerges from the 'equality of relationships' paradigm differs from the current 'real link' test under which the primary relationship of integration appears between the host Member State and the Union citizen. The 'interpersonal' test views the establishment of a 'real link' not just as an expression of individual activity but also as a shared commitment with the nationals of the host Member State to pursue one's life project under the same rights and duties as the nationals of the host Member State. To assess justificatory criteria for legitimate differential treatment becomes more positive, for it will take into account how equal access to the benefit in question would advance the applicant's equal relationships with the nationals of the host Member State, i.e. his/her potential for future integration into the society of the host Member State. Social integration is seen as a dynamic process and the right to equal treatment is not just a reward for individual activity but also a shared goal which may have positive effects on the future integration of the individual in question. In other words, the 'interpersonal' test would also recognise the *ex post* integrative dimension of equal treatment.

The current interpretation of Article 18 TFEU implies that *those who belong deserve to be treated equally*, whereas viewing EU citizens as full and equal subjects of EU law would suggest that *those who are treated equally (will) belong*. The discrimination analysis under the 'equality of relationships' paradigm focuses on the potential of equal treatment to create integration rather than on the evidence of assumed non-integration, such as economic dependence, vulnerability and the lack of long-term resident status of those 'needy' EU citizens who, nonetheless, would benefit from equal treatment as a means of strengthening their sense of subjectivity as EU citizens through further integration into the host Member

State. Thus, a constitutional constructive perspective on EU citizenship as expressed in the 'equality of relationships' paradigm can provide us with a renewed understanding of the essence of EU citizens' general right to equal treatment because it bases their right on the claim that just and equal relationships between EU citizens form a precondition for the becoming of EU citizens as full and equal subjects of EU law.

However, the EU equality problem is rooted in a deeper uncertainty over what is meant by integration in the first place. The quest for equal treatment between Union citizens must therefore go beyond the establishment of individual rights to examine the relevance of just and equal relationships between EU citizens for the whole project of European integration. The next section will conclude this chapter, and the thesis, by asking what it means for the project of European integration to recognise EU citizens as its full and equal subjects and to define the 'essence of the rights of EU citizenship' by virtue of the 'equality of relationships' paradigm as suggested in this section.

5.4 EU citizens' subjectivity in theory: about the ideal of interdependence in European integration

The equality of relationships between EU citizens becomes a more independent objective of EU law if EU citizens, as subjects of integration, constitute integration by 'being and having' (i.e. by their very existence) rather than only by doing and by activity. The legitimacy of this vision depends on the hermeneutics of integration, i.e. on the values and principles of interpretation which underlie the project of European integration. This section will therefore explore which ideal of integration would support the view of EU citizens' subjectivity as something that constitutes integration in itself. I will suggest that this ideal is to conceive European integration as a dynamic process of deepening interdependence between the subjects of integration, for it places a distinct value on creating and enabling such relationships between its subjects which would not exist otherwise.

The idea of transnational solidarity has sometimes been offered as a moral justification for the existence of the EU beyond the internal market and free movement.⁷¹⁹ The status of EU citizenship has accordingly been described as an 'institutionalization of solidarity'.⁷²⁰ However, solidarity, whether national or transnational, is based on the existing sense of community or belonging. It has been noted that this approach is problematic in the context of the EU because the ideal of transnational solidarity 'presupposes something which it simultaneously needs to develop: common values and the willingness to share'.⁷²¹ The notion of solidarity makes EU citizenship rights descriptive of *ex ante* belonging, failing to examine the constructive potential of EU citizenship to redefine on what basis EU citizens are sufficiently related to one another to be treated equally under European Union law.

An alternative way to justify EU citizenship as an Equal Status suggests that the EU principle of equality does not provide a basis for a more transnational view of social solidarity but, in contrast, it underlines that the idea of 'solidarity' is not the only value which matters in/for the project of European integration. From this follows that the requirement of belonging can be in conflict with the EU principle of equality even if it complies with the principle of solidarity which is arguably based on 'gradations according to differing degrees of integration in and membership of the (national) redistribution collectivity'.⁷²² Unlike the idea of transnational solidarity, this approach directly challenges the current attributes of belonging as a precondition for equal treatment and claims that EU

⁷¹⁹ E.g. Yuri Borgmann-Prebil and Malcolm Ross, 'Promoting European Solidarity: Between Rhetoric and Reality' in Yuri Borgmann-Prebil and Malcolm Ross (eds), *Promoting Solidarity in the European Union* (OUP 2010) 20.

⁷²⁰ Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU' in Yuri Borgmann-Prebil and Malcolm Ross (eds), *Promoting Solidarity in the European Union* (OUP 2010) 27.

⁷²¹ Lamping (n 715) 47.

⁷²² Giubboni (n 212) 375.

citizenship necessarily transforms what constitutes a 'meaningful relationship' for the purposes of equal treatment under European Union law.

It has been argued that Union citizenship has already established a substantive right which fundamentally differs from functional rights established by the four fundamental freedoms.⁷²³ If this is true and the rights of citizens of the Union are not just instruments for constructing the internal market, what, then, is the justification for requiring their equal treatment? Or, why has facilitating non-economic movement been given such a central place in EU law? This thesis replies that deepening the relationships of interdependence between the subjects of European integration as the fundamental value underlying the project of European integration can best explain why the process of integration has taken the direction of constitutionalization instead of the more traditional forms of intergovernmentalism. Or, that it can be used to give legitimacy to those constitutional developments afterwards even if their origins are more pragmatic than idealistic in nature.

It is important to note that the idea of interdependence is built on 'meaningful' relationships.⁷²⁴ From this follows that responsibility is thought to include 'both self and other, viewed as different but connected rather than as separate or opposed'.⁷²⁵ This connection between interdependence and 'meaningful' relationships explains why the equality of relationships between the subjects of European integration becomes normative under EU law if European integration is defined as a process of dynamic recognition of mutual interdependence between its subjects. In this way, the process of integration can be understood as striving for more just and equal relationships between its subjects as a means

⁷²³ E.g. Xavier Groussot, 'Principled citizenship and the process of European constitutionalization: from a pie in the sky to a sky with diamonds' in Ulf Bernitz and Joakin Nergelius and Cecilia Gardner (eds), *General Principles Of EC Law In A Process Of Development* (Kluwer 2008).

⁷²⁴ Koggel (n 711) 186.

⁷²⁵ Ibid 200.

of deepening their mutual interdependence - instead of seeing (inter)dependence merely as a vice which needs to be overcome by political or legal cooperation.

Thus, interpreting the objectives of European integration in the light of the ideal of interdependence indicates that just and equal relationships between the subjects of integration become involuntary, i.e. not chosen, for the integration project and theory. This is a claim for a political (not cosmopolitan) conception of justice⁷²⁶ in the sense that conditioning the project of European integration on just and equal relations between the subjects of integration creates an obligation to live in a just society with other subjects of integration who commit themselves to the values and objectives of European integration and not with just anyone. What is, however, important is that this account of European integration provides a new definition of 'meaningful relationships' for the purposes of equal treatment in so far as EU citizens can be seen as subjects of European integration. Namely, in the light of the ideal of interdependence, European integration appears as a dynamic process which does not just value the existing relationships between its subjects, but which also searches for opportunities to deepen their interdependence by creating new 'meaningful relationships' between them.

Advancing just and equal legal relationships between EU citizens therefore becomes a self-contained principle of interpretation in EU law. In practice, this means that the questions of recognition and redistribution, including access to social benefits, in the context of EU law can be approached by asking what is needed to create and maintain equal relationships between the subjects of European integration, as was suggested in Section 5.3. However, the 'articulation of the problem as one of relationships and associations' must still address the question of 'why people might want to transfer even

⁷²⁶ See more about the difference between these two forms of justice in Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113, 121 and 132.

some of their loyalty to abstract and so far incoherent and incomplete institutions such as the EU and its constitution'.⁷²⁷ A political and legal system which derives its existence from the relationships of interdependence between its subjects needs to value their relationships non-instrumentally in order not to become self-contradictory. How far the dynamic process of deepening interdependence can extend depends on political decision makers. But to define integration in terms of interdependence implies that just and equal relationships between the subjects of integration (whether individuals or States) have a distinct value for the project of integration.

The diversity of human relationships leads to the diversity of duties based on these relationships.⁷²⁸ In particular, it is common to distinguish between 'general' duties in relation to everyone and 'special' or 'associative' duties in relation to those people with whom we either have 'certain significant sorts of interactions' or with whom we have developed 'certain significant sorts of relations'.⁷²⁹ The critics of post-national citizenship models argue that duties based on social rights will always require 'strong social and symbolic ties of generalized reciprocity and diffuse solidarity'.⁷³⁰ However, it is not self-evident that duties which arise out of special relationships must always be reduced to 'duties arising out of discrete interactions'.⁷³¹ On the contrary, some argue for a 'non-reductionist' approach to special responsibilities under which special responsibilities can be

⁷²⁷ Jo Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 MLR 293, 306.

⁷²⁸ Scheffler (n 453) 50.

⁷²⁹ Ibid 49.

⁷³⁰ Thomas Faist, 'Social Citizenship in The European Union: Nested Membership' (2001) 39 Journal of Common Market Studies 37, 46.

⁷³¹ Scheffler (n 453) 98.

based on 'our relationships to people rather than particular interactions with them'.⁷³² This approach suggests that to value one's relationships is, in part, to see oneself 'as having such responsibilities'.⁷³³

The central question for these non-reductionist theories is under what conditions people would have reasons to value their relations to others in such a way that those relationships become a source of rights and duties. This question can be re-framed by asking whether the process of European integration can provide such reasons to value just and equal relationships between EU citizens that those relationships become a source of a more independent equality objective in EU law. This thesis has suggested that, because equal treatment advances those relationships within which EU citizens can become full subjects of EU law and European integration, there is a strong reason to value just and equal relationships between EU citizens, independent of the internal market.

It follows from this argument that viewing EU citizenship as a source of subjectivity can transform those relationships which are regarded to be meaningful when access to social benefits is defined under EU law. Namely, meaningful relationships between EU citizens cannot be created without creating new 'associative' duties based on these relationships. Or, as Samuel Scheffler has put it, 'the perception of them as giving rise to such duties is what enables them to make rewarding relationships possible'.⁷³⁴ In other words, if just and equal relationships between EU citizens *qua* EU citizens are meaningful because they help to construct EU citizenship as a source of subjectivity, these

⁷³² Ibid 100. Under Scheffler's account, 'only socially salient connections among people' count as relationships in this sense. However, Scheffler outlines that 'two members of a socially recognized group do have a relationship in the relevant sense, even if they have never met'. Ibid 102.

⁷³³ Ibid 103-104. According to Scheffler, the fact that the 'significance of our social relations is not fully under our own control' does not compromise self-determination because the 'relationships that generate responsibilities for an individual are those relationships that the individual has reason to value'. Ibid 100.

⁷³⁴ Ibid 62.

relationships can also be seen as an independent source of social rights and entitlements in EU law. The crucial question is therefore whether EU citizens can be seen as subjects of EU law and European integration not just in the judicial rhetoric but also in the application of EU citizenship rights in general and the right to equal treatment in particular.

It has been seen in this section that explaining European integration in terms of interdependence places intrinsic value both on deepening the existing relationships between the subjects of integration and on creating new relationships which would not otherwise exist between them. It is important to bear in mind that one condition for genuine relationships is the self-governance of those who are involved in those relationships. Subjectivity emerges in and through relationships, but, simultaneously, the existence of meaningful relationships depends on the subjectivity of those who are involved in those relationships.⁷³⁵ By analogy, this means that recognising EU citizens as subjects of European integration makes possible such 'meaningful relationships' which would not exist otherwise because their materialisation and existence depend on the full subjectivity of those EU citizens who are involved in these relationships.

Thus, although the ideal of interdependence is not alone adequate to legitimise EU citizens as equal subjects of EU law and European integration, it nonetheless provides very strong reasons for this through its emphasis on creating such meaningful relationships which would not exist otherwise. At the same time, viewing the constitutionalization of EU law as a dynamic process of deepening interdependence between its subjects is in accordance with the argument that integration will naturally involve different levels.⁷³⁶ At the first level, the mutual interdependence was recognized only between the Member States and only in the context of economic policy, above all, free and undistorted

⁷³⁵ This argument has been discussed in detail in Chapter 4.

⁷³⁶ E.g. Ojanen (n 64).

competition. The so-called 'constitutional moments'⁷³⁷ of EU law, including the emergence of the doctrines of direct effect and supremacy, the creation of Union citizenship, and the inclusion of the EU Charter of Fundamental Rights in primary law have provided significant signposts on this journey. The next step in this line will be the Union's accession to the European Convention on Human Rights. What the effects of this step on EU citizenship are remains to be seen. However, it is certainly a step towards (and not away from) giving more substance to the idea of EU citizens as full subjects of European integration.

5.5 Conclusion

This chapter examined what theoretical and practical implications the argument of EU citizens as full and equal subjects of European integration will have for EU constitutional law and for the objectives of European integration. First, the chapter discussed how a constitutional constructive perspective to EU citizenship gives rise to the 'equality of relationships' paradigm which was used to conceptualise the theoretical idea of 'subjectivity through relationships'. The chapter, then, moved on to explain how the 'equality of relationships' paradigm affects the legal analysis under Article 18 TFEU and how it gives birth to a new, more interpersonal, test for legitimate differential treatment between EU citizens.

Finally, the chapter completed the analysis of EU citizens as subjects of European integration by arguing that a more independent 'equality objective' can be justified in EU law if European integration is defined as a process of dynamic recognition of mutual interdependence between its subjects, including not just the Member States but also the nationals of the Member States, that is EU citizens. Thus, just and equal relationships between EU citizens become normative for political and legal integration if EU citizens are

⁷³⁷ E.g. Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Longman 2002) 522.

recognised as subjects of European integration. As there is a whole array of relationships of interdependence which become possible when the Union gives birth to its own subjects (= EU citizens), it seems logical that this is what happens in due course. On this basis, the chapter concluded that EU citizenship can transform what constitutes a 'meaningful relationship' for the purposes of equal treatment under EU law and maintaining just and equal relationships between EU citizens can provide an independent source of equality rights under EU law.

Conclusions: the EU's quest for Legitimacy or for Justice?

The crucial question for re-interpreting the EU principle of equality and EU citizens' right to equal treatment is whether EU citizens are fully recognised as subjects of EU law and European integration. If the answer is 'yes', the essence of EU citizens' right to equal treatment is inherently relational and just and equal relationships between EU citizens become a decisive criterion for interpreting the EU principle of equality. The ideal of integration as described in this thesis offers a positive approach to the ontology of relationships: For a project involving political and legal integration in the triangular relationships between states, individuals, and social institutions, interdependence is no longer an unfortunate imperative or vice which must be overcome but a virtue which should be fostered. European integration can thus be seen as an opposite to what has been called 'transnational individualism', which claims that 'once we move beyond the purview of family life and friendship, we live in mutual isolation from one another'.⁷³⁸

The Union's fundamental purpose is to create a 'level-playing field', i.e. to create rules that are applicable cross-border.⁷³⁹ It is nonetheless important to ask 'Why is this so?'. This thesis argued that the *Telos* of integration is to transform our understanding of what constitutes a 'meaningful relationships' between its subjects for the purposes of equal treatment. The relevance of 'justice as fairness' must not be rejected, but the project of European integration is fundamentally a project which emerges from the need to redefine what justice means in the world in which no one can claim to be self-sufficient. It has been argued that it would be 'unrealistic (at least at present) to offer an overarching, substantive,

⁷³⁸ Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (OUP 2008) 240.

⁷³⁹ E.g. Elsmore and Starup (200) 62.

redistributionist theory of justice for the EU'.⁷⁴⁰ However, this thesis claimed that there must be a meaningful relationship between 'equality' and 'citizenship'. This presumption is based on the view that 'citizenship of unequals before the law' is an 'oxymoron'.⁷⁴¹ It follows from this that the analysis of EU citizenship cannot avoid the question of justice.

The EU equality problem emerges from the fact that EU citizenship, as the 'fundamental status' of all Member State nationals, is deeply rooted in the narrow individualistic view of agency in EU law (**Chapter 2**). Therefore, the philosophical justifications that underlie the EU principle of equality had to be critically evaluated (**Chapter 3**). On a more positive note, the EU equality problem can be faced by (re)constructing EU citizenship as a source of subjectivity. Analysis of the conditions of subjectivity showed that EU citizens' full subjectivity as EU citizens can only emerge within just and equal relationships between EU citizens (**Chapter 4**). Hence, where national citizenship can primarily be seen as an instrument for 'gaining political legitimacy in a representative democracy',⁷⁴² EU citizenship can be seen as an instrument for creating new subjects of European integration (**Chapter 5**).

Supranational citizenship is more substantive and more normative than its national counter-part because it emerges from the objectives of the founding Treaties and its aim is to secure the realization of the values and aims of integration. This thesis endorsed the view that the critique of EU citizenship needs more 'philosophy' because both the 'history' and the 'tradition' of the EU legal system are thin compared to national or international

⁷⁴⁰ Sionaidh Douglas Scott, 'The Problem of Justice in the European Union – Values, Pluralism, and Critical Legal Justice' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 412.

⁷⁴¹ Kochenov (98) 14.

⁷⁴² *Ibid* 17.

law.⁷⁴³ The inadequacy of legal positivism is multiplied in the realm of supranational law where the existing democratic structure does not provide validity and recognition (Hart) for the law and its application. What remains is a technocratic system of rules and regulations that consume private individuals and their human potential for a neo-liberal and potentially discriminating economic agenda or, even more appallingly, a technocratic system which exists for the sake of its own existence, rather than for the sake of justice or any other human value, including the economic growth.

For pessimists, EU equality law seems to approach a travesty of justice in instrumentalising private individuals and their fundamental rights in the name of European economic integration. The *status quo* has been challenged by suggesting that the status of EU citizenship should be interpreted 'in such a way that both the "rich" and the "poor" can enjoy the rights that come with it'.⁷⁴⁴ This thesis explored whether the philosophical foundations of the EU principle of equality can be transformed within the existing constitutional system of the Union in such a way that 'needy' EU citizens could gain agency and fully enjoy the status of EU citizenship. The critique of EU citizenship went beyond the claim that Articles 18 and 21 TFEU should be read as fundamental rights to examine where the normativity of these claims comes from in the case of economically inactive and dependent Union citizens. This thesis concluded that recognising the connection between citizens' agency and their subjectivity can provide an alternative justification for a more independent equality objective in EU law.

The positive outcome of this analysis is that the philosophical foundations for a more coherent conception of equality can be established within the existing constitutional framework of EU law if the Court's early references to private individuals as subjects of

⁷⁴³ See Karst (n 451) about this taxonomy in American constitutional law.

⁷⁴⁴ Van der Mei (n 4) 220.

European integration are given more substance in the application of EU law. What is novel and intriguing in Union citizenship is that it promises to put flesh on the Court's promise to recognise private individuals as subjects of political and legal integration. The more negative side of this analysis is that (re)constructing EU citizenship as a source of subjectivity appears as a complex cognitive process which depends essentially on more just and equal relationships between EU citizens.

However, this study does not promote unconditional access to social benefits. Instead, it introduced a new conceptual framework for supranational subjectivity within which just and equal (legal) relationships must be given more weight in discrimination analysis. Even if the political will is to protect the national welfare sovereignty at the cost of EU citizens' right to equal treatment, it is no longer sustainable to mask what implications these choices have on EU citizens' agency and subjectivity as EU citizens. By contrast, it is necessary to discuss more openly what ideological and philosophical presumptions are embedded in the interpretation of the EU principle of equality. The main contribution of this thesis project is theoretical. However, it makes a big difference to know that there are valid philosophical alternatives to the indeterminacy/incoherence of EU citizenship available and that the EU equality problem, both in its structural and substantive forms, could (in theory) be solved within the current constitutional system of the European Union.

At the same time, it is important to bear in mind that the question of EU citizenship as an Equal Status is a question about transnational justice and not just about individual rights. The reason why this question is addressed at the end of the thesis, rather than at the beginning of it, is that the question of 'Should the EU pursue a quest for justice?' cannot be examined as separate from the question of what justice means for the EU. What makes supranational law special is the value it places on just and equal relationships

between its subjects. The EU's quest for justice can only be understood if we first understand the role of just and equal relationships in the project of European integration. It is only the commitment to mutual interdependence (and vulnerability) between the subjects of integration that can explain both what being just means in the supranational context (= enabling just and equal relationships between the subjects of integration to deepen their mutual interdependence) and why it should be pursued (= it is a necessary precondition for the subjectivity of EU citizens). However, as discussed below, this argument will ultimately direct us to contemplate the transcendental element embedded in the ideal of European integration.

The concern for the 'race to the bottom'⁷⁴⁵ assumes that 'the "poor" are mobile'⁷⁴⁶ and that they are more mobile than those who are able to contribute financially to the economic system of the host Member State. The 'race to the bottom' theory is tricky because it builds on the mere assumption that social tourism may become reality in the future. The fear of increasing movement may encourage the Member States to stagnate the level of welfare protection and would, thus, 'hamper a "race to the top"'.⁷⁴⁷ For instance, Gareth Davies draws the following scenario for the future:

There will be ever more persons present on the soil who are not fully integrated into the welfare system, and so who follow relatively precarious lives by comparison with the long-run resident or worker. Yet the alternative to inequality is closure and Europe's love affair with equality since the war has been made possible by its protection from outside. It has been said that 'the poor will always be with us'. For a long time it seemed that it did not have to be so – they were safely outside our borders. Now, as borders come down to the east, but also with increasing immigration, more generally, we can be sure that they once again are, at least until wealth has spread throughout the world.⁷⁴⁸

⁷⁴⁵ E.g. Catherine Barnard, 'Social Dumping and Race to the Bottom: Some Lessons for the EU from Delaware?' (2000) ELRev 57.

⁷⁴⁶ See for a critique of this assumption e.g. in Van der Mei (n 4) 206-207.

⁷⁴⁷ Ibid 208.

⁷⁴⁸ Davies (n 382) 221.

If these premonitions are correct and, in the light of the fact that it would be against both the Union's *Telos* and its competences to harmonize benefit levels in the different Member States, it seems correct to argue that a more just EU can only follow from re-estimating what role economically inactive and dependent EU citizens play in the overall project of European integration. Recognizing the case of the 'needy' Union citizens as a valuable touchstone of how the European Union lives up to the ideal of interdependence between its subjects, and not their closure of the project of European integration, may provide the only protection for the welfare systems of all Member States and, above all of those Member States who value the 'race to the top' in particular.

The painful news is that there is no easy or politically costless way to protect the social welfare systems against the challenge imposed on them by the EU principles of equality and free movement. Instead, the available choices seem to vary between social dumping or the blunt harmonization of national benefit levels. However, in this thesis, it has been shown that there is also a 'third way' which is both more difficult and more faithful to the core values of European integration. The case of the 'needy' Union citizens allows us to test and develop the ideal of interdependence between individual subjects of integration that arguably underlies the project of European integration. This cognitive change is philosophically possible within the existing constitutional framework of the European Union. There is no conceptual obstacle to transforming the EU discrimination analysis under Article 18 TFEU from the 'equality of belonging' towards the 'equality of relationships'.

However, in Chapter 4, the constitution of political subjectivity was viewed as a complex psychological process which depends on just and equal relationships but which

can never be reduced to the mere conscious elements of *cognitio*.⁷⁴⁹ The necessary cognitive reforms for (re)constructing EU citizenship as a source of subjectivity may therefore require a revelation, or a Revelation, which still eludes the political decision-makers of the Union, as well as us who vote for them. Perhaps, the legitimacy of the European Union must always partly lie beyond the perception: the project of European integration in its Finality is about the promise of something which is yet to be seen and which promises to bring together those who seem otherwise so different by affirming their mutual interdependence. The right question is therefore not 'whether integration is possible' but 'whether it is true'. For Europe, replying to this question must always include a leap of faith. 'For now we see through a glass darkly; but then face to face: now I know in part; but then shall I know even as also I am known. And now abideth faith, hope, charity, these three; but the greatest of these is charity.' (1 Cor. 13:12-13)

⁷⁴⁹ Analysis of the cognitive dimension of (supranational) subjectivity in Chapter 4 draws a picture of EU citizenship as a more intentional commitment than the cultural or ethnic emotions of Weiler's 'Eros' but also as a more comprehensive process than the rational reasons for his 'Civilization'. J. H. H. Weiler, 'To be a European citizen – Eros and civilization' (1997) 4 *Journal of European Public Policy* 495, 509-511.

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