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**Constitutional rights norms in the European Union  
legal framework: An analysis of European Union  
citizenship as a constitutional right**

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I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree and the work produced here is my own except where stated otherwise.

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Date: \_\_\_\_\_

## DEDICATION

To Jolene

&amp; Torsten



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Not everyone who started this journey with me has seen me complete it. Not everyone who has seen me complete it has been there from the start. So many people have played such a vital part in the completion of this project that I can name only a few.

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## ABSTRACT

The Court of Justice of the European Union (CJEU) continues to be subjected to a level of scrutiny that differs significantly from that received by domestic courts of constitutional relevance and status. This intense scrutiny is rooted in the wide range of cultural and legal understandings of the role of courts within specific legal systems and has resulted in the CJEU being labelled an activist court with a political agenda. This thesis contributes to legal scholarship and in part, political science, adding to the discourse surrounding the CJEU and its reasoning, by suggesting that a norm theoretical approach informs the Court's jurisprudence and advances its role as the constitutional court of the European Union (EU).

The CJEU, as a de facto constitutional court within the EU constitutional order, applies and interprets the norms of the Treaty on European Union and the Treaty on the Functioning of the European Union. These norms demonstrate the characteristics of constitutional rights norms, as discussed by Robert Alexy's Theory of Constitutional Rights Norms. It is argued that understanding norms in this way enables a clear distinction between rules and principles as norm categories to be drawn. The thesis offers a structural analysis of the EU constitutional framework, highlighting specific norm characteristics as influential in the process of constitutionalisation.

Treaty norms governing EU citizenship are analysed in this thesis from the perspective of constitutional rights norms, which enables these norms to be seen as open-textured, requiring rights and interests to be balanced where they conflict with other provisions. The radiating effect of these provisions gives constitutional relevance to secondary legislation, which is of particular relevance in the context of EU law. The thesis makes the case for looking at EU citizenship, in its norm structure, as a constitutional principle, which requires the CJEU to apply and interpret the provision in specific ways that may then be construed as judicial activism. The thesis informs and enhances the highly relevant and topical discussion of EU citizen rights through a norm structural analysis of the Treaty provisions enshrining EU citizenship within the EU legal framework. The thesis suggests that such an evaluation enables a more objective consideration of EU citizenship as a constitutional right extending beyond subjective rights.

Finally, it is argued in this thesis that understanding norm categories and their relevance within the EU constitutional framework enables the development of a structured understanding of the Court's jurisprudence based on legal theory.

**ABBREVIATIONS**

BverfG	<i>Bundesverfassungsgericht</i> (see FCC)
BverfGE	<i>Bundesverfassungsgerichtsentscheidung</i>
CJEU	Court of Justice of the European Union
EU	European Union
FCC	German Federal Constitutional Court (translation of BverfG)
TFEU	Treaty on the Functioning of the European Union

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## Chapter 1 Introduction

From the “fairy-tale Grand Duchy of Luxembourg”, the Court of Justice of the European Union (CJEU)<sup>1</sup> widens the scope of European Union (EU) law illegitimately, by strengthening or overstretching its own and wider EU competences in its application of EU law, some argue.<sup>2</sup> Claiming ‘judicial activism’ by the Court, political and legal scholars alike are critical of the way this unique institution seemingly towers over the foundations laid by the Member States through the Treaties.<sup>3</sup> This thesis will argue that the Court’s reasoning in ‘judicial activist’ cases can more convincingly be evaluated with a focus on the nature and characteristics (as opposed to the substance of the) norms assessed by the Court. In establishing this argument, a particular norm theory, the German theory of constitutional rights norms by Robert Alexy, will be applied to the Treaty provisions of EU citizenship, as a set of example norms. It will be argued that Articles 20 and 21 of the Treaty on the Functioning of the EU (TFEU) constitute constitutional rights norms, which, in line with Alexy’s approach, are open-textured principles, requiring the rights they entail to be fulfilled to the optimal extent.<sup>4</sup> The analysis of example cases will support this claim, showing how the Court’s reasoning reflects the characteristics of the theory of constitutional rights norms in relation to EU citizenship.

In doing so, this thesis will follow a doctrinal methodology, analysing Treaty norms through the lens of Court’s jurisprudence in order to determine the relevance of norm theory for the European Union legal framework in the particular given context. Primary and secondary legal sources will be considered alike and evaluated in the context of constitutionalism and constitutional rights norm theory. Particular consideration will be

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<sup>1</sup> Hereinafter also referred to as ‘the Court’.

<sup>2</sup> Mancini, G. F. (1989). The Making of a Constitution for Europe. *Common Market Law Review*. Vol. 26. pp. 595 – 614. p. 597.

<sup>3</sup> de Visser, M. (2013). A cautionary tale: some insights regarding judicial activism from the national experience. In: Dawson, M., De Witte, B. & Muir, E. (2013). *Judicial Activism at the European Court of Justice*. Edward Elgar. pp. 188 – 210.

<sup>4</sup> Alexy, R. (2002). *A Theory of Constitutional Rights*. Oxford University Press.

given to the EU Treaties and the work of Robert Alexy, as well as the critique of it produced by Jakab, Raz and others.<sup>5</sup>

As a result, this thesis contributes to jurisprudential scholarship on the CJEU, as well as scholarship evaluating the EU's legal framework and EU citizenship.

## 1. The EU's legal order

This thesis applies a constitutional rights theory to the EU's legal order. In doing so, it will discuss the characteristics of said legal order with the aim to strengthen its choice of theoretical framework. It will be shown how the EU's legal order outgrew its international law roots.<sup>6</sup> The creation of norms by the EU institutions, the Treaties as source of those norms and the processes involved, as well as the varying principles and concepts developed by the Court, lead us to a conceptual understanding of the EU's normative sphere as independent legal order. The characteristics of this new legal order will be discussed with a particular focus on constitutionalising factors and elements.

When assessing the specifics of the EU legal order according to its constitutional status, reference will be made to MacCormick, who sees room for "a democratic constitution below, above and beyond the nation state."<sup>7</sup> The legal traditions of the Member States and a reliance on their goodwill influence the unique character of this particular constitution, as it needs "to be consciously acknowledged, pursued, [and] promoted by undertaking a moral and political commitment towards the construction of Europe."<sup>8</sup> Reflecting this in a constructed constitution, we need to acknowledge the "validity of community law [as] dependent on national constitutions."<sup>9</sup> It is this closeness and continuing attention to the legal traditions of the Member States that supports consideration of domestic legal theories in the constitutional analysis on the EU level.

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<sup>5</sup> Jakab, A. (2016). *European Constitutional Language*. Cambridge University Press; Raz, J. (2007). "The argument from Justice, or How Not to Reply to Legal Positivism". In: Supra Pavlakos, G. (2007). pp. 17 – 35.

<sup>6</sup> *Van Gend en Loos* [1963] Case 26/62 ECR 1, *Costa v ENEL* [1964] Case 6/64 ECR 585. ECLI:EU:C:1963:1.

<sup>7</sup> MacCormick, N. (1993). *Beyond the Sovereign State*. *The Modern Law Review*. Vol. 56, 1. pp. 1 – 18.

<sup>8</sup> Itzcovich, G. (2012). *Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts*. *European Law Journal*. Vol. 18, 3. pp. 358 – 384. p. 379.

<sup>9</sup> Menéndez, A. J. (2011b). *From constitutional pluralism to a pluralistic constitution? Constitutional synthesis as a MacCormickian constitutional theory of European integration*. In: Fossum, J.E. & Menéndez, A. J. (2011). *Law and Democracy in Neil MacCormick's Legal and Political Theory*. Springer. pp. 211 – 243. p. 226.

The EU's integration focus and integrational theory will be discussed in this context, leading to considerations of federalism as a fitting term to evaluate the evolved legal order. It will, however, be argued that narrowing the analysis of the EU's legal order down to a union of states is dismissive of the constitutional depth and potential of EU law. As such, an analytical framework appreciative of the independency of the EU legal order and at the same time acknowledging the role of its Member States is to be given priority. This is where the EU's constitutional legal order will be discussed as a pluralist legal framework.

### 1.1. Constitutional Pluralism

Legal pluralism has not gained prominence for the first time in the context of EU law, but in the context of colonialism.<sup>10</sup> It became very relevant to the analysis of the EU's founding communities and existing legal order, and gained credibility as a concept relevant for EU law.<sup>11</sup> Legal Pluralism is the idea that "internal and external legal values" become mutually relevant and interact in "a sort of 'dialogue'" which makes it particularly relevant as a way to discuss the EU's legal order.<sup>12</sup> Constitutional pluralism evolved from these roots but is not a coherent concept itself, as it depends on whether a supporter of pluralism engages with constitutional mechanisms, or a constitutionalist discussant aims to widen their scope through pluralism.<sup>13</sup> With the EU's legal framework, constitutional pluralism "stresses the beneficial effects [...] of the interplay between two constitutional levels": The EU and the Member States.<sup>14</sup> This is where Menéndez' constitutional synthesis argues that "the central structuring and legitimising role played by the constitutions of the participating states" within the "new polity" are recognised and "fleshed out and specified" as the pluralist construct, here the EU, develops.<sup>15</sup> The interplay between the Court and the German Federal Constitutional

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<sup>10</sup> Griffiths, J. (1986). What is Legal Pluralism? *Journal of Legal Pluralism and Unofficial Law*. Vol. 24. pp. 1 – 55; Merry, S.E. (1988) Legal Pluralism. *Law & Society Review*. Vol. 22. pp. 869 – 896.

<sup>11</sup> Barber, N.W. (2006). Legal Pluralism and the European Union. *European Law Journal*. Vol. 12, 3. pp. 306 – 329; Patrignani, E. (2016). Legal Pluralism as a Theoretical Programme. *Onati Social-Legal Series*. Vol. 6, 3. pp. 707 – 725.

<sup>12</sup> *Supra* Itzcovich, G. (2012).

<sup>13</sup> Barber, N.W. (2010). *The Constitutional State*. Oxford University Press. p. 145; Walker, N. (2002). The Idea of Constitutional Pluralism. *Modern Law Review*. Vol 65, 3. pp. 317 – 359.

<sup>14</sup> Goldoni, M. (2012). Constitutional Pluralism and the Question of the European Common Good. *European Law Journal*. Vol. 18, 3. pp. 385 – 406. p. 386.

<sup>15</sup> *Supra* Menéndez, A.J. (2011b). p. 235.

Court (FCC) can be argued to be evidence of such synthesis.<sup>16</sup> Within this thesis, the synthesis argument will not so much rely on the interplay of the courts as it will argue there is an interrelation and comparability of norm characteristics within the two connected legal orders. There is a resemblance between specific norms of the German Basic law and specific norms of the Treaty on the Functioning of the European Union (TFEU).<sup>17</sup> This resemblance supports the application of Alexy's approach to an analysis of the jurisprudence of the CJEU.<sup>18</sup>

The contributions of Walker and Menéndez will be particularly influential in framing the constitutional pluralism concept applied in this thesis.<sup>19</sup> When analysing the constitutional characteristics of a transnational treaty through the lens of a domestic constitutional rights theory, it needs to be clear how and why such theory, deeply rooted in the realm of a domestic legal framework, is able to support this analysis.

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<sup>16</sup> The FCC is Germany's highest court and constitutional court in German: *Bundesverfassungsgericht (BVerfG)*. Analysing the relationship between the two courts among others: Lanier, E. R. (1988). Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge Boston College International and Comparative Law Review. Vol. 11, 1. pp. 1 – 29; Kelemen, R.D. (2016). The Court of Justice of the European Union in the twenty-first century. Law and Contemporary Problems. Vol. 79, 1. pp. 117-140; Adrian, A. (2009). Grundprobleme einer juristischen (gemeinschaftsrechtliche) Methodenlehre : die begrifflichen und ("fuzzy")-logischen Grenzen der Befugnisnormen zur Rechtsprechung des Europäischen Gerichtshofes und die Maastricht-Entscheidung des Bundesverfassungsgerichtes [*Basic problems of legal methodology (under Community law): the terminological and ("fuzzy")-logical limits of competence regulations of ECJ jurisprudence and the Federal Constitutional Court's Maastricht-decision*]. Duncker & Humblot; The FCC also submitted its very first preliminary ruling referral as discussed by Pennesi, F. (2017). The impossible constitutional reconciliation of the BVerfG and the ECJ in the OMT case. A legal analysis of the first preliminary referral of the BVerfG. Perspectives on Federalism. Vol 8, 3. pp. 1 – 21.

<sup>17</sup> Within this thesis the German *Grundgesetz* will be interchangeably referred to as German constitution or Basic Law.

<sup>18</sup> Discussing the value of Alexy's work beyond German constitutional law are among others: Van Niekerk, P. (1991) A Critical Analysis of Robert Alexy's Distinction between Legal Rules and Principles and its Relevance for his Theory of Fundamental Rights, *Philosophia Reformata*, 2/1991; Heinold, A. (2011). Die Prinzipientheorie bei Ronald Dworkin und Robert Alexy [The *principle theory of Ronald Dworkin and Robert Alexy*]. Duncker & Humblot; Pavlakos, G. (2007). Law, Rights and Discourse. The Legal Philosophy of Robert Alexy. Hart; Clérico, L. (2009). Grundrechte, Prinzipien und Argumentation: Studien zur Rechtstheorie Robert Alexys [*Constitutional Rights, Principles and Argumentation: Studies of Robert Alexys legal theory*]. Nomos; Ipsen, J. (2013). Grundzüge einer Grundrechtsdogmatik. Zugleich Erwiderung auf Robert Alexy, „Jörn Ipsens Konstruktion der Grundrechte“ [*Basics of constitutional rights doctrine and response to Robert Alexy's "Jörn Ipsen's construction of constitutional rights"*]. Der Staat, 02/2013; Camilo de Oliveira, R. (2013). Zur Kritik der Abwägung in der Grundrechtsdogmatik: Beitrag zu einem liberalen Grundrechtsverständnis im demokratischen Rechtsstaat [*Regarding the criticism of weighting within constitutional rights doctrine: Contribution to a liberal understanding of constitutional rights within the democratic constitutional state*]. Duncker & Humblot; Critical: Supra Jakab, A. (2016). pp. 368 ff.

<sup>19</sup> Supra Menéndez, A.J. (2011b). p. 229; Walker, N. (2002). The Idea of Constitutional Pluralism. *Modern Law Review*. Vol. 65, 3. pp. 317 – 359; Walker, N. (2016). Constitutional Pluralism Revisited. *European Law Journal*. Vol 22, 3. pp. 333 – 355.

Constitutional pluralism is used as a way to understand the EU legal framework in order to support the application of Alexy's constitutional rights theory within the EU context.

## 1.2. Theory of Constitutional Rights

Robert Alexy's theory of constitutional rights analyses the German Basic Law as applied by the FCC decision making in application of Basic Law norms. It was originally published in 1987 and enhanced with its translation into English in 2002.<sup>20</sup> The theory of constitutional rights has since reached far beyond the Basic Law scope.<sup>21</sup>

Within this theory, Alexy distinguishes between two norm categories: Principles and rules. He develops a principle theory that is distinguishable from Dworkin.<sup>22</sup> Whereas Alexy argues that rules and principles differ in their structure, Dworkin describes principles "as a separate sorts of standards, different from legal rules".<sup>23</sup> He views them as hypernym and antonym to rules, without developing a norm structural concept.<sup>24</sup> Alexy, leading on from Dworkin's assessment, introduces principles as optimization requirements, seeking the fulfilment of the rights they entail to the greatest extent, considering the factually and legally possible.<sup>25</sup> The different norm categories can be most visibly distinguished when they are in conflict in any given scenario.<sup>26</sup> Alexy examines the Basic Law as a constitutional framework applied and upheld by the FCC. He consequently draws from FCC cases to establish his legal framework. It needs to be understood that Alexy is not offering an analysis of the substance of a norm. His theory focusses exclusively on the structure of norms, offering no contribution to the wider discourse on constitutional, fundamental and human rights. Alexy is only concerned with the structure of norms as principles and rules and how these norm categories are reflected within jurisprudence.

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<sup>20</sup> Reprint: Alexy, R. (1994). *Theorie der Grundrechte*. Suhrkamp.

<sup>21</sup> The relevance of Alexy's approach beyond the scope of German law was predicted by translator Rivers in: Rivers, J. (2002). *A Theory of Constitutional Rights and the British Constitution*. Translator's Introduction. In: Alexy, R. (2002). *A Theory of Constitutional Rights*. Oxford University Press. pp. xvii-li. p. xviii.

<sup>22</sup> Dworkin, R. (1977). *Taking Rights Seriously*. Harvard University Press. pp. 24, 41 ff; Supra Alexy, R. (2002). pp. 47 ff.; Supra Heinold, A. (2011).

<sup>23</sup> Supra Dworkin, R. (1977). p. 28.

<sup>24</sup> Supra Heinold, A. (2011). p. 80 ff.

<sup>25</sup> Supra Alexy, R. (2002). p. 47.

<sup>26</sup> Ibid pp. 48 ff.

This thesis will transfer his analysis into the context of EU law. Alexy's discussion of norm characteristics will disprove allegations made within the judicial activism debate, as our analysis of case law will evidence that judgments are a reflection of norm characteristics rather than of the Court's agenda. Within the analysis of Court's reasoning, the focus is consequently moved away from the Court itself and towards an evaluation of norm characteristics and how far these determine the decision made.

### **1.3. Constitutional rights in EU law**

Alexy's theory of constitutional rights norms will be used to argue that there are such constitutional rights norms within EU law. The relevance of this particular theoretical framework for the EU's Charter of Fundamental Rights has been argued before, but no attempt has been made so far to evaluate Treaty provisions as constitutional rights norms.<sup>27</sup> The status of the Union's legal order is often declared to be constitutional, but there is a lack of consideration of theoretical frameworks underpinning that claim.<sup>28</sup>

After introducing Alexy's theory and discussing the constitutional characteristics of the EU's legal order, it will be shown how the application of the theory of constitutional rights supports the constitutionalism within the EU. The characteristics of principles will be tested against Treaty provisions, evidencing their constitutional status and consequently supporting the EU's legal order as constitutional framework.

## **2. The role and function of the CJEU**

The analysis of the EU's legal order as constitutional will go hand in hand with a discussion of the CJEU as an institution. The Court's unique set up, competences and influence continue to inspire political and legal scholars alike to ask questions about its comparability with domestic courts, its main features and particularly the "role of extra-legal factors in the decision-making of the Court".<sup>29</sup> Approaches to the Court's reasoning tend to have a legal focus; the evaluation of the case law and its impact as well as the

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<sup>27</sup> Supra Rivers, J. (2002). pp. xvii ff.

<sup>28</sup> Eriksen, E.O., Fossum, J.E. & Menéndez, A. J. (2004). *Developing a Constitution for Europe*. Routledge; de Burca, G. & Weiler, J.H.H. (2011). *The Worlds of European Constitutionalism*. Cambridge University Press; Tuori, K. (2015). *European Constitutionalism*. Cambridge University Press; Jakab, A. (2016). *European Constitutional Language*. Cambridge University Press.

<sup>29</sup> Bengoetxea, J. (1993). *The Legal reasoning of the European Court of Justice*. Clarendon Press. Oxford. p. 1



role of the Court within the EU can, however, also be political. As such, the Court's reasoning is already assessed through two separate lenses, applying differing expectations and understandings of courts and polities.

Contributions to the study of the CJEU can relate to the fundamental difference in understanding of the role of courts in general or are reflections of the character of the EU legal framework. The Court, as a result, is subjected to analytical ping-pong, with opposing sides claiming the Court does not successfully follow the "pre-determined view or conception of EU integration."<sup>30</sup> The starting point underlying these claims is flawed, though: the "literal meaning of provisions of EU law" is seen as fixed and objective, so long as "the 'proper' meaning were to be given to the terms and concepts used".<sup>31</sup> The goalposts for the Court are continuously shifting, depending on political developments in the Member States, global economic drifts and societal needs.<sup>32</sup>

This is where the analysis of the EU's legal framework leads to the consideration of the Court and vice versa. The Court is considered as a driver of constitutionalism within the EU.<sup>33</sup> Criticism of the Court is consequently connected to criticism of the EU's constitutional framework, evaluating the Court's jurisprudence from a subjective standpoint in relation to the EU.<sup>34</sup>

## 2.1. Judicial Activism

Accusations of judicial activism are as old as the Court itself and almost exclusively applied in a derogative manner.<sup>35</sup> The Court's jurisprudence is described as activist when it diverges from "apparently settled principles without adequate justification or

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<sup>30</sup> Bengoetxea, J. (2015). Text and Telos in the European Court of Justice. Four Recent Takes on the Legal Reasoning of the ECJ. *European Constitutional Law Review*. Vol. 11. pp. 184 – 216. p. 199.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid p. 216.

<sup>33</sup> Saurugger, S. & Terpan, F. (2017). *The Court of Justice of the European Union and the Politics of Law*. Palgrave. pp. 158 ff; Höreth, M. (2013). The least dangerous branch of European governance? The European Court of Justice under the checks and balances doctrine. In: Dawson, M., De Witte, B. & Muir, E. (2013). *Judicial Activism at the European Court of Justice*. Edward Elgar. pp. 32 – 55. p. 41 ff.

<sup>34</sup> Supra Itzcovich, G. (2012). p. 359; Rasmussen, H. (1986) *On Law and Policy in the European Court of Justice*. Martinus Nijhoff; Pescatore, P. (1974). *The Law of Integration*. Leyden. Slijthoff.

<sup>35</sup> Arnall, A. (2013). Judicial activism and the European Court of Justice: how should academics respond? In: Dawson, M., De Witte, B. & Muir, E. (2013). *Judicial Activism at the European Court of Justice*. Edward Elgar. pp. 211 – 232. p. 231; Also: Neill, Sir P. (1995). *The European Court of Justice: A Case Study in Judicial Activism*. European Policy Forum.

explanation of their wider implications.”<sup>36</sup> Judicial activism is consequently “closely connected to the way in which [politicians, the media and the public] perceive the legitimacy of the court and its judgments”.<sup>37</sup> Rasmussen sees activism “causing a decline in judicial authority and legitimacy”.<sup>38</sup>

The CJEU is subject to a level of scrutiny that differs significantly from that awarded to the highest courts within the domestic jurisdictions.<sup>39</sup> Accusations of judicial activism tend to arise in relation to individual cases and not as a general criticism regarding the institution.<sup>40</sup> In particular, when the Court “strikes down legislation [...] and when it extends its own jurisdiction”, it puts its legitimacy most at risk.<sup>41</sup> Rasmussen sees this as an issue of protectionism and destruction, arguing that “the Court’s original and accumulated authority and legitimacy to invent legal resolutions to the conflicts” needs to “remain within societally acceptable boundaries”.<sup>42</sup> The interest is consequently particularly high as and when the Court establishes new concepts and principles.<sup>43</sup>

Nonetheless, it is mostly not the specific outcome of a case, but the lack of an “adequate justification or explanation of their wider implications” provided through the Court’s reasoning that determines how the case is perceived.<sup>44</sup> The motivations behind the

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<sup>36</sup> Ibid.

<sup>37</sup> Supra de Visser, M. (2013). p. 188.

<sup>38</sup> Supra Rasmussen, H. (1986). p. 8.

<sup>39</sup> Providing a selection of contributions from legal and political scholars: Supra Rasmussen, H. (1986); Tridimas, T. (1996). The Court of Justice and judicial activism. *European Law Review*. Vol. 21, 3. pp. 199 – 210. p. 199; Llorens, A.A. (1999). The European Court of Justice. More than a Teleological Court. *Cambridge Yearbook of European Legal Studies*. Vol. 2. pp. 373- 398; Stone Sweet, A. (2004). The Judicial Construction of Europe. Oxford University Press; Solanke, I. (2011). ‘Stop the ECJ?’ An Empirical Assessment of Activism at the Court. *European Law Journal*. Vol. 17, 6. pp. 764 – 784; Davies, G. (2012). Activism relocated. The self-restraint of the European Court of Justice in its national context. *Journal of European Public Policy*. Vol. 19, 1. pp. 76 – 91; Dawson, M., De Witte, B. & Muir, E. (2013). Judicial Activism at the European Court of Justice. Edward Elgar; Grimm, A. (2014). The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law. *European Journal of Legal Studies*. Vol 7, 2. pp. 61 – 83.

<sup>40</sup> Supra de Visser, M. (2013). p. 191.

<sup>41</sup> Ibid.

<sup>42</sup> Supra Rasmussen, H. (1986). p. 9.

<sup>43</sup> E.g. Arnall offers an overview of activism discussions around *Van Gend en Loos* [1963] Case 26/62 ECR 1, *Costa v ENEL* [1964] Case 6/64 ECR 585, and *Werner Mangold v Ruediger Helm* [2005] C-144/04 ECR I-9981 in Supra Arnall, A. (2013). pp. 217, 224, 228.

<sup>44</sup> Supra Arnall, A. (2013). p. 231.

Court's judgements are assessed by commentators, who argue that the Court is following a political agenda as communitarian court.<sup>45</sup>

Only a few authors give credit to the Court as an institution constituted of judges with varying legal backgrounds and different understandings of constitutional frameworks, resembling and relating to the EU Member State's legal cultures.<sup>46</sup> Sankari points out how "the legal thinking of judges of a collegiate court is likely to represent a range of different constitutional theories".<sup>47</sup> Considering the Court's diverse set up is informative, but the same applies in relation to the perspective of the assessing scholars. Arnall discusses how there is a distinct difference in the way continental European, UK and U.S. American scholars discuss EU law in general and the reasoning of the Court in particular, arguing that the perspective "is affected by legal training, language, the organisation of higher education in the State in which they work and the type of research which is encouraged there", as well as other cultural factors.<sup>48</sup> The background of the critiquing scholar can, consequently, also influence the analysis of the Court's jurisprudence.

This thesis contributes to the judicial activism debate by seeking to disprove some of the claims made under judicial activism.<sup>49</sup> It seeks to do so by showing alternative means to interpret and evaluate the Court's jurisprudence.

## **2.2. The Court's reasoning**

The Court's reasoning has been subject to numerous assessments, also discussing the institution's legitimacy as judicator of the EU and as court in its own right.<sup>50</sup> The relevant contributions rely on self-assessments by CJEU judges and on what can be drawn from

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<sup>45</sup> Conway, G. (2012). *The Limits of Legal Reasoning and the European Court of Justice*. Cambridge University Press. p. 280 f.

<sup>46</sup> Sankari, S. (2013). *European Court of Justice Legal Reasoning in Context*. Europa Law Publishing.

<sup>47</sup> Ibid p. 3.

<sup>48</sup> Supra Arnall, A. (2013). p. 230.

<sup>49</sup> See also: Grimm, A. (2014b). *The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law*. *European Journal of Legal Studies*. Vol. 7, 2. pp. 61 – 83.

<sup>50</sup> Among others: de Búrca, G. & Weiler, J.H.H. (2001). *The European Court of Justice*. Oxford University Press; Bengoetxea, J. (1993). *The Legal reasoning of the European Court of Justice*. Clarendon Press; Maduro, M. (1998). *We, the court. The European Court of Justice & the European Economic Constitution*. Hart; Beck, G. (2012). *The Legal Reasoning of the Court of Justice*. Hart; Supra Conway, G. (2012); Supra Sankari, S. (2013); Also, Bengoetxea discussing contributions of Beck, Conway and Sankari in: Supra Bengoetxea, J. (2015).

case law.<sup>51</sup> The perspectives differ, some arguing in favour of a “subjective originalist interpretation” of the CJEU, others opting for a contextualised approach also reflecting on what is not said.<sup>52</sup> In doing so, the Court’s methods of interpretation are assessed, its motifs scrutinised and its reasoning in specific cases evaluated in relation to the competences awarded to it.<sup>53</sup>

These observations touch on various areas of EU law, with a focus on the Court’s reasoning in particular cases. Assessments of the Court’s judgments and reasoning consequently mostly evaluate the decision made, with a particular view being offered regarding the substance of the norms involved.<sup>54</sup> The focus of the discussion lies on norm content, as applied by the Court. The analysis considers the scope of the norm, or the relevant piece of legislation as a whole, without particular reference to norm structure. This is no doubt an understandable focus, particularly in cases involving the rights of individuals. The focus on norm content, however, distracts from the wider debate of the function the particular Treaty norm holds within the wider context of the EU legal framework.

Moving the focus away from a discussion of content and substance, and towards a discussion of the structure of norms as assessed by the Court, will enable a more objective analysis of the Court’s jurisprudence and the characteristics of its reasoning. It will allow the discussion of the Court’s role to move beyond the focus on particular subjective rights through an analysis of the structure of specific Treaty norms. In doing so, seemingly activist decisions will prove to be based on the application of norms of a specific structure, instead of evidencing flaws within the Court’s established role.

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<sup>51</sup> E.g.: Court of Justice of the European Communities. (1976). Judicial and Academic Conference 27-28 September 1976. Report. Office for Official Publications of the European Communities.

<sup>52</sup> As example for the former: Supra Conway, G. (2012). pp. 247 ff; As example for the latter: Sankari, S. (2013). pp. 214 ff.

<sup>53</sup> Supra. Bengoetxea, J. (2015); Bengoetxea, J., MacCormick, N. & Soriano, L. M. (2001). Integration and Integrity in the Legal Reasoning of the European Court of Justice. In: de Búrca, G. & Weiler, J.H.H. (2001). The European Court of Justice. Oxford University Press. pp. 43 – 85.

<sup>54</sup> Supra de Búrca, G. & Weiler, J.H.H. (2001); Gimmel, A. (2012). Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice. European Law Journal. Vol. 18, 4. pp. 518 – 535.

### 3. EU citizenship as constitutional right

Having just argued that the focus on specific subjective rights will be replaced by an analysis of norm structure, the thesis will still need to narrow its scope by focussing on specific norms. Alexy does not argue that his theory of constitutional rights applies to all norms of the Basic Law.<sup>55</sup> He narrows the selection of constitutional rights norm candidates depending on their scope and the way the FCC applies them.<sup>56</sup> For the purpose of this thesis, the EU citizenship norms in Articles 20 and 21 TFEU will be given preference.

#### 3.1. EU citizenship: catalysing constitutionalism

It will be shown how the EU citizenship norms within the TFEU serve as a valuable example in our attempt to apply Alexy's theory of constitutional rights norms to the EU's legal framework. Since its introduction with the Maastricht Treaty, EU citizenship has been declared a "fundamental status" with the Court continuing to distinguish it from other provisions governing the free movement of people.<sup>57</sup>

EU citizenship continues to gain prominence, particularly considering the current political climate and a Member State moving towards withdrawal from the EU with significant consequences for EU citizens.<sup>58</sup> UK-EU citizens and non-UK EU citizens are united in their concerns over the impact the detangling of UK and EU law will have on the exercise of their EU citizenship rights and their 'fundamental status' as EU citizens.<sup>59</sup> The process will test the EU's constitutional framework generally, but particularly the EU's commitment to a 'Union of people', keeping EU citizenship at the forefront of the debate.

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<sup>55</sup> Supra Alexy, R. (2002). p. 30 ff.

<sup>56</sup> Ibid.

<sup>57</sup> *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2001] ECR I-06193.

<sup>58</sup> Wesemann, A. (2017). Four ways Britain could guarantee the right to remain for EU citizens after Brexit. The Conversation. Available online: <https://theconversation.com/four-ways-britain-could-guarantee-the-right-to-remain-for-eu-citizens-after-brexite-72692>. [accessed 01/07/2018].

<sup>59</sup> Wesemann, A. (2017b). The UK's offering to EU citizens - A Lesson in Fairness and Generosity. European Law and Policy Research Group. University of Sussex. Available online: <https://elprg.wordpress.com/2017/07/19/the-uks-offering-to-eu-citizens-a-lesson-in-fairness-and-generosity/> [accessed 06/07/2018].

Consequently, EU citizenship as a concept continues to be defined, with the content of this status and the Court's dealing with it being the focus.<sup>60</sup> As this thesis does not seek to contribute to the wider EU citizenship discourse, it will not be arguing for a specific status or subjective rights content as the appropriate one. It will rather focus on the structure of Articles 20 and 21 TFEU and analyse the Court's reasoning in reference to their norm structure. While this will in turn support a discussion regarding the substantive rights of EU citizens and their scope, this thesis will not focus on the analysis of EU citizenship rights but rather on an objective analysis of these norms.

Moreover, after introducing citizenship concepts and discussing EU citizenship in light of these, it will be argued that EU citizenship has served as a catalyst in the constitutionalisation process of the EU.<sup>61</sup> Its constitutional relevance and the rights entailed within it, together with the way the Court applies the EU citizenship provisions, make EU citizenship the ideal candidate for the application of Alexy's constitutional rights theory.

### **3.2. A European constitutional right**

As this thesis aims to test the existence of constitutional rights norms within the EU's legal order, it seeks to ascertain whether EU citizenship can be described, evaluated and applied as constitutional rights norm. Consequently, it will be assessed whether the rights entailed within these norms can be characterised as constitutional rights. A selection of CJEU's case law will be used to carry out the assessment. Cases in which the

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<sup>60</sup> Among others: MacCormick, N. (1997). *Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'*. *Law and Philosophy*. Vol. 16, 4. pp. 331 – 356; Shaw, J. (1997). *The many parts and futures of citizenship in the European Union*. *European Law Review*. Vol.22, 6. pp. 554 – 572; Menéndez, A.J. (2009). *European Citizenship after Martínez Sala and Baumbast*. *Has European law become more human but less social?* IDEAS Working Paper Series from RePEc; Kochenov, D. (2009). *Ius tractum of many faces: European citizenship and the difficult relationship between status and rights*. *Columbia journal of European law*. Vol. 15, 2. pp.169 – 237; Isin, E.F. & Saward, M. (2013). *Acts of citizenship deprivation: ruptures between citizen and state*. *Enacting European Citizenship*. 6. pp. 111 – 131; Sánchez, S.I. (2014). *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?* *European Law Journal*. Vol. 20, No. 4, pp. 464 – 481; Kochenov, D. (2014) *EU Citizenship without Duties*. *European Law Journal*, Vol. 20, No. 4, pp. 482 – 498; Various contributors to *German Law Journal special issue*, Vol. 15 No. 05: *EU Citizenship: Twenty Years On*, including: Eleftheriadis, P. (2014). *The Content of European Citizenship*. pp. 777 – 796, Menéndez, A.J. (2014). *Which Citizenship? Whose Europe? - The Many Paradoxes of European Citizenship*. pp. 907 – 934; O'Brien, C. (2016). *"Hand-to-mouth" citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment*. *Journal of Social Welfare and Family Law*. Vol. 38, 2. pp. 228 – 245.

<sup>61</sup> Kostakopoulou, D. (2005). *Ideas, Norms and European Citizenship: Explaining Institutional Change*. *Modern Law Review*. Vol. 68, 2. pp. 233 - 267.

Court solely or mainly relied on Articles 20 and 21 TFEU in its reasoning will be analysed in light of Alexy's theory of constitutional rights norms. Evidence will be sought to support the claim that a differentiation between norm categories is present in EU law and that EU citizenship can be read and applied as a principle requiring optimization. The proportionality analysis in cases such as *Rottmann* and *Zambrano* will be interpreted as a situation of conflicting norms, where the involved interests require balancing and weighing.<sup>62</sup> This analysis will show how the elements of Alexy's constitutional rights theory are reflected within the EU's citizenship provisions. EU citizenship will consequently, based on its structure, be treated as a constitutional right of the EU.

#### 4. Thesis structure

This thesis will, following this introductory chapter, offer its analysis in five chapters.

Chapter 2 introduces the theoretical framework proposed by Robert Alexy in the form of a theory of constitutional rights. It will position this approach within the wider understandings of law developed by Alexy, particularly his discourse theory and claim to correctness.<sup>63</sup> The theory of constitutional rights will be introduced, with a focus on the elements relevant to this thesis, while some aspects of the complex framework will be paid less attention to for not being relevant for our purposes. The intention is not to provide a full analysis of the understanding of law and legal theory provided by Robert Alexy, but rather lay the basis for the subsequent analysis in this thesis.

The theory of constitutional rights will be introduced, highlighting the relationship between the FCC and Basic Law. Understanding this interrelation is essential in order to support our application of this framework to the EU's legal order and its Court. Chapter 2 will touch upon the philosophical discourse of norm character and functionality. It will be shown how the understanding of norms as principles enhances and supports the functioning of a legal order. The domestic focus of Alexy's theory means this chapter will, in its norm discussion, focus on the arguments being made in reference to the German constitutional framework. It is essential to fully grasp the domestic setting of

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<sup>62</sup> *Janko Rottmann v Freistaat Bayern* Case C-135/08 ECR 2010 I-01449; *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* Case C-34/09 [2011] European Court Reports 2011 I-01177.

<sup>63</sup> Alexy, R. (2009). *A Theory of Legal Argumentation*. Oxford University Press; Alexy, R. (1998). *Law and Correctness*. *Current Legal Problems*. Vol. 51, 1. pp. 205 – 221; Alexy, R. (2002b). *The Argument from Injustice*. Oxford University Press.

the theoretical framework in order to understand the characteristics required of the EU's legal order in order to allow the analogous application of the theory.

Chapter 3 will consider the EU's legal order, considering how it fits within international law first. The characteristics of the EU's legal framework and various understandings of what makes a constitutional legal order will be discussed. This chapter will evaluate different ways in which the constitutional character of the EU's legal order has been reviewed so far, particularly focussing on integration theory and federalism. This will take on board considerations of legal and constitutional pluralism. Here, the unique characteristics of the EU and its relationship with the Member States will be the defining factors of this unique constitutional setting.

Chapter 4 introduces EU citizenship and discusses how it relates to concepts of citizenship within and outside of the sphere of the nation state. In doing so, it will consider sociological, political, as well as legal assessments of citizenship, to see how far these are reflected by the EU's concept. EU citizenship's design and the reflection of these features in reality will be discussed to show how, as a concept, it still requires clarification. Leading on from chapter 3, the constitutionalising impact of EU citizenship will be considered, with a focus on the rights attached to the status. This chapter will therefore provide consideration of the rights entailed by the status as background to the subsequent structural analysis in chapter 5.

Chapter 5 will lead on from the considerations in previous chapters and test the application of Robert Alexy's theory of constitutional rights to Articles 20 and 21 TFEU, as applied by the Court. By considering the characteristics introduced in chapter 2, it will be shown how these are reflected in the way the Court applies and reasons with the provisions. In order to do so effectively, the chapter will consider the role of the Court and how approaches to the CJEU's reasoning can support the analysis. The chapter will then discuss the fundamental status of constitutional rights norms, the differentiation of rules and principles, and the consequences of treating norms as optimization requirements in relation to EU citizenship case law. The cases considered range from *Grzelczyk* to *Chavez-Vilchez*, with the aim to not only consider EU citizenship cases



considering one aspect of the rights entailed within the status, but also offering the opportunity for a wider discussion of EU citizenship as a constitutional rights norm.<sup>64</sup>

Chapter 6 will then conclude this thesis. Building on the preceding chapters, the application of Alexy's constitutional rights theory to the Court's EU citizenship jurisprudence will be evaluated. This evaluation will relate to EU citizenship itself, but also to the EU legal framework as a whole. The chapter will reflect on the established characteristics of a pluralistic EU constitution, the role of the Court and EU citizenship within it, and the way in which a European constitutional rights theory informs all of the above. It will also consider the weaknesses of Alexy's approach and how far this potentially hinders the claims made. The thesis will conclude with an outlook of how the research presented in relation to constitutions, the EU's legal order and EU citizenship can be taken forward.

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<sup>64</sup> *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2001] ECR I-06193 ; *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* Case C-133/15 ECLI:EU:C:2017:354.

## Chapter 2      Constitutional rights theory

### 1. Introduction

Within this thesis, we are seeking to apply a theory of constitutional rights to the EU constitutional legal framework by focusing on EU citizenship as constitutional rights norm. The constitutional rights theory applied is provided by Robert Alexy, as a legal theory with an inherent practical function in relation to the German constitutional framework, mainly the jurisprudence of the FCC.<sup>65</sup> While this analysis is going to focus on Alexy's theory of constitutional rights, his contribution to legal theory is much broader, with some arguing Alexy is establishing his "own concept and understanding of legal systems".<sup>66</sup> Alexy's work is reflected by three linked and yet separated contributions to legal theory and philosophy: the discourse theory, the correctness thesis, and his principle theory.<sup>67</sup>

Alexy's discourse theory views law as social practice, inviting dialogue and avoiding confrontation.<sup>68</sup> The discourse theory in this sense illustrates the "deep structure of legal argumentation" by using "discursive grammar".<sup>69</sup> His correctness thesis then relates closely to Radbruch's formula, where "extremely unjust law is deprived of its legal character for reasons that are internal to the legal system".<sup>70</sup> Alexy argues law incorporates moral elements and is consequently raising a claim to correctness and objectivity - a contested claim.<sup>71</sup> Objectivity is an essential feature of law and as such engaging with questions of justice as moral questions. Alexy's main point within *The Argument from Injustice* can be summarised as follows: "[...] extreme injustice is not

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<sup>65</sup> Supra Alexy, R. (2002); Alexy, R. (2010). *The Construction of Constitutional Rights*. *Law & Ethics of Human Rights*. Vol. 4, 1. pp. 19 – 32.

<sup>66</sup> Pavlakos in introduction to: Pavlakos, G. (2007). Supra. p. 1 f.

<sup>67</sup> Supra Alexy, R. (2002); Supra Alexy, R. (2009); Supra Alexy, R. (1998); Supra Alexy, R. (2002b).

<sup>68</sup> See Supra Pavlakos, G. (2007). p. 2.

<sup>69</sup> Ibid Alexy engages with approaches established by Hapel and Habermas and implies three rules: rules of logic, rules of rationality and pragmatic rules.

<sup>70</sup> Ibid p. 4.

<sup>71</sup> Raz argues for a distinct difference between a moral claim and the claim to correctness. He agrees with the former, but not with the latter. He accuses Alexy of supporting "conceptual confusions" and "highly speculative empirical assumptions": Supra Raz, J. (2007). p. 33; MacCormick disagrees arguing law to be "unable to make any kind of claim", as it would otherwise confuse the ideal and real aspects of law: MacCormick, N. (2007). *Why Law Makes No Claims*. In: Supra Pavlakos, G. (2007). pp. 59 – 67.

law”.<sup>72</sup> This feeds into his correctness thesis and is reflected in his discourse theory. It is in this context that Alexy establishes his principle theory. Law, as social practice, is necessarily connected to moral and ethics, reflected in practical reasoning. Alexy’s work deserves to be discussed as “holistic or system-based approach to the study of law”.<sup>73</sup> Having said that, this thesis will explicitly draw on principle theory and in doing so, will work with the arguably “best reconstruction of constitutional rights law available”.<sup>74</sup>

Alexy introduces this particular legal theory as a means to come as close as possible to the ideal and general constitutional rights theory, comprising three dimensions: analytical, empirical and normative.<sup>75</sup> These dimensions are set to function with a particular focus, so not to have one of these marginalising the other. The dimensions focus on serving the practical function of legal theory.<sup>76</sup> A legal theory is bound to serve a practical function, as the legal profession is “in the first instance a practical discipline, because it asks the question, what ought to happen in real or hypothetical situations.”<sup>77</sup> In aiming to develop the ideal general constitutional rights theory wanting to discuss more than “specific problems of specific rights”, Alexy recognises that “[e]very existing, and in that sense real, theory of constitutional rights can only approximate” the ideal legal theory.<sup>78</sup> Determined to establish the value of his approach, Alexy discusses the positioning of his offering in the wider discourse of German constitutional rights theories.<sup>79</sup> He could not at the time have foreseen how his work would resonate with

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<sup>72</sup> Alexy, R. (2015). Legal Certainty and Correctness. *Ratio Juris*. Vol. 28, 4. pp. 441 – 451. p. 445; Supra Alexy, R. (2002b). p. 5 ff.

<sup>73</sup> Möller, K. (2012). *The Global Model of Constitutional Rights*. Oxford University Press. p. 15; See also: Kumm, M. (2004). *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice - A Review Essay on a Theory of Constitutional Rights*. *International Journal for Constitutional Law*. Vol. 2, 3. pp. 574 – 596. p. 595; Klatt, M. (2012). Robert Alexy’s Philosophy of Law as System. In: Klatt, M. (2012). *Institutionalized Reason: The Jurisprudence of Robert Alexy*. Oxford University Press. pp. 1 – 26.

<sup>74</sup> Supra Möller, K. (2012). p. 15.

<sup>75</sup> Supra Alexy, R. (2002). p. 7 – 8.

<sup>76</sup> Ibid p. 9.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid p. 10 – 11.

<sup>79</sup> Providing only a selection of scholars Alexy is referring to: Böckenförde, E.-W. (1974). *Grundrechtstheorie und Grundrechtsinterpretation* [*Constitutional rights theory and Constitutional rights interpretation*]. *Neue Juristische Wochenschrift*. pp. 1529 – 1538; Kröger, K. (1978). *Grundrechtstheorie als Verfassungsproblem* [*Constitutional rights theory as a constitutional problem*]. *Nomos*; Klopfer, M. (1980). *Datenschutz als Grundrecht* [*Data protection as constitutional right*]. *Athenäum*; Schwabe, J. (1977). *Probleme der Grundrechtsdogmatik* [*Issues of constitutional legal doctrine*]. *Author*; Schmidt, W. (1983). *Grundrechtstheorie im Wandel der Verfassungsgeschichte* [*Constitutional rights theory through the constitution’s history*]. *Jura*. pp. 169 – 180.

scholars inside and outside the limited sphere of German constitutional law scholarship.<sup>80</sup>

Alexy sees his contribution to be a structural theory, integrating different approaches to constitutional rights within the German constitutional setting. Out of the three dimensions, the analytical dimension is most influential within this structural theory, as “it investigates structures such as constitutional rights concepts, the influence of constitutional rights on the legal system, and constitutional justification with reference to the practical function of an integrated theory.”<sup>81</sup> He, however, acknowledges the need for a multidimensional perspective, connecting the analytical with the empirical and normative, as only then the practical function is sufficiently supported.<sup>82</sup> After all, “jurisprudence can only fulfil its practical task as a multidimensional discipline.”<sup>83</sup> It is for jurisprudence as a discipline to engage with the law in the appropriate manner and come to a logically derived result.<sup>84</sup> The focus on the practical function of legal theory and his understanding of “discoveries in jurisprudence” being dependent on the standard of the analytical dimension allow Alexy’s theory of constitutional rights to add to the discourse of conceptual jurisprudence.<sup>85</sup> While this particular discourse is deeply rooted within the German jurisprudence, Alexy’s approach contributes to a wider scholarship of positivism, morality, argumentation and lastly constitutional rights.<sup>86</sup>

As Alexy discusses the shape of the ideal legal theory, we benefit from his perspective of a system of norms, functioning in a specific manner in order to establish and maintain a functioning constitutional framework. He develops an abstract and structure focussed system of norm understanding that can be lifted out of its original context in order to

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<sup>80</sup> Publications discussing Alexy’s work have been published in multiple languages, see among others: Manrique, R. G. (2009). *Derechos sociales y ponderación*. Fundación Coloquio Jurídico Europeo; Supra Pavlakos, G. (2007); Sieckmann, J.-R. (2007). *Die Prinzipientheorie der Grundrechte: Studien zur Grundrechtstheorie Robert Alexys* [*The principle theory of constitutional rights: Contributions regarding Robert Alexy’s theory of constitutional rights*]. Nomos.

<sup>81</sup> Supra Alexy, R. (2002). p. 13.

<sup>82</sup> Very critical of Alexy’s approach as normative theory is: Klement, J. H. (2008). *Vom Nutzen einer Theorie, die alles erklärt: Robert Alexys Prinzipientheorie aus der Sicht der Grundrechtsdogmatik* [*The benefits of a theory explaining it all: Robert Alexy’s principle theory assessed through legal doctrine of fundamental rights*]. *JuristenZeitung*. Vol. 63, 15/16. pp. 756 – 763.

<sup>83</sup> Supra Alexy, R. (2002). p. 17.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid p. 18.

<sup>86</sup> Alexy, R. (2007). *Thirteen Replies*. In: Supra Pavlakos, G. (2007). pp. 333 – 366.

support the norm analysis of other constitutional frameworks.<sup>87</sup> The concept and structure of constitutional rights norms as discussed by Robert Alexy will be introduced in this chapter, including references to his highly abstract terminology. In doing so, we will be relying heavily on Alexy's contribution to principle theory, but will also discuss the offering and versions of principle theory within which it is situated. Constitutional rights norms will be introduced as principles and we will establish the differences between principle and rule construction.<sup>88</sup>

## **2. The Constitutional rights norm**

This thesis will be testing the hypothesis that EU citizenship, as established by Article 20 and 21 TFEU, is to be seen as a constitutional right, established through constitutional rights norms and consequently showing a defined character and behaviour when applied by the Court of Justice of the European Union. In order to support this assumption later on in this thesis, we firstly need to investigate the Alexian concept and structure of constitutional rights norms. In doing so, we will touch on philosophical debates regarding the validity of norms and how far validity adds to norm terminology. We will look at the concept of constitutional rights norms and determine how much semantics regarding norm, provision and statement matter in defining them, before moving on to discuss the structure of constitutional rights norms by introducing the Alexian principle theory.

### **2.1. Norms and norm statements**

Grammatically, a norm is a, not necessarily written, statement. The norm is the result of the normative meaning of a statement.<sup>89</sup> While a norm can entail multiple normative

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<sup>87</sup> Julian Rivers proposes its relevance to the British constitution with a particular focus on Human Rights in: Rivers, J. (2002). *A Theory of Constitutional Rights and the British Constitution*. Oxford University Press. In: Supra Alexy, R. (2002). pp. xvii – li.; Van Der Schyff sees the relevance of the framework for the South African constitution, in: Van Der Schyff, G. (2004). *A Theory of Constitutional Rights*, Robert Alexy: book review. *Tydskrif vir die Suid-Afrikaanse Reg*. pp. 770 – 771; Kumm argues for the need to engage with Alexy's approach seriously from an American perspective in: Supra Kumm, M. (2004). p. 596.

<sup>88</sup> Supra Alexy, R. (2010).

<sup>89</sup> Supra Alexy, R. (2002). p. 22. Alexy differentiates between "Norm" and "Normsatz" in German publication: Alexy, R. (1994). *Theorie der Grundrechte*. Suhrkamp. p. 42; See also: Supra Heinold, A. (2011). p. 181.

statements, the same statement can also be related to more than one norm.<sup>90</sup> We are therefore distinguishing between the two.<sup>91</sup> Constitutional rights norms then, as the type of norms this thesis is going to focus on, entail normative statements outlining constitutional rights.<sup>92</sup> Consequently, when determining the normative characteristics of a statement, its content is considered. Some normative statements may be easily identifiable, others not. Alexy discusses this in relation to semantics and validity.<sup>93</sup>

In order to establish the semantics, Alexy discusses deontic modes and how these inform the characterisation of statements as normative.<sup>94</sup> Following the view that normative statements express either command, prohibition or permission, Alexy claims that every normative statement in one way or another articulates that “something ought to be the case”.<sup>95</sup> These semantics always encompass a level of openness, or open-texture.<sup>96</sup> In discussing the semantics, Alexy eventually responds to approaches linking a norms validity to its characterisation. He criticises those linking semantics and validity inextricably, in order to determine whether a statement constitutes a norm, arguing that “as it is possible to express a thought without laying it down as true, [...] it has to be possible to express a norm without assuming that it is valid.”<sup>97</sup> Alexy’s discussion of norm validity prepares his proposed structure of constitutional rights norms.<sup>98</sup> His focus on a structural analysis leads him to argue a semantic definition of norms only. Alexy does not want the discussion of norm validity to distract or hinder the structural analysis

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<sup>90</sup> Borowski, M. (2006). Die Glaubens- und Gewissensfreiheit des Grundgesetzes [*Freedom of faith and conscience within the Basic Law*]. Mohr Siebeck. pp. 181 – 182.

<sup>91</sup> On the differentiation between norm and normative statement (or “Norm” and “Normsatz”): Supra Heinold, A. (2011). p. 177.

<sup>92</sup> Supra Alexy, R. (2002). p. 19.

<sup>93</sup> Ibid p. 25 ff.

<sup>94</sup> Ibid p. 22 ff. Discussing deontic modes and deontic logic are among others: Navarro, P. (2010). Deontic Logic and Legal Philosophy. In: Nuccetelli, S., Schutte, O. & Bueno, O. (2010). A Companion to Latin American Philosophy. Blackwell Publishing. pp. 439 – 453; Goga-Vigaru, R. (2012). A Corpus-based Analysis of Deontic and Epistemic Values of the Modal Shall in Legal Texts. Contemporary Readings in Law & Social Justice. Vol. 4, 2. pp. 752 – 763; Allen, L.E. (1998). Some Examples of Using the Legal Relations Language in the Legal Domain: Applied Deontic Logic. Notre Dame Law Review. Vol. 73, 3. pp. 535 – 574.

<sup>95</sup> Supra Alexy, R. (2002). p. 25; In reference to Kelsen as assessing “‘Ought’ as the expression for all normative functions” In: Kelsen, H. (1991). General Theory of Norms. Oxford University Press. p. 97; Others use different terminology referring to ‘morality’ of ‘authored and un-authored norms’: Wilson, C. (2004). Moral Animals: Ideals and Constraints in Moral Theory. Oxford University Press. pp. 40 ff.

<sup>96</sup> Kleiber, M. (2014). Der grundrechtliche Schutz künftiger Generationen [*Future generations’ constitutional protection*]. Mohr Siebeck. p. 252.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid p. 27; Also supra Alexy, R. (2002b). p. 88.

he has in mind and yet it is infused by a sociological or ethical concept of validity.<sup>99</sup> While he is reluctant to choose a preference in the way the validity of a norm is discussed or determined, he concludes with a logical assertion, breaking the collection of theories of validity down to a formula in which he claims “when in respect of norm *N* the criteria  $C_1, \dots, C_n$  apply, then norm *N* is valid.”<sup>100</sup>

The validity question and Alexy’s willingness to include assertions in his norm analysis that lie outside the norm itself, reflect his general understanding of jurisprudence in delivering and working towards a practical function. He does not view law as operating within a closed off vacuum created by written statements in codes and statutes, but rather as requiring the inclusion of non-legal elements such as ethical and moral considerations. In that, Alexy’s approach to law matches that of Dworkin’s.<sup>101</sup> We will discuss how far Alexy’s approach reflects Dworkin’s work when introducing the Alexian view on principle theory later on in this chapter.

## 2.2. Constitutional Rights provisions

While the discussion of norm semantics and validity informs our understanding of Alexy’s approach, it is the way he then establishes the concept of constitutional rights norms that is crucial for this thesis. In order for us to be able to apply this theoretical framework within the EU setting, the characteristics of constitutional rights norms need to be explicitly established and then applied to Articles 20 and 21 TFEU.

While Alexy acknowledges an abstract and concrete setting in which constitutional rights norms are analysed and applied, we are interested in the latter: A concrete analysis determining EU Citizenship, within the EU constitutional framework, to be constitutional rights norms.<sup>102</sup> As Alexy focusses his analysis on a particular constitutional framework (the German Constitution and the constitutional rights

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<sup>99</sup> Supra Alexy, R. (2002). p. 27. Fn. 32.

<sup>100</sup> Ibid.

<sup>101</sup> Supra Dworkin, R. (1977); Dworkin, R. (1985). *A Matter of Principle*. Harvard University Press; Dworkin, R. (1986). *Law’s Empire*. Belknap Press; Dworkin, R. (2013). *Justice for Hedgehogs*. Harvard University Press; Also see analysis and critique of his position: Allen, J. (1997). *Legal Interpretation and the Separation of Law and Morality: A Moral Sceptic’s Attack on Dworkin*. *Anglo-American Law Review*. Vol. 26. pp. 405 – 430; Lyons, D. (1986). *The Connection Between Law and Morality: Comments on Dworkin*. *Journal of Legal Education*. Vol 36. pp. 485 – 487; Baxter, H. (2010). *Dworkin’s “One-System” Conception of Law and Morality*. *Boston University Law Review*. Vol. 90. pp. 857 – 862.

<sup>102</sup> Supra Alexy, R. (2002). p. 30.

provisions within it), we are seeking a very particular analysis within the EU constitutional framework.<sup>103</sup> While Alexy's approach is narrow in arguing constitutional rights norms can only be expressed through provisions within the Basic Law, we will argue and show how his approach to norm structure and functionality can be applied to EU treaty provisions, EU Citizenship in particular.

### **2.2.1. Constitutional Rights**

Within this structural analysis, we have got so far as establishing that constitutional rights are expressed through normative statements. This normative statement expressing such right is consequently to be defined as constitutional rights norm. We would therefore have to discuss how to determine whether a normative statement is in fact expressing a constitutional right. This takes us to the question: What are constitutional rights? Alexy's approach is so focussed on structure that he does not engage much in a debate of substantive characteristics of constitutional rights.<sup>104</sup> Other approaches to constitutional rights, particularly those discussing them in an international context, are consequently critical of the lack of substantive analysis in Alexy's work.<sup>105</sup> Both approaches, however, see "constitutional rights as protecting an extremely broad range of interests but at the same time limitable by recourse to a balancing or proportionality approach".<sup>106</sup> Most importantly this applies horizontally, between individual right holders, as well as vertically, between the right holder and a public body or the state itself. Human rights are constitutional rights in many constitutional legal frameworks.<sup>107</sup> Loughlin, in aiming to establish a concept of constitutional rights, discusses how far "the term should be reserved for that category of natural rights that are retained by the people when the constitution of government is devised" and as such "are enumerated" within a constitutional document.<sup>108</sup> This is

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid p.31.

<sup>105</sup> Supra Möller, K. (2012). p. 2; Möller views his work as "a substantive moral theory of rights, [which] can thus be read as offering a constructive response to what [he regards] as deficiencies in Alexy's methodology."

<sup>106</sup> Ibid p.1, p. 10.

<sup>107</sup> Wellman, C. (2010). *The Moral Dimensions of Human Rights*. Oxford University Press. pp. 127 ff.

<sup>108</sup> Loughlin, M. (2010). *Foundations of Public Law*. Oxford University Press. p. 344.



where we return to a formal and structural assessment of constitutional rights and are moving away from a focus on substance.

The format in which constitutional rights are presented matters in order to determine whether they are of constitutional 'quality'.<sup>109</sup> Alexy relies on the prominent German jurist and political theorist Schmitt, who stated that constitutional rights, as a substantive element, "form part of the foundation of the state".<sup>110</sup> The purpose of rights is to support and form a liberal state and, within that, qualify as individual liberty.<sup>111</sup> Schmitt established his approach on the basis of Weimar's Constitution, which never came to fruition, being manipulated in order to support Hitler's democratic uprising and legalise his actions.<sup>112</sup> The main issue with Schmitt's definition is that it makes the characterisation of constitutional rights dependant on the definition of the State.<sup>113</sup> Instead of aiming for an all-encompassing characterisation of constitutional rights, we will be able to identify them in various ways. Firstly, those norms expressing the guarantee of a subjective right can be seen as constitutional rights provisions.<sup>114</sup> Secondly, the position within the constitutional text, in Alexy's case Articles 1 – 19 of the Basic Law, qualify these as constitutional rights provisions.<sup>115</sup> While the former involves a substantive element, the latter again focusses on structure only. Alexy himself sees the limits of either of these approaches as he, e.g., sees Article 93 (1) No. 4 of the Basic Law needing to be included within the realm of structural constitutional rights provision, as it guarantees the individual's right to constitutional review before the FCC.<sup>116</sup> All of

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<sup>109</sup> Möller, K. (2007). Balancing and the structure of constitutional rights. *International Journal of Constitutional Law*. Vol. 5, 3. pp. 453 – 468. p. 453. <https://doi.org/10.1093/icon/mom023>.

<sup>110</sup> Schmitt, C. (1932). *Grundrechte und Grundpflichten* [*Constitutional rights and constitutional duties*]. In: Schmitt, C. (1973). *Verfassungsrechtliche Aufsätze* [*Essays in Constitutional Law*]. p. 190.

<sup>111</sup> Ibid p. 206.

<sup>112</sup> Polak, K. (1948). *Die Weimarer Verfassung: ihre Errungenschaften und Mängel* [*Weimar's constitution: Its Accomplishments and Deficiencies*]. Kongressverlag; Apelt, W. (1964). *Geschichte der Weimarer Verfassung* [*History of Weimar's Constitution*]. Beck; Gusy, C. (2016). *Die Weimarer Verfassung zwischen Überforderung und Herausforderung* [*Weimar's Constitution between overextension and challenge*]. Der Staat. Vol. 55, 3. pp. 291 – 318; Brokoff, J. (2001). *Die Apokalypse in der Weimarer Republik* [*The Apocalypse within Weimar's Republic*]. Fink; Regarding the more general questioning of Nazi law see: Lavis, S. (2018). The Distorted Jurisprudential Discourse of validity in 'Nazi Law': Uncovering the 'Rupture Thesis' in the Anglo-American Legal Academy. *International Journal for the Semiotics of Law*. <https://doi.org/10.1007/s11196-017-9538-5> [accessed 15/04/2018].

<sup>113</sup> Supra Alexy, R. (2002). Ibid p.31.

<sup>114</sup> Ibid p. 32; Supra Möller, K. (2007). p. 453.

<sup>115</sup> Supra Möller, K. (2007). p. 453.

<sup>116</sup> Supra Alexy, R. (2002). p. 32.

these attempts to characterise constitutional rights focus on definitions through substantive or formal, even structural, definitions and approaches.

### 2.3. Derivative constitutional rights norms

By characterising constitutional rights in this manner, they remain limited to the constitutional text, the Basic Law. Alexy introduces his theory as a constitutional rights theory applying to the Basic law only. These are directly expressed constitutional rights. This is where we do well to remind us of Alexy's goal: He is seeking to present a general theory of constitutional rights fulfilling the practical function within jurisprudence. In order to fulfil the practical function, the constitutional norms as established by the relevant constitutional text are not sufficient. These norms present a right through an open-texture, aiming to secure an "extremely broad range of interests".<sup>117</sup> This open-textured norm does not sufficiently fulfil the practical function, as it alone and in of itself cannot provide enough clarity on the right entailed and protected.

This is where Alexy introduces *zugeordnete* constitutional rights norms, translated by Rivers as derivative norms.<sup>118</sup> The content, and so the protected constitutional right within the norm, can be far from clear.<sup>119</sup> These derivative norms can be created through case law, in specific circumstances even academic commentary, which defines crucial terminology and consequentially scopes the constitutional right entrenched within the text of the constitution.<sup>120</sup> They will close the open-texture to a limiting extent, as they may only be relevant to specific situations, whereas the full open-texture constitutional rights norm remains applicable generally. Denying these derivative norms constitutional status would be denying their constitutional relevance in relation to substance and

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<sup>117</sup> Supra Möller, K. (2012). p. 1.

<sup>118</sup> While *derivative* expresses the supposedly secondary nature of these constitutional rights norms, *conjugated* would describe the relationship between constitutional rights norms within the Basic Law and those linked to them more efficiently, as the German term *zugeordnet* does not necessarily express a secondary nature.

<sup>119</sup> Alexy uses the constitutionally entrenched freedom of sciences in Art. 5 (3) Basic Law to discuss how the protected terms of *arts*, *science*, *research* and *teaching* require clarification from outside the constitutional text but with equal constitutional quality: Supra Alexy, R. (2002). pp. 33 ff. Kleiber undergoes a similar exercise when discussing *dignity* as stated within Article 1 (1) Basic Law: Supra Kleiber, M. (2014). p. 252.

<sup>120</sup> Supra Alexy, R. (2002), in reference to BverfGE 35, 79 (113) defining what *science* entails in relation to Art. 5 Basic Law.

structure of constitutional rights norms.<sup>121</sup> It is the relationship between the constitutional rights norms and its derivatives that clarifies and substantiates the constitutional right(s) entailed. It is the constitutional rights norm's open-texture that facilitates this process, and consequently awards constitutional character to specific court decisions, which provide substantive and structural qualifications of the relevant norm within the constitution.

It is important then to distinguish between on the one hand, case law and scholarship simply applying the constitutional norm and, on the other hand, those norm external contributions adding clarification and substantiation to the norm. The latter will consequently qualify as a derivative constitutional rights norm. This is where Alexy sees the relevance of justifying mechanisms. As and when "correct constitutional justification is possible" the provision at hand constitutes a constitutional rights norm, or the derivative of one.<sup>122</sup> Constitutional rights norms will include means of limitation and justification within their semantics. Derivatives, however, will have their justifications and limits provided through other case law and commentary.

### **3. Rules and Principles**

With the established concept of constitutional rights norms in mind, we are approaching Alexy's core thesis. He proposes that those norms, through their structure, are in fact principles, seeking to be fulfilled to the optimum extent legally and practically possible.<sup>123</sup> In proposing some norms to be principles, Alexy establishes a way to differentiate these from those norms that are rules. It is clear that within this thesis and Alexy's theoretical framework, the terminology around principles is strictly discussed in relation to norm analysis and not exclusively focussing on wider principles of law.<sup>124</sup>

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<sup>121</sup> Supra Alexy, R. (2002); Supra Kleiber, M. (2014).

<sup>122</sup> Supra Alexy, R. (2002). p.37.

<sup>123</sup> Ibid p. 47.

<sup>124</sup> The differentiation is essential, particularly considering the wealth of contributions discussing 'constitutional principles' or 'principles' in law: Finnis, J. (2007). Nationality, alienage and constitutional principle. *Law Quarterly Review*. Vol 123. pp. 417 – 445; Ekins, R. (2013). Constitutional Principle in the Laws of the Commonwealth. In: Keown, J. and George, R.P. (2013). *Reason, Morality, and Law: The Philosophy of John Finnis*. Oxford University Press. pp. 397 – 413; Berger, B. (2014). Constitutional Principles. In: Dubber, M.D. and Hörnle, T. (2014). *The Oxford Handbook of Criminal Law*. Oxford University Press. pp. 422 – 445; Hathaway, O.A. (2005). Between Power and Principle: An Integrated Theory of International Law. *The University of Chicago Law Review*. Vol. 72, 2. pp. 469 – 536; Coleman, J.

### 3.1. Differentiation

Understanding norms as principles is not a new way of considering and analysing norms.<sup>125</sup> The field is, however, often confusing, with inconsistent terminology and contributions using the terms ‘norm’ and ‘principle’ almost as opposites, suggesting principles are not norms, or interchangeably.<sup>126</sup> Rules and principles will be discussed as concepts of a norm. They both pass the introduced ‘ought to’ test and consequently can both qualify as normative statements. Both, as norms, are therefore present in legal texts, whether they are of constitutional quality or not. In that way, the differentiation between rules and principles is not per se a constitutional matter but a norm theoretical one, proposing a formal and structural definition. When looking for criteria to support the identification and differentiation of rules and principles, we need to account for the varying perspectives on the matter of norm theory.

While some deny a structural distinction between principles and rules altogether, other contributions differ regarding the extent to which they agree the two to be separate.<sup>127</sup> Those denying a structural differentiation either argue that the attempt fails to acknowledge practical reality or go so far as to view it as “superfluous commonplace” that “unnecessarily complicates” the issues it is seeking to address.<sup>128</sup> Consequently, as no differentiation is accepted, no criteria to identify rules and principles have been successfully proposed. Those accepting a moderate, or weak, differentiation between principles and rules accept the structural difference between the two, but do not view it as being of fundamental difference but rather a “gradual logical difference”.<sup>129</sup> Within

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(2003). *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford University Press.

<sup>125</sup> Among others: Holmes, O.W. (1881). *The Common Law*. American Bar Association. pp. 35, 78 f; Pound, R. (1908). *Common Law and Legislation*. Harvard Law Review. Vol. 21, 6. pp. 383 – 407; Llewellyn, K.N. (1960). *The Common Law Tradition*. Little, Brown and Company; Raz, J. (1972). *Legal Principles and the Limits of Law*. Yale Law Journal. Vol. 81, 5. pp. 823 – 854; Supra Dworkin, R. (1977); Esser, J. (1956). *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts [Principle and Norm in judicial education in civil law]*. J.C.B. Mohr.

<sup>126</sup> See on terminology: Supra Esser, J. (1956).

<sup>127</sup> Heinold discusses this as *Übereinstimmungsthese* (congruence thesis), *schwache Trennungsthese* (weak partition thesis) and *starke Trennungsthese* (strong partition thesis): Supra Heinold, A. (2011). pp. 182 ff.

<sup>128</sup> Hughes, G. (1968). *Rules, Policy and Decision Making*. The Yale Law Journal. Vol. 77, 3. pp. 411 – 439. p. 419; Jakab, A. (2016). *European Constitutional Language*. Cambridge University Press. pp. 369 – 374.

<sup>129</sup> Supra Heinold, A. (2011). p. 183; Raz discusses how far Dworkin’s differentiation is fitting, In: Supra Raz, J. (1972). p. 825 ff; Also: Sieckmann, J.-R. (1990). *Regelmodelle und Prinzipienmodelle des Rechtssystems [Models of rules and principles within the legal system]*. Nomos.

this stream of moderate difference, the distinguishing criteria focus on a measurement of generality. Principles are argued to be “norms of relatively high generality”, with rules being perceived as narrower in scope.<sup>130</sup> The third group and those viewing rules and principles as structurally different and consequently different “norm classifications” is represented by Alexy’s approach but also by Dworkin.<sup>131</sup> It is here that Alexy proposes his approach to differentiation, which lies in his characterisation of principles as “optimization requirements.”<sup>132</sup>

### 3.1.1 Optimization requirements

Alexy refers to his own work when establishing this differentiating criterion. According to him, norms that “require something be realized to the greatest extent possible given the legal and factual possibilities” are principles.<sup>133</sup> These norms then can be satisfied to varying degrees and are seeking to be realised to their optimum. As the circumstances in which the principle is to be realised change, the degree to which it achieves fulfilment will vary. The factually possible is determined through the situation to which we want to apply the principle. The legally possible, however, depends on those norms (principles and rules) that limit the principle at hand, by either contradicting it directly or infringing on its scope by establishing rights that interfere with their substance. The principle, through its deontic norm characteristics, is ordered to fulfil the substantive normative scope, without knowing or clarifying the applicable circumstances.<sup>134</sup> This is what reflects their *prima facie* character, which is easier to understand within non-common law legal frameworks, where the binding nature of precedents is absent. While we can define principles separately, their characteristics are more evident when analysing them

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<sup>130</sup> Supra Alexy, R. (2002). p. 45.

<sup>131</sup> Ibid pp. 47 ff; Supra Heinold, A. (2011). p. 184; Supra Dworkin, R. (1977). pp. 24, 41 ff.

<sup>132</sup> Supra Alexy, R. (2002). pp. 47 ff; Rivers translates Alexy’s *Optimierungsgebote* to optimization requirements. The German term ‘Gebote’ stands in direct relation to the earlier established deontic modes within norms. The English term requirements does not quite grasp that relation and it is not captured or clarified elsewhere within Rivers’ translation. It is translated as optimization obligations in other publications, e.g.: Aarnio, A. (1990). Taking Rules Seriously. Archiv für Rechts- und Sozialphilosophie. Beiheft 42. pp. 180 – 192. p. 187 ff.; ‘Optimization commands’ would grasp the subtleties of the meaning better and facilitate the link to deontic modes of norms. This thesis will, however, continue to use Rivers’ terminology to avoid confusion.

<sup>133</sup> Alexy, R. (1979). Zum Begriff des Rechtsprinzips. Rechtstheorie. Beiheft Band 1. pp. 59 – 87. p. 79 ff; Supra Alexy, R. (2002). p. 47.

<sup>134</sup> Supra Heinold, A. (2011). p. 196.

in relation to other (conflicting/competing) norms, which is also where the process of balancing becomes apparent.

In contrast to principles, rules have a binary character. A rule either applies to a situation or not. It is consequently either fulfilled or not. There is no variation in the degree of satisfaction, fulfilment or generality when it comes to rules: “In this way rules contain fix points in the field of the factually and legally possible.”<sup>135</sup> It is the dismissal of degree as a fitting criterion in relation to rules that differentiates Alexy’s approach from others. According to him, an appropriate norm understanding cannot be one which focusses on the degree as distinguishing element - be it in the form of considering one norm more general than the other or more explicit or more significant: “This means that the distinction between rules and principles is a qualitative one and not one of degree.”<sup>136</sup> Only principles can be fulfilled to varying degrees, depending on the factually and legally possible. Rules are always either fulfilled or not, without any gradual reference.

This is an abstract, structural differentiation, which acknowledges that not all norms fulfil identical purposes and functions and consequently present different characteristics. It is worth noting that the concept of optimization requirements, while alien to other legal frameworks, is by now a well-established perception of norms within the German legal framework. Alexy first discussed the concept of optimization requirements in 1979 and published his constitutional rights thesis in 1985.<sup>137</sup> His approach has been critiqued and applied in various ways ever since, with the concept of optimization requirements being one focus, also outside the sphere of constitutional and general legal theory.<sup>138</sup> While some dismiss the differentiation of norms as artificial,

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<sup>135</sup> Ibid p. 48.

<sup>136</sup> Ibid.

<sup>137</sup> Supra Alexy, R. (1979); Supra Alexy, R. (1994).

<sup>138</sup> Robrahm, R. & Bock, K. (2018). Schutzziele als Optimierungsgebote [*Protective goals as optimization requirements*]. Datenschutz und Datensicherheit – DUD. Vol. 42, 1. pp. 7 – 11; Englisch, J. (2008). Wettbewerbsgleichheit im grenzüberschreitenden Handel [*The level playing field in transborder trade*]. Mohr Siebeck. pp. 21 ff; Stürner, M. (2010). Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht [*The Principle of Proportionality in the law of obligations*]. Mohr Siebeck. pp. 331 ff.; Dreier, J. (1995). Die normative Steuerung der planerischen Abwägung [*Normative governance in planning law consideration*]. Duncker & Humblot. pp. 121 ff.; Thome, S. (2014). Reform der Datenschutzaufsicht [*Reform of data protection supervision*]. Springer Vieweg. pp. 118 ff.; Supra Kleiber, M. (2014). pp. 89 ff; Poscher, R. (2010). Theorie eines Phantoms – Die erfolglose Suche der Prinzipientheorie nach ihrem Gegenstand [*A phantom’s theory – Principle theory’s unsuccessful search for its cause*]. Zeitschrift für rechtswissenschaftliche Forschung. Heft 4. pp. 349 – 372. p. 368.

others see value in considering norm structure instead of focusing on norm substance only. In acknowledging that not all norms are functioning equally when applied and interpreted, we accept there to be different norm categories. We can then follow Alexy, who developed a characterization of principles with optimization requirements as one of these categories. We can also agree with Jakab's very critical account, challenging the notion that "principles [are] logically distinct from rules" as superfluous, as he does not argue all norms are homogenous.<sup>139</sup> He argues principles to simply be "very general rules" that require the court to interpret them in a specific way depending on the case.<sup>140</sup> In favour of terminological clarity, Alexy's introduction of structurally separable norm versions, rules and principles, will continue to be followed. The advantages of a clear distinction, beyond characteristics of generality, will become more apparent when we explore how rules and principles function in what Alexy calls *Prinzipienkollision* and *Regelkonflikt*.<sup>141</sup>

### 3.1.2. *Prima facie* character

Recognising Jakab's criticism, we should also briefly consider other means of describing and differentiating rules and principles. Alexy proposes that both norm categories differ according to their defined character and how we read and analyse them as reasons depending on their character.<sup>142</sup> Both these differentiating categories are so *prima facie*, discussed within an artificial context of standard circumstances and accepted as correct until proven otherwise.<sup>143</sup> While the discussion of rules and principles as reasons will follow our norm conflict discussion, we will introduce the differentiation by *prima facie* character here.

This differentiation repeats the assessment of rules as static. Here, they are described as norms of clearly defined character. Rules insist on their entailed normative statement to be fulfilled exactly as required.<sup>144</sup> Contrary to this, principles are not definitive but

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<sup>139</sup> Supra Jakab, A. (2016). p. 373 f.

<sup>140</sup> Ibid p. 374.

<sup>141</sup> Rivers translates these as meaning 'competing principles' and 'conflict of rules'. The discussion of norm collision (*Normenkollision*) is inherent to German constitutional law and German legal theory. Internationally, the discussion is best reflected through international private law.

<sup>142</sup> Supra Alexy, R. (2002). p. 57 – 60; Supra Alexy, R. (1994). p. 87 – 92.

<sup>143</sup> Supra Heinold, A. (2011). p. 195.

<sup>144</sup> Supra Alexy, R. (2002). p. 57.

“lacking the resources to determine their own extent”, which reflects their characterisation as optimization requirements.<sup>145</sup> Rules have a defined legal consequence, in “an all-or-nothing way”, while principles “require something to be realized to the greatest extent possible”.<sup>146</sup> This differentiation is another reflection on Dworkin’s work, who saw this to be a logical distinction.<sup>147</sup> While Alexy views the differentiation to be one of structure, he draws on Dworkin’s approach.

In other works, Alexy refers to the ideal Ought when ascribing principles the optimizing pull and their prima facie character.<sup>148</sup> The ideal Ought requires no absolute, but simply approximate, realisation of what the norm sets out to achieve.<sup>149</sup> Heinold, in comparing the approaches of Alexy and Dworkin, goes to great lengths to discuss the ideal and real Ought.<sup>150</sup> Both are again a way in which norms are differentiated. The real Ought sets a rule, while the ideal Ought sets a principle, with its fulfilment depending on the circumstances.<sup>151</sup> Alexy, was concerned about the potential for misunderstanding of this approach and abolished its use in his later publications then almost exclusively relying on the discussion of prima facie character and optimization requirements when defining the two norm categories.<sup>152</sup> This suggests that the concept of the ideal Ought and that of optimization requirements are congruent descriptions of principles. Alexy’s move away from focussing on the ideal Ought towards the optimization description, however, represents a subtle shift in perspective. The ideal Ought is a character description of principles, reflected in the prima facie narrative. Depicting principles as optimization requirements, however, is ordering those applying the law (the legal practitioner) to do so in a specific way in relation to their deontic normative statement.<sup>153</sup> Both serve the differentiation of rules and principles, but one in relation to their norm character and the other in relation to their normative statement.

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<sup>145</sup> Ibid.

<sup>146</sup> Ibid; Supra Heinold, A. (2011). p. 195.

<sup>147</sup> Supra Dworkin, R. (1977). p. 24 ff; Supra Heinold, A. (2011). p. 194; See also: Griller, S. (2011). Der Rechtsbegriff bei Ronald Dworkin [*Legal definitions by Ronald Dworkin*]. In: Rill, H.P. & Griller, S. (2011). Rechtstheorie: Rechtsbegriff – Dynamik – Auslegung. pp. 57 – 79. p. 61 f.

<sup>148</sup> Supra Alexy, R. (1979). p. 79 ff.

<sup>149</sup> Supra Heinold, A. (2011). p. 197.

<sup>150</sup> Ibid p. 196 ff.

<sup>151</sup> Ibid.

<sup>152</sup> Supra Alexy, R. (2002). p. 82, FN 148.

<sup>153</sup> Supra Heinold, A. (2011). p. 198.



### 3.2. Conflicting norms

Rules and principles as two norm categories interact differently when opposing norms are relevant to the same scenario. It is this interaction, or norm collision, that highlights the different characteristics of both norms. Heinold discusses norm collision in greater depth, as what makes a conflict, collision or simply contradiction is not agreed among scholars, albeit Alexy not seeing the need for clarification in his approach.<sup>154</sup> Particularly in relation to collision of rules, those engaged in the debate disagree whether rules entailing exceptions prevent a collision from occurring.<sup>155</sup> Heinold focusses on the disagreement between Raz and Dworkin, who apply different understandings of norms and consequently arrive at different conclusions when they see their individual norm concepts in collision.<sup>156</sup>

Alexy focusses on the fact that when a collision occurs, principles and rules solve these differently. As rules either apply or not, there can be no gradual difference to their relevance and applicability to a situation. Where two rules apply but arrive at contradicting legal ought judgments, one can either be viewed as the exception to the other, or one rule is declared to be invalid.<sup>157</sup> While accepting the one rule as exception to the other is a simple solution, it may not be applicable to all norm collisions.<sup>159</sup> It is then that the validity of one rule is questioned over the validity of the other. In a significant difference to principles, the relationship between conflicting rules remains in place even after the specific situation arose. If the one rule cannot be the exception of the other, it will need to be “excised from the legal system”.<sup>160</sup> This excision can take different forms, examples being *lex posterior derogate legi priori* or *lex specialis derogate legi generali*.<sup>161</sup> The German Constitution offers a different example here that

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<sup>154</sup> Supra Heinold, A. (2011). p. 189 ff.

<sup>155</sup> Ibid.

<sup>156</sup> See: Supra Dworkin, R. (1977). p. 27, p. 74; Supra Raz, J. (1972). p. 832 ff; Costa-Neto, J. (2015). Rights as trumps and balancing: reconciling the irreconcilable? *Revista Direito GV*. Vol. 21. pp. 159 – 188; A summary of the Hart-Dworkin debate at the root of these opposing views is provided and contextualised by: Stavropoulos, N. (2017). *The Debate That Never Was*. *Harvard Law Review*. Vol. 130. pp. 2082 – 2095.

<sup>157</sup> Supra Alexy, R. (2002). p. 49.

<sup>159</sup> Ibid: Alexy provides the example of school bells ringing to alert students to now attend class and not leave the class room, being contradicted by the rule that in case of a fire alarm the building is to be evacuated. This norm collision is quickly by accepting the latter as exception to the former rule.

<sup>160</sup> Ibid.

<sup>161</sup> *lex posterior derogate legi priori* meaning a later law repeals an earlier law; *lex specialis derogate legi generali* meaning a special law repeals general law.

tends to re-appear in constitutional law exams: The Basic Law states in Article 102 that the death penalty has been abolished. One of the federal state constitution's, that of Hessen, however, states in Article 21 that the death penalty is a form of punishment depending on the seriousness of the offence. On the surface, one might assume that the federal state constitution might serve as *lex specialis*; the Basic Law itself, however, regulates the relationship of its norms to federal state constitutional norms by outlining the *Geltungsvorrang* in Article 31 Basic Law. The article stipulates that federal law receives primary validity over that of federal states. Consequently, the federal states' norm allowing the death penalty in specific circumstances is invalid owing to the primary validity of the norm within the Basic Law. This invalidity is indefinite and does not depend on the 'factually or legally possible' in any given situation. The relationship between the two rules cannot be altered by these, as it is not one of degree.

### 3.2.1. Competing Principles

Principles act very differently to rules in a norm collision, which is a consequence of their ability to present the fulfilment or satisfaction of their scope to varying degrees. The established relationship between two contradicting or competing principles is also not permanent. The defeated principle will not be "excised" from the legal system, for in a different scenario it may see a different fate.<sup>162</sup> While a collision of rules consequently results in a statement regarding validity, the outcome of a collision of principles is one of "weight".<sup>163</sup> These collision situations are the simplest form of norm collision, as both opponents belong to the same category of norms. Norm collision overall becomes more complex when we consider a principle to be in collision with a rule and vice versa.<sup>164</sup> While scenarios often involve a range of norms of either rule or principle character, the differentiation also becomes relevant in "hard cases".<sup>165</sup> Some theoretical norm collisions are even prevented through reservation clauses, which do not necessarily regulate an exemption but open the binary character of valid / invalid rules up to gradual

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<sup>162</sup> Alexy uses the term *Prinzipienkollision*, while Rivers translates this into "competing principles". Rivers' translation focusses on the principle characteristics and speaks well to the weighing and balancing part of the solution process, while Alexy at this point seems to focus on presenting the issue as one of norm collision: Supra Alexy, R. (2002). p. 50.

<sup>163</sup> Alexy uses Dworkin's "concept of a dimension of weight" here: Supra Dworkin, R. (1977). p. 26 f.

<sup>164</sup> Supra Heinold, A. (2011). p. 188.

<sup>165</sup> Ibid p. 188 – 189; Supra Dworkin, R. (1977). p. 83 f.

influence by principles.<sup>166</sup> In this situation a collision does not occur, so long as the principle is covered by the clause. Heinold questions the effect reservation clauses have on Alexy's thesis, as they clearly undermine the characterisation of norms as either rules or principles.<sup>167</sup> The assumed binary character of rules is suddenly open to a decision based on degree and weight, which confused the established structural differentiation. Alexy does not view reservation clauses as a threat, but rather as analytical tool enabling a more precise norm theory discourse.<sup>168</sup> In his theory of constitutional rights, Alexy only refers to reservation clauses when discussing limits to constitutional rights, not in the context of establishing differentiating criteria on the norm theoretical level.<sup>169</sup> While the discussion is informative, it is intrinsic to German constitutional law and legal theory.<sup>170</sup> There are other aspects of norm collision that can inform our aim to apply Alexy's theoretical framework to the EU legal framework and provide more clarity on the differentiation between norms and principles. The theoretical complexity of norm collision arising from reservation clauses consequently should not have to hinder us when aiming to apply the approach within the context of EU case law. We will need to see whether differentiating the involved norms leads to an overly complex interaction of rules and principles when analysing specific EU citizenship cases in chapter 5.

### 3.2.2. *Kollisionsgesetz*: The Law of Competing Principles

Alexy uses two distinct FCC cases to establish "the law of competing principles", while acknowledging the "many cases in which [the FCC] has balanced interests".<sup>171</sup> We will discuss the *Lebach* judgement and the conclusions Alexy draws from it.<sup>172</sup> The *Lebach* judgement is a significant case within German constitutional law, as it concerns the relationship between two competing constitutional rights: freedom of expression and

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<sup>166</sup> Supra Alexy, R. (1979). p. 70 f; Supra Heinold, A. (2011). pp. 186 – 188.

<sup>167</sup> Supra Heinold, A. (2011). p. 193 f.

<sup>168</sup> Supra Alexy, R. (1979). p. 71 f.

<sup>169</sup> Supra Alexy, R. (1994). p. 263 ff.; Supra Alexy, R. (2002). p. 189 ff.

<sup>170</sup> Among others: Borowski, M. (2007). Grundrechte als Prinzipien [*Constitutional Rights as principles*]. Nomos. pp. 231 – 239; Spielmann, C. (2008). Konkurrenz der Grundrechtsnormen [*Competing Constitutional rights norms*]. Nomos. pp. 173 – 195; Epping, V. (2017). Grundrechte [*Constitutional Rights*]. Springer; Supra Schwabe, J. (1977); Krebs, W. (1975). Vorbehalt des Gesetzes und Grundrechte. [*Reservations in law and constitutional rights*]. Duncker & Humboldt. pp. 102, 110 ff.

<sup>171</sup> Supra Alexy, R. (2002). p. 50; *Kollisionsgesetz* is Alexy's original terminology, which has been translated by Rivers into law of competing principles: Supra Alexy, R. (1994). p. 79.

<sup>172</sup> Supra Alexy, R. (2002); 1 BvR 536, 72 BVerfGE 35, 202–245.

personal freedom.<sup>173</sup> While the German legal framework does not know the concept of precedent, the case establishes a legal principle in form of a *Grundsatzurteil* (as seminal case).

Within the case, the idea that contradicting norms are balanced against one another is very visible. The case was brought before the FCC by a soon to be released prisoner, whose crime and conviction were about to be brought back to public attention by a TV programme discussing the case and re-enacting the crime. The complainant requested the prohibition of the new programme. The FCC decided in support of the complainant, based on the importance of an unaffected reintegration into society. In a later case, involving a different TV broadcaster but the same criminal case, the FCC decided against the complainant, arguing that the new production would not discuss sufficient details in order to lead to his identification and consequently impact on his personal freedom.<sup>174</sup>

Alexy uses *Lebach* to illustrate how the FCC's balancing process functions and how far his theory of constitutional rights speaks to that. As Article 5 and Article 2 of the Basic Law "have equal status in the abstract", the question answerable by the FCC is which "had the greater weight in the concrete case".<sup>175</sup> The balancing process cannot operate in abstract, as Articles 5 and 2 do not differ in status, hierarchy or weight. The specific characteristics of the case scenario determine the outcome.<sup>176</sup> The FCC discusses the broadcaster's interest and the interests of the individual before concluding that it is specifically the immediate release of the convicted that convinced the FCC of the impact the broadcast could have on the personal freedom of the individual.<sup>177</sup>

The result of the collision of these principle norms is a momentarily valid prevalence of one principle over the other.<sup>178</sup> It is not a decision affecting the validity of either norm.<sup>179</sup> In concluding that the freedom of expression ought to be outweighed by personal freedom in this case, the FCC creates a new norm, establishing the *Grundsatzurteil* and

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<sup>173</sup> Article 5 (1), 2 and Article 2 Basic Law.

<sup>174</sup> BVerfG, Beschluss der 1. Kammer des Ersten Senats vom 25. November 1999 - 1 BvR 348/98 - Rn. (1-45) Available online: [http://www.bverfg.de/e/rk19991125\\_1bvr034898.html](http://www.bverfg.de/e/rk19991125_1bvr034898.html) [accessed 29/04/2018].

<sup>175</sup> Supra Alexy, R. (2002). p. 51.

<sup>176</sup> Ibid p. 52.

<sup>177</sup> Supra 1 BvR 536.

<sup>178</sup> Rivers uses the term precedence when describing the relation between the competing principles, without assuming the doctrine of precedence to be operating within the German legal framework.

<sup>179</sup> Supra Alexy, R. (2002). p. 54.

ultimately affecting the relationship between the two principle norms applied in the balancing process. This norm establishes a relationship of preference.<sup>180</sup> Notably, this relationship of preference formulates a rule. In its content, this rule resembles the principle succeeding in the conflict. In this particular case, by balancing the broadcaster's freedom of expression and the individual's personal freedom, the FCC creates a derivative constitutional rights norm, conjugated with Article 5 and 2, but expressing the content of Article 2 of the Basic Law.<sup>181</sup>

This resembles Alexy's law of competing principles which describes as following: "The circumstances under which one principle takes precedence over another constitute the condition of a rule which has the same legal consequences as the principle taking precedence."<sup>182</sup> That the result of the principle collision formulates a rule sits well with the common law understanding and application of the doctrine of precedent. A court decision can create a new norm, as a version of legislated norm. We will see how far the law of competing principles applies to the CJEU jurisprudence in EU citizenship and whether it is reflected in the reasoning and reference to previous case law.

Alexy's law of competing principles is not uncontested, with Jakab being very critical of it and offering an alternative discussion of the *Lebach* judgement.<sup>183</sup> Jakab is adamant that a structural differentiation between rules and principles is "superfluous", as "the problems of applying the law it explains can be explained without it".<sup>184</sup> While he disagrees with any structural differentiation between rules and principles, he proposes that what Alexy discusses as principles are simply rules with a "scope which is uncertain because of the vague and general expressions contained in their linguistic form".<sup>185</sup> Jakab consequently agrees with Alexy's assessment of constitutional rights norms as open-textured and needing clarification. In his assessment of the *Lebach* judgment, Jakab argues that the FCC, in assessing the rules of Articles 5 and 2, simply held freedom of expression "inapplicable (that is, it interpreted this constitutional provision such that

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<sup>180</sup> Supra Heinold, A. (2011). p. 199.

<sup>181</sup> Supra Alexy, R. (2002). p. 54 and 56.

<sup>182</sup> Ibid p. 54.

<sup>183</sup> Supra Jakab, A. (2016). p. 373 f.

<sup>184</sup> Ibid p. 374.

<sup>185</sup> Ibid

it did not cover this concrete case)".<sup>186</sup> While this assumption may be fitting for Jakab's attempt to disprove the existence of structurally differing norms, his argument is invalid. The FCC did not see Article 5 as inapplicable in the case or not covering the case. It went to great lengths and detail to discuss how both constitutional rights manifested in Articles 5 and 2 needed consideration. It was only at the final stage of its assessment that it did not see a greater relevance of Article 5 over Article 2. Both norms applied to the case and both norms were affected by the judgment. Jakab may be critical of a clear structural difference between rules and principles, but his criticism of Alexy's approach in the *Lebach* case does not withstand closer scrutiny. The argument he uses to support his assumption (that the solution of the case did not require a structural difference between norms) is flawed, as it dismisses the equality that both norms (Article 5 and Article 2) held in the case.

Jakab's criticism does, however, highlight the weaknesses in Alexy's attempt to differentiate between rules and principles by the way they react when in conflict with one another in a concrete case. Alexy's other means of differentiation in relation to character and reason compensate for that weakness, as we are not limited to one differentiating characteristic.

### **3.2.3. Reasons as norm categories**

While we introduced the *prima facie* differentiation, we have yet to discuss the norm categories as reasons. The normative reasons discussed here are to be distinguished from motivating reasons, which will not be considered in this thesis.<sup>187</sup> Alexy wants to see his analysis of principles and rules as reasons for norms to be clearly differentiated from Raz's approach, who discusses norms as reasons for actions.<sup>188</sup>

In line with his previously established differentiation between principles and rules, Alexy introduces rules as definitive reasons, while principles are *prima facie* reasons.<sup>189</sup> This description leads on from the established law of competing principles and the weighing exercise as inseparable component. A rule is reason to a concrete ought judgment and

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<sup>186</sup> Ibid.

<sup>187</sup> Dancy, J. (2002). *Practical Reality*. Oxford University Press. p. 20 f.

<sup>188</sup> Supra Alexy, R. (2002). p. 59; Raz, J. (1975). *Practical Reasons and Norms*. Hutchinson. pp. 15, 58; Raz, J. (2011). *From Normativity to Responsibility*. Oxford University Press. pp. 36 ff.

<sup>189</sup> Supra Alexy, R. (2002). p. 60.

consequently a definitive reason. So long as the rule is “valid, applicable and without relevant exception”, it is, in and of itself, the reason for the judgment made.<sup>190</sup> Principles, on the other hand, do not carry or create definitive statements or rights. They remain *prima facie* statements and consequently are *prima facie* reasons, as they depend on the weighing exercise and the establishment of the relation of preference to gain definitive character.<sup>191</sup>

Alexy gives this categorisation practical relevance. He views the characterisation of rules and principles as reasons for norms as jurisprudential and inherent to the study of law.<sup>192</sup> Klement, who argues Alexy’s approach is not a normative but purely analytical (if not descriptive) one, criticises the practical relevance but struggles to disprove the existence of norms applying the above prescribed characteristics.<sup>193</sup> While he is unconvinced by the practical value of Alexy’s principle theory, he acknowledges it reflects practices in jurisprudence.<sup>194</sup> Reimer is more comfortable with acknowledging the value of this particular principle theory as norm structure analysis than that of a theory with dogmatic relevance.<sup>195</sup> Alexy himself applies and discusses his framework in the context of a series of cases before the FCC, particularly in relation to the rights to liberty and equality as entrenched within the Basic Law.<sup>196</sup> This thesis will follow Alexy in his attempt to show the practical relevance of his approach in the analysis of particular case law. When discussing CJEU cases in the area of EU citizenship, we will continue the discussion about rules and principles, aiming to show how this particular norm theory approach enhances the analysis of constitutionally significant case law.

### 3.3. Challenged concept

As we introduced the different means used by Alexy to establish a differentiation between rules and principles, we started to encounter opposing views. Jakab, most

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<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid p. 59.

<sup>193</sup> Supra Klement, J. H. (2008). p. 760 f.

<sup>194</sup> Ibid.

<sup>195</sup> Reimer, P. (2013). “... und machete zu Jüngern alle Völker”? Von „universellen Verfassungsprinzipien“ und der Weltmission der Prinzipientheorie der Grundrechte [“...and make disciples of all nations”? About “universal fundamental principles” and the world mission of a principle theory of fundamental rights]. *Der Staat*. Vol. 53, 1. pp. 27 – 57. p. 38 ff.

<sup>196</sup> Supra Alexy, R. (2002). pp. 223 ff, pp. 260 ff.

profoundly dubbing Alexy's approach as superfluous, Raz seeing no value in the category of principles, and others focussing on the weaknesses of Alexy's approach when it comes to the practical reality of jurisprudence.<sup>197</sup>

Alexy himself argues that any set of norms, and consequently any legal system, knows how to differentiate between rules and principles. While Raz recognises a differentiation between norms as *prima facie* reasons and conclusive reasons, he disagrees with Alexy's rule and principle categories.<sup>198</sup> Raz, himself arguing to be so critical out of agreement and not disagreement, does not see the value of Alexy's differentiations and challenges whether the point needs to be made.<sup>199</sup> There is "a necessary connection between law and morality" and consequently "every legal system contains various kinds of laws".<sup>200</sup> Raz argues it to be natural for each legal system to entail "legal standards of varying kinds" in order to follow the professions purpose to solve "practical disputes".<sup>201</sup> As it is natural, he finds Alexy's theory of principles rather "unexciting" and claims that it "is not valid, for it concludes that the law of a country includes principles from the sole premise that the courts are required, by law, to apply principles."<sup>202</sup> Raz's criticism is reflected by Jakab, who also dismisses Alexy's differentiation of norms as unnecessary and overly complicated.<sup>203</sup> Jakab, just like Raz, challenges Alexy's argument for a structural difference between rules and principles as norms. The three scholars agree on the existence of norms with differing characteristics. While Alexy argues for a fundamental difference, reflected in their functionality as well as characteristics, Raz and Jakab disagree with the latter simply differentiating between rules and 'very important rules'.<sup>204</sup> Jakab denounces the differentiation to be a rhetorical one, while Alexy builds a framework for court reasoning by arguing for a structural difference between norm

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<sup>197</sup> Supra Jakab, A. (2016); Supra Raz, J. (2007). p. 34; Garcia Amado, J. A. (2009). *Abwägung versus normative Auslegung? Kritik der Anwendung des Verhältnismaßigkeitsprinzips als Mittel juristischer Methodik [Weighing of interests versus normative interpretation? Criticising the use of proportionality as legal methodology]*. Rechtstheorie. Vol. 40. pp. 1 – 42; Poscher, R. (2012). *The Principles Theory*. In: Supra Klatt, M. (2012). pp. 218 – 247; Poscher, R. (2013). *Einsichten, Irrtümer und Selbstmissverständnis der Prinzipientheorie [Insights, Misapprehensions and self-mis-conception of principle theory]*. In: Supra Sieckmann, J.-R. (2007). pp. 59 – 79; Supra Möller, K. (2007).

<sup>198</sup> Supra Raz, J. (2007). p. 34.

<sup>199</sup> Ibid p. 35.

<sup>200</sup> Ibid p. 20, p. 34.

<sup>201</sup> Ibid p. 34.

<sup>202</sup> Ibid.

<sup>203</sup> Supra Jakab, A. (2016). pp. 368 – 369.

<sup>204</sup> Ibid.



categories. Raz does not see any value added by introducing a new terminology that in the end simply describes the influence of naturally flexible values on a legal system. Amado even sees a threat in Alexy's approach to the discretion of constitutional courts, as it seeks to deny the indefiniteness of constitutional norms.<sup>205</sup> While Amado overlooks the semantic limits to constitutional principles within the constitutional framework, his criticism shows the relevance of the debate within other legal frameworks.<sup>206</sup>

Interestingly, none of the aforementioned critiques challenges the existence of the phenomenon described, developed and applied by Alexy. They argue about semantics and the need for them. Alexy's stringent and functional analysis of norm categories is born out of a specific understanding of constitutions, norms and legal frameworks and, as such, reflects a very German-centric scholarship. Constitutional theory has a proud history in German legal, political and philosophical scholarship and academia and builds and reflects on a specific understanding of constitutionalism and norms within a legal framework. While, within other legal traditions, a differentiation of norm categories may be of limited use or even be seen as irrelevant, within the German constitutional law discourse the terminology is a welcome addition. It opens the discourse around court reasoning by relating its benefits and contributions to the practical function of any legal theory and allows a discussion of uncertain outcomes through certain and functional terminology.

#### **4. Proportionality**

Attempting to offer a clear and suitable terminology, Alexy's approach needs to be put in perspective in relation to the phenomenon of proportionality within constitutional court settings. As we have distinguished rules and principles, following Alexy's principle theory, we established principles as norms requiring optimization and, as such, being engaged in collision and competition with other norms, then solved by a balancing of interests. This exercise is strongly related to the principle of proportionality.

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<sup>205</sup> Critical of Amado: Bernal Pulido, C. (2007). Grundrechtsprinzipien in Spanien: Rationalität und Grenzen der Abwägung. [*Constitutional principles in Spain: Rationality and Limits of Balancing*]. In: Supra Sieckmann, J.-R. (2007). pp. 197 – 213. p. 205.

<sup>206</sup> Ibid p. 210 – 213.

The need for a response to be measured, proportionate or balanced is known in different legal contexts, be it judicial review or fundamental rights infringements, and not Alexy's creation. While the balancing of interests can be said to be a common law and mainly American term, the German constitution knows the principle of proportionality well and it is applied by the FCC to appeals on constitutional issues.<sup>207</sup> It is for that reason that Alexy spends some time discussing proportionality and balancing, lending the latter from Dworkin's work mainly.<sup>208</sup>

The principle of proportionality, or proportionality test, as applied and discussed within the German legal framework, is a means to justify an infringement and is consequently the basis for a test at the latest stage in an appeal on a constitutional issue affecting individual rights. It is part of the discussion of the merit of the case. There are four elements to this test, described by Petersen as: "the legitimate aim, the rational-connection test, the less-restrictive-means test, and the balancing of the public purpose and the individual right."<sup>209</sup> The latter three test the suitability (*Geeignetheit*), necessity (*Erforderlichkeit*) and appropriateness (*Angemessenheit*) of the rights infringing measure against the established legitimate aim.<sup>210</sup> The appropriateness assessment entails a weighing and balancing exercise, which is the main focus of Alexy's discussion of the principle of proportionality and consequently referred to as proportionality in the narrow sense.<sup>211</sup>

We need to distinguish the categorisation of specific norms as principles, which consequently requires a balancing of interests to determine their concrete content, from the principle of proportionality and its defining tests. The former is a discussion of norm structure, informing the understanding of constitutional frameworks and their functionality. The latter is a principle applied and discussed where and when norms

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<sup>207</sup> On the historic context of the principle of proportionality: Cohen-Eliya, M. & Porat, I. (2010). American balancing and German proportionality: The historical origins. *ICON*. Vol. 8, 2. pp. 263 – 286. p. 271 ff. See also: Schlink, B. (2011). Proportionality in Constitutional Law: Why Everywhere But Here? *Duke Journal of Comparative & International Law*. Vol. 22. pp. 291 – 302.

<sup>208</sup> Supra Dworkin, R. (1985).

<sup>209</sup> Petersen, N. (2017). Proportionality and Judicial Activism. *Fundamental Rights Adjudication in Canada, Germany and South Africa*. Cambridge University Press. p. 80.

<sup>210</sup> Discussing these elements and the process of weighing of interests critically: Supra Garcia Amado, J. A. (2009).

<sup>211</sup> Supra Alexy, R. (2002). p. 397 f.

entailing rights collide in a scenario and a decision needs to be made regarding which interest outweighs the other.

The principle of proportionality has certainly informed Alexy's theory and is reflected in his assessment; it is, however, a construct in its own right, not altered by the approach introduced here. Additionally, it does not characterise norms in anyway, let alone determine their structure when its tests are applied.<sup>212</sup> Alexy refers to the principle of proportionality as "emerging from the nature of constitutional rights themselves".<sup>213</sup> As such, proportionality is born out of the structure of constitutional rights norms.

When we later attempt the application of the theory of constitutional rights to Articles 20 and 21 TFEU, we will find evidence to support our attempt in the way the CJEU reasons as part of a proportionality test. This will be the part of the judgment where the Court will allow us to see the need for a balancing and weighing exercise in the process of applying EU citizenship provisions.

## 5. Conclusion

Alexy presents a complex concept of norm understanding within a legal theory, aiming to support jurisprudence as a practical discipline. His theory of constitutional rights is consequently characterised by its practical function. While aiming for an ideal theory, Alexy acknowledges that the empirical and normative elements of his approach are less of a focus than the analytical. Outlining the differentiating criteria between different norm categories, we begin to see the complexity but also the potential of this particular approach.

A discussion of the functionality of norms with a focus on their structure risks quickly becoming too abstract to be meaningful. The introduction of Alexy's constitutional rights theory in appropriate depth was necessary in order to allow an informed assessment of the main hypothesis. Having said that, the analysis will move away from the abstract with the next chapters and conclude with an application of Alexy's understanding of constitutional rights norms to the EU legal framework.

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<sup>212</sup> Critical of this differentiation: Windisch, F. (2013). „Abwägung“: Total, Formal, oder Strukturiert? [*Weighing of interests: Total, formal or structured?*]. *Rechtstheorie*. Vol. 44. pp. 61 – 102. p. 72 ff.

<sup>213</sup> *Supra* Alexy, R. (2002). p. 66.

With critiques focussing on semantics not denying the actual functionality argument Alexy is making, we can confidently apply this approach within a different constitutional setting. The introduced terms will help us to facilitate a new and unique discussion of constitutional rights within the EU legal framework, without a narrow focus on Human Rights and the Charter of Fundamental Rights of the EU.<sup>214</sup>

Alexy sees the differentiation of rules and principles to be relevant to any legal order. We have, however, seen how his approach is born out of a specific understanding of constitutional frameworks, their weaknesses and functionality. The next chapter will show how this German constitutional rights theory relates to constitutional understandings of the EU legal framework and EU citizenship in particular.

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<sup>214</sup> See Supra Rivers, J. (2002). pp. xvii ff.

## Chapter 3      European (pluralist) constitutionalism

### 1. Introduction

The Alexian framework of constitutional rights is firmly rooted within the German constitutional order. Alexy analyses decisions of the FCC in relation to specific rights norms in the German constitution.<sup>215</sup> Domestic constitutions, and the theoretical conceptions analysing and discussing them, are irremovably connected to the setting of the nation state to whose legal order they apply... or are they? This thesis argues the relevance of Alexy's constitutional rights discourse to the EU legal order and its constitutional framework. In doing so, it will lift the theory of constitutional rights norms out of its domestic context and show its relevance for the rights analysis of EU norms, EU citizenship norms in particular.

German constitutional norms and European legislative statements are the result of arguably different normative understandings and processes.<sup>216</sup> A simple application of this domestically developed norm theory would be oversimplifying those significant differences. We need to define the perspective this thesis applies when analysing norm structures within a legal system. This is crucial, as in a debate of European constitutional law we need to expect very diverse perspectives of what is viewed as constitutional. Jakab, serving as one example of many scholars, argues that perspective and preference are key, as "when we 'describe' the constitutional concepts, we actually do not just describe them but rather implicitly prescribe a use which favours our political preferences (be it emotional-ideological preferences or interest preferences)."<sup>217</sup> Which perspective is it then that we see applied here? It is not the perspective of a domestic jurist, aiming to push a German constitutional rights theory beyond its applicable scope. It is also not the perspective of a post-, trans-, or international lawyer arguing the irrelevance of the nation state and seeking a new grounding for theoretical frameworks developed in that context. Instead, the perspective applied is one of legal pluralism, constitutional pluralism in fact, which will show how the co-existence and interrelation

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<sup>215</sup> Throughout this chapter also referred to Basic Law.

<sup>216</sup> 'Statements' referring to Alexy's terminology have been elaborated and defined in chapter 2, section 2.1.

<sup>217</sup> Supra Jakab, A. (2016). p. 2.

of the legal orders of Germany and the EU offer a logical ground for the application of a domestic rights theory in EU (constitutional) norm analysis.

This chapter will discuss whether, and how, the application of a domestic constitutional rights theory within the EU legal framework generally adds a valid viewpoint to discussions of EU constitutional law. It will present an overview of different concepts of EU constitutional law analysis. It will then continue to briefly present alternative understandings of the EU's legal order introducing approaches such as (and within) Particularism, Holism and Federalism. The focus of this chapter will be a discussion of legal pluralism, generally, and within that constitutional pluralism, in particular, as a particularly attractive approach to legal analysis of the EU legal order.<sup>218</sup>

By arguing the pluralist nature of the EU constitution, we are able to allow domestically established norm analysis to filter through into the discourse of EU (constitutional) norms. We will be seeing the benefit of the lens of pluralism,<sup>219</sup> as Alexy's analysis of constitutional rights norms and the strengths of his approach will appear ever more relevant to the non-national constitutional framework of EU constitutional law.

## 2. A European Union Constitution

The EU and its predecessor communities have been the subject of a multidisciplinary discourse with questions around the legal nature of the established and ever-growing framework.<sup>220</sup> This discussion gained interest quickly, as the newly established Court(s) quickly responded to early case law in an unexpected fashion.<sup>221</sup>

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<sup>218</sup> The attractiveness is reflected by the range of scholars engaging in the discourse, e.g.: Supra Walker, N. (2002); Supra Walker, N. (2016); Avbelj, M., Komarek, J. (2008). Four Visions of Constitutional Pluralism. EUI Working Paper LAW No. 2008/21; Supra Goldoni, M. (2012); Sweet, A. S. & Stranz, K. (2012). Rights adjudication and constitutional pluralism in Germany and Europe. *Journal for European Public Policy*. Vol. 19, 1. pp. 92-108; Menéndez, A. J. (2011). A Theory of Constitutional Synthesis. In: Fossum, J.E. & Menéndez, A. J. (2011). *The Constitution's Gift*. Rowman & Littlefield. pp. 45 – 76; Supra Menéndez, A. J. (2011b).

<sup>219</sup> Bianchi, A. (2016). *International Law Theories*. Oxford University Press. p. 229.

<sup>220</sup> E.g. Schlochauer, H.-J. (1955). *Rechtsformen der europäischen Ordnung [Legal forms within the European order]*. *Archiv des Völkerrechts*, 5. Bd., No. 1/2, pp. 40 – 62; Weiler, J.H.H. (1986). Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities. *Washington Law Review*. Vol. 61. pp. 1103 – 1144.

<sup>221</sup> *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* Case 26-62 [1963] ECR 1 ECLI:EU:C:1963:1; *Flaminio Costa v. ENEL* Case 6/64 [1964] ECR 585 ECLI:EU:C:1964:66; Regarding analysis and introduction to EU/EC constitutional history, see among others: Weiler, J.H.H. (1999). The Constitution of Europe 'Do The New Clothes Have an Emperor?' and

While there are many perspectives on offer regarding European constitutionalism, the notion of a specific EU constitutional legal framework remains prominent.<sup>222</sup> The specific level of constitutionalism and its uniqueness are cause for debate. This is based on a fundamental disagreement, mainly between international law and EU law scholars, regarding the features of the EU's legal order. The question is whether the EU has the inherent and uniquely constructed constitutional framework the Court claims it has, or whether it is still very much situated within international law, albeit developing the very unique structure and framework we see today.<sup>223</sup>

Constitutionalism as an argument is not a deciding factor in this exchange, as International law has long recognised the relevance of constitutionalism to its structure and framework.<sup>224</sup> It is rather the question whether the European Communities, by transforming into the EU or by other means, have formed in fact some recognisably new and specific legal framework. This debate wants to clarify whether the specifics of International law still very much apply within the EU's legal framework, or whether the Union has cut itself off the influence of that particular understanding of law, including its theoretical underpinnings and conceptual understandings.

It is not the purpose of this thesis to discuss the relation between EU law and international law in great depth. However, in applying Robert Alexy's constitutional rights theory to the TFEU, we are passing judgment on the constitutional character of the treaty. We will be treating this contract between sovereign states as a constitution in relation to how its norms are structured and behave in conflicting scenarios. Engaging in the wider discussion of the constitutional character of the Treaty, be it within

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Other Essays on European Integration. Cambridge University Press. pp. 10 – 101 (the 'foundational years 1958 to 1970s' being the focus of pp. 16 – 39); Cohen, A. (2008). Transnational Statecraft: Legal Entrepreneurs, the European Field of Power and the Genesis of the European Constitution. In: Petersen, H., Kjaer, A. L., Krunke, H. & Rask Madsen, M. (2008). Paradoxes of European Legal Integration. Ashgate. pp. 111 – 127. p. 115 ff.

<sup>222</sup> Supra Eriksen, E.O., Fossum, J.E. & Menéndez, A. J. (2004). p. 3; von Bogdandy, A. (2010). Founding Principles. In: von Bogdandy, A. & Bast, J. (2009). Principles of European Constitutional Law. Hart. pp. 11 – 54.

<sup>223</sup> Among others: Witte, B. (2010). EU Law: How Autonomous is its Legal Order? ZÖR, Vol. 65. pp. 141–155. <https://doi.org/10.1007/s00708-010-0043-5>; Grimm, D. (2004). Treaty or constitution? The legal basis of the EU after Maastricht. In: Supra Eriksen, E.O., Fossum, J.E. & Menéndez, A. J. (2004). pp. 69 – 87; Uerpmann-Wittzack, R. (2010). The Constitutional Role of International Law. In: von Bogdandy, A. & Bast, J. (2010). Principles of European Constitutional Law. Hart. pp. 131 – 167.

<sup>224</sup> Verdross, A. (1926). Die Verfassung der Völkerrechtsgemeinschaft [*The Constitution of the International Legal Community*]. Springer.

international or EU law, will allow us to position this analysis firmly in relation to the wider discourse of European constitutional law and constitutional legal theory.

### 2.1. Outgrowing International law

A prominent argument for the continuing international law character within the EU legal framework is that of the relation between the EU as (international) organisation and its Member States. Walker suggests that this is “a school of thought which emphasises the continuing role of the states as ‘masters of the treaties’ and which, on that basis, continues to depict the new legal order in terms of a very old international law pedigree.”<sup>225</sup> Part of that pedigree is a specific understanding of the characteristics of an international organisation, which the founding European Communities were. Witte describes the European Coal and Steel Community as “a form of an international organization based on a treaty” which was in effect nothing ground-breaking, but in fact “using the age-old instrument of the international treaty.”<sup>226</sup> The Treaty of Rome, establishing the European Economic Community in 1957, as well as the accession treaties as particular form of international law have “gradually become the main instrument for the legal deepening and widening of European integration.”<sup>227</sup>

The specifics within the EU’s legal order, including the structure of competences, supremacy and the judiciary, suggest a constitutionalising process of this legal order rooted within, but subsequently outgrowing, international law.<sup>228</sup> However, Witte evaluates this process differently and argues that “the effort to sharply separate the EU from the field of international law might be misguided for two complementary reasons: because it overestimates the novelty of EU law, and because it underestimates the capacity of international law to develop innovative features in other contexts than that of European integration.”<sup>229</sup> If we were to not partake in the effort of sharp separation but rather appreciate the debate as a way of easing an otherwise seemingly rigid

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<sup>225</sup> Supra Walker, N. (2002). p. 322.

<sup>226</sup> de Witte, B. (2011). The EU as an international legal experiment. In: Supra de Burca, G. & Weiler, J.H.H. (2011). pp. 19 – 56. p. 22.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid p.50; See also: de Búrca, G. (2011). The ECJ and the international order: a re-evaluation. In: de Búrca, G. & Weiler, J.H.H. (2011). The Worlds of European Constitutionalism. Cambridge University Press. pp. 105 – 149.

<sup>229</sup> Supra de Witte, B. (2011). p. 21.



understanding of constitutional law and discourse in EU Law as well as in International Law, the following analysis would be able to provide an even more valuable addition to the debate.

In assuming a less rigid understanding of EU constitutionalism by allowing and embracing the existing connection to International law, we can focus less on what it is that we are analysing and more on how it is being analysed. In doing so, the relevance of perspective becomes apparent and the less rigid approach suggested becomes more tangible. The perspective of those scholars engaging with questions of EU Constitutionalism and its relation to International law matters hugely. Bianchi specifically refers to the influence of German scholarship on international law: “Using categories and concepts that often ‘reflected their experience as German lawyers and intellectuals’, German scholars [...] read treaties not as contracts but as laws. This horizon is given not by rational action but by a view of international law as a ‘legal community’ (*Rechtsgemeinschaft*).”<sup>230</sup> Perspectives seem to matter, particularly in a discussion of law outside the domestic contexts in which each scholar engaging in the debate is educated.

## 2.2. Terminology and perspective

What is law, how it should apply and what its main characteristics are, very much depends on who is asked. The definition of appropriate terminology and focus is challenging in any academic debate, but particularly complicated when the attempt is made to discuss aspects outside their acknowledged remits. In the discourse around the EU constitution(s), the scholars involved are challenged to overcome their scholarly heritage in order to be able to lead a conclusively convincing debate. This is complicated by the fact that any discourse in relation to the EU will rely on domestically established understandings (*Denkmuster*) of law, society and politics, which are not necessarily transferrable into any sphere outside the order of a nation state.<sup>231</sup>

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<sup>230</sup> Supra Bianchi, A. (2016). p. 44.

<sup>231</sup> Jachtenfuchs, M. & Kohler-Koch, B. (1996). Regieren im dynamischen Mehrebenensystem [*Governing within a dynamic system of multi-level governance*]. In: Jachtenfuchs, M. & Kohler-Koch, B. (1996). Europäische Integration. Leske + Budrich. pp. 15 – 44. p. 30.

Tuori sees law to be particularly prone to a perspective focussed analysis, “which inevitably affects what [legal scholars] identify as law and how they interpret and apply it. There is no law as such. Law exists only as identified and interpreted by situated legal actors: that is, legal actors embedded in a particular social and cultural context.”<sup>232</sup> While in an increasingly globalised world the incentive is to leave one’s legal heritage behind and aim to apply a neutral, non-bias, perspective free approach to the law, such an undertaking is difficult to achieve. In fact, Jakab argues that there is an inherent bias particularly in the constitutional law discourse, as “emotional-political or ideological preferences play an even bigger role than usual (lawyers love to sell these ideological preferences as purely legal-conceptual questions to conceal their actual influence on their constitutional reasoning).”<sup>233</sup> Consequently, we need to at least acknowledge the complexity of viewpoints involved, before agreeing on a specific route within the EU constitutional discourse for the purpose of this paper. Indeed, a particular bias forms an inherent part of this specific analysis, which requires justification.

Fittingly, there is a prominent ‘German flavour’ to the discussion of constitutionalism in international law.<sup>234</sup> This is based on a very distinct understanding of law in the international sphere, so outside the domestic scope, which is the result of an analogous application of “the categories, concepts, and mindset that are familiar to them”.<sup>235</sup> This is an argument that brings us back to Jakab’s statement. This ‘German flavour’ is reflected in the “conception of international law as a system”, the application of public law terminology when discussing the law and the focus on a constitutional argument.<sup>236</sup> We have seen elements of this in Alexy’s conception of constitutional rights norms, although this was firmly rooted within the German legal system. His legal language fits within the constitutional theory discourse applying and adding to the ‘German flavour’, which is omnipresent.<sup>237</sup>

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<sup>232</sup> Supra Tuori, K. (2015). p. 78.

<sup>233</sup> Supra Jakab, A. (2016). p. 86.

<sup>234</sup> Supra Bianchi, A. (2016). p. 45.

<sup>235</sup> Ibid p. 46.

<sup>236</sup> Koskeniemi, M. (2011). Between Coordination and Constitution: International Law as a German Discipline. Redescriptions. Vol. 15. pp. 45 – 70. p. 64.

<sup>237</sup> Habermas, J. (2008). The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society. Constellations. Vol. 15. pp. 444 – 445.

Adding this to Witte's discussion of the EU's constitutional character, a wider understanding of 'constitutional' would allow a more liberal discussion of norm character and substance by using a range of norm theoretical or even philosophical tools for the analysis; including the Alexian definition of constitutional rights norms. If the term constitution and its application are not limited to specific static constructs, we can allow a discussion of legal framework constructing and operating the international organisation of the EU as a constitution of its own kind, seeking to establish its very own constitutional understanding and norm theory.

With this in mind, we will now explore some of the versions or better visions of the EU constitution in particular and European constitutionalism more generally. The perspective on all of these will remain relevant.

### **3. Constitutionalising Europe**

When we discussed whether or not the EU's constitutional framework is worthy of the declaration of independence from its founding International law roots, the main argument for this was the EU's very particular way of structuring and applying competences, supremacy and the judiciary. It is indeed the Court who is seen as the lead 'constitutionalising' actor. By introducing mechanisms like direct effect and establishing the supremacy of EU law, the Court not only defended the Treaty status quo, but it also added something to that collection of International Treaties that gave the construct an increasingly unique structure and an increasingly systematic feel. At the same time globalisation gained momentum, which added to the arguable need to constitutionalise. If the EU was to carry any meaning in the globalised world, it had to outgrow the economic purposes and focus on the development of a political and social Union.<sup>238</sup> The approach the EU has taken in developing that meaning, has always been integrational. The characteristics of the appearing legal framework, are however interpreted differently. The following sections will introduce integration as an approach within the EU's development but not as a constitutional format. The idea of a federalist constitution for the EU will be discussed before finally introducing and defining the

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<sup>238</sup> Habermas, J. (2004). Why Europe needs a Constitution. In: Supra Eriksen, E.O., Fossum, J.E. & Menendez, A.J. (2004). pp. 19 – 34. p. 20 ff.

concept of pluralism, which will be favoured when analysing the (constitutional) legal framework of the EU.

### 3.1. Integration

EU law is inherently integration focussed. The analysis of this non-domestic legal framework with focus on its integrational characteristics is a logical consequence of the EU's own goal of an "ever closer Union".<sup>239</sup> Integration theory approaches the analysis of the EU's legal framework with a focus on the shift of power from a national to a "new centre, whose institutions possess or demand jurisdiction over the pre-existing national states".<sup>240</sup> Haas includes within this the shift of social responsibilities as well as "political activities", which follows a particular strand within integration theory, with which not all integrationist scholars agree.<sup>241</sup> Within integration theory scholarship, a difference is also drawn between whether the process of integration itself is analysed and whether focus lies on the outcome of the process, given centre stage to the newly developed government structure.<sup>242</sup> Integration theory helps us to understand how and why the EU framework was shaped in the way it exists today and how it may have to adapt in order to become or remain fully functional. All of these are reflected in three phases of integration theory: Explaining integration, analysing governance, and constructing the EU.<sup>243</sup> While integration theory will not form the basis of the present analysis, it is important to acknowledge the relevance of this approach and the value added to the discussion of the EU constitutional framework. As the EU's policies very much follow an integrationist approach, awareness of the understandings within integrational theory can only strengthen the arguments made.

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<sup>239</sup> A goal older than the EU itself, as it already features in the preamble of Treaty of Rome (Treaty Establishing the European Economic Community – EEC), where the six founding Member States undersigned their determination "to lay the foundations of an ever-closer union among the peoples of Europe".

<sup>240</sup> Haas, E.B. (1958). *The Uniting of Europe: Political, Social, and Economic Forces 1950-57*. Stanford University Press. p. 16.

<sup>241</sup> Wiener, A. & Diez, T. (2009). *European Integration Theory*. Oxford University Press. p. 3.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid p. 7.

### 3.2. Federalism

The EU's 'governmental' structure is regularly referred to as federalist structure, particularly in light of the founding vision of a 'United States of Europe'.<sup>244</sup> Schütze sees this as the result of a specific understanding of sovereignty: "Sovereignty was indivisible. In a Union of States, it could either lie with the States, in which case the Union was an international organisation; or sovereignty would lie with the Union, in which case the Union was a Federal 'State'. Federalism was thought of in terms of a sovereign State."<sup>245</sup>

In this context federalism is very narrowly defined. Any application of the concept to the EU's structure will need to hold ground against traditional federalist constitutions, such as Germany. The German constitution is very much a witness of its time, designed to share power and competence with specific entities in order for the nation state to be limited in what it can achieve against the federal states' agreement.<sup>246</sup> This is a federal order. When analysing the EU's structure in detail, we quickly come to realise that the label does not suit, not in the established sense of federalism.<sup>247</sup> The aforementioned implementation of EU law supremacy and direct effect led scholars to argue for a more distinguished constitutional character of the Union based on Federalism. Particularly those familiar with the German concept of federalism would see noticeable parallels to the European construct, noting that "although the Community judicial structure departs from the federal model, the result in terms of primacy is the federal result: *Bundesrecht bricht Landesrecht*."<sup>248</sup> Weiler even argued that the framework of Community law was

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<sup>244</sup> Oeter, S. (2010). Federalism and Democracy. In: von Bogdany, A. & Bast, J. (2010). Principles of European Constitutional Law. 2Edn. Hart. pp. 55 – 82; Burgess, M. (2000). Federalism and EU: The Building of Europe. Routledge; Schütze, R. (2012). European Constitutional Law. Cambridge University Press. pp. 47 – 79.

<sup>245</sup> Supra Schütze, R. (2012). p. 53.

<sup>246</sup> Renzsch, W. (1989). German Federalism in Historical Perspective: Federalism as a Substitute for a National State. Publius. Vol. 19, No. 4. Federalism and Intergovernmental Relations in West Germany: A Fortieth Year Appraisal. pp. 17 – 33. p. 24 f.

<sup>247</sup> Moravcsik, A. (2001). Federalism in the EU: Rhetoric and Reality. In: Nicolaidis, K. & Howse, R. (2001). The Federal Vision: Legitimacy and Levels of Governance in the United States and the EU. Oxford University Press. pp. 161 – 187.

<sup>248</sup> In other words, the highest federal level law trumps the law in each of the federal states: Jacobs, F. & Karst, K. (1986). The Federal Legal Order: The U.S.A. and Europe Compared – A juridical Perspective. In: Cappelletti, M., Seccombe, M. & Weiler, J. (1986). Integration through Law – Europe and the American Federal Experience. Vol. 1, Book 1. De Gruyter. pp. 169 – 243. p. 234.

evidently “indistinguishable from analogous relationships in constitutions of federal states”.<sup>249</sup>

While the basic principles of EU law (direct effect and supremacy of EU law) may support the idea of a federal Europe, the structure of the Court system serves as powerful counterargument. As in this comparison reference is often made to the German federal state structure, we will focus on a comparison of this particular example with the EU. German judiciary is organised on a Federal and federal states level, with a constitutional court present in each federal state overseeing the *Landesverfassung* (federal state constitution), just as the FCC oversees and protects the application of the Basic law as the German constitution. There is an internal appeal process where cases before a federal state court can be brought before the federal court assessing the correctness of the lower courts application of federal state as well as federal law. Such an appeal structure does not exist within the EU judiciary. There is no right to appeal to the CJEU if a decision by a Member State court shows a flawed application of EU law, the courts are merely expected to use the CJEU to clarify uncertain matters through the preliminary reference procedure.<sup>250</sup> The adherence to the principle of supremacy of EU law is expected, but not directly enforced through the court.

Within a federal structure, competences are clearly defined and arrangements within the federal state constitutions cannot practically oppose federal law. A powerful example within the German framework is the federal state constitution of Hessen, which in Article 21 still allows the death penalty as highest possible punishment. The German constitution abolished the death penalty shortly after World War 2. Consequently, the federal constitution contradicts the federal state arrangement. Due to the nature of the relationship within this particular federalist state, the federal state Article 21 will however never see a practical application as “*Bundesrecht bricht Landesrecht*”. It can be argued that such strict application of EU supremacy is not applied outside the EU’s areas

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<sup>249</sup> Weiler, J.H.H. (1991). The Transformation of Europe. Yale Law Journal. Vol 100. pp. 2403 – 2484. p. 2413.

<sup>250</sup> Supra de Witte, B. (2011). p. 46.

of exclusive competence,<sup>251</sup> and current political debates show the EU's limited direct impact on constitutional matters of its Member States.<sup>252</sup>

The concept of Federalism at the European level is as much a question of constitutional terminology as of identity. Following two World Wars, Europe as an entity accepted that the concept of a strictly sovereign nation state should make way for international sovereignty infused co-operation. Within the now existing EU framework, Member States are "actors" and "limbs", as "they are subject to its policies and legal order and must give it primacy over national policies and law."<sup>253</sup> Although Federalism seems an attractive label, it can however not escape its traditional conception and does therefore only fit the EU framework in a somewhat uncomfortable way.<sup>254</sup> Nevertheless, a federal principle or federal model can be seen in the Union's structure and governance.<sup>255</sup> In discussing a European federation of states, it is suggested that power shifts from the entities towards the EU. However, the traditional concept of federalism, and the reason for its implementation in Germany after the Second World War, rather suggests the opposite - a "strengthening of the smaller units against central power."<sup>256</sup> After all, federalism as a concept, however much attractive on the surface, does not describe the EU's framework accurately. Rather than aiming to force our understanding of the Union into the traditional concept of federalism or developing a somewhat artificial new concept of federalism to suit, we will accept the EU as a Union of States and look for other means to define its constitutional framework.<sup>257</sup>

The analysis of the EU's overall structure as a constitutional framework is not helped by the conception of a Union of States. It describes the status quo without analysis of the

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<sup>251</sup> Supra Mancini, G.F. (2000). p. 4.

<sup>252</sup> Szczerbiak, A. (2017). Is Poland's constitutional tribunal crisis over? The Polish Politics Blog. <https://polishpoliticsblog.wordpress.com/2017/01/16/is-polands-constitutional-tribunal-crisis-over/> [accessed 08/09/17].

<sup>253</sup> Everling, U. (2009). The EU as a Federal Association. In: von Bogdany, A. & Bast, J. (2009). Principles of European Constitutional Law. pp. 701 – 734. p. 730.

<sup>254</sup> Ibid p. 731. Everling views federal state and federation of states as inappropriate means to describe the "connection of states" through the EU.

<sup>255</sup> Ibid p. 733. Everling uses the Council as an example as it is "far-reachingly constructed like the German Bundesrat, the chamber of representatives of the Länder."

<sup>256</sup> Ibid p. 734.

<sup>257</sup> Kirchhof, P. (2009). The EU of States. In: Supra von Bogdany, A. & Bast, J. (2009). pp. 735 – 761. p. 743.

structure and theoretical conception underpinning it. This is where the approach of (legal) pluralism, and constitutional pluralism in particular, becomes relevant.

### 3.3. Pluralism defined

It is not within the scope of this thesis to fully examine the “many faces of legal pluralism”.<sup>258</sup> Furthermore, it is not our purpose to discuss the variety of pluralistic theories and understandings in depth. Pluralism as an understanding of legal analysis,<sup>259</sup> a selection of approaches within it and an introduction to its roots will be presented briefly. This section will moreover provide an overview of the contemporary approaches to legal pluralism, in order to explain the preference for one specific concept for the purpose of this thesis. In doing so, it will provide a condensed overview of the vast literature on legal pluralism and we will view pluralism as “a useful lens through which to examine an increasingly interconnected world.”<sup>260</sup> Finally, constitutional pluralism will appear as the preferred ‘face of legal pluralism’ in this instance and the connection to the constitutional rights analysis within this thesis will be made.

Discussions of pluralism as a theory in law are relatively young, but matured quickly and became ‘suddenly fashionable’.<sup>261</sup> Patrignani introduces the transition as a move away from the ‘descriptive label’ of legal pluralism for “a situation observed in the world” to “a more sophisticated understanding of the role of the concept”.<sup>262</sup> The main consensus between any of the pluralist views is that they all more or less introduce a range of viewpoints formed around one core understanding: the discourse of law in a post-national context. Interestingly, the understanding of more than one legal order existing within the same political space was first verbalised within anthropology.<sup>263</sup> It was then further developed through social sciences, before it found its first followers within law.

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<sup>258</sup> In reference to: Avbelj, M. (2006). The EU and the many faces of legal pluralism – Toward a coherent or uniform EU legal order. *Croatian Yearbook of European Law and Policy*. Vol. 2. pp. 377 – 391; Avbelj, M. & Komarek, J. (2008). Four Visions of Constitutional Pluralism. *EUI Working Papers*. LAW 2008/21.

<sup>259</sup> Including the works of: Supra Griffiths, J. (1986); Supra Merry, S.E. (1988); Burke-White, W.W. (2004). *International Legal Pluralism*. *Michigan Journal of International Law*. Vol. 24. p. 963; Stone Sweet, A & Stranz, K. (2011). Rights adjudication and constitutional pluralism Germany and Europe. *Journal of European Public Policy*. Vol. 19, 1. pp. 92 – 108.

<sup>260</sup> Supra Bianchi, A. (2016). p. 229.

<sup>261</sup> Supra Barber, N.W. (2006). p. 306.

<sup>262</sup> Supra Patrignani, E. (2016). p. 707.

<sup>263</sup> Supra Bianchi, A. (2016). p. 227 ff.



There is a vast offering of attempts to narrow the meaning and clarify the definition of what we consider legal pluralism. Twining defines Legal Pluralism “as a concept which refers to legal systems, networks or orders co-existing in the same geographical space”,<sup>264</sup> a definition which very much speaks to the early anthropologist view of pluralism. The historic perspective offered by Bianchi and Tamanaha shows how Pluralism is indeed no modern creation of globalisation, but rather a re-occurring phenomenon already present in the Middle Ages: “[C]anon law administered by the Catholic Church, Roman law handled by jurists in universities, the so-called *lex mercatoria* used by merchants in their transactions, and local customs and usages, alongside Germanic Lombard law and feudal law, constituted legal systems operating autonomously with a varying institutional machinery.”<sup>265</sup> The state system as we know it, which legal pluralism today suggests needs to be overcome, did not exist at the time and pluralist legal orders were clearly visible. One such pluralist symptom would be the way courts operated: “Different types of courts existed which would pass judgment on matters on which they had an often limited jurisdiction. Jurisdictional rules depended on either the status of the person, or the subject matter, or both.”<sup>266</sup> As the structure of the nation state developed, new challenges to law arose but the relevance of pluralism did not fade. Colonialism re-ignited the need for a broader view of valid and applicable law within a legal order and also within one particular geographical space.<sup>267</sup> Pluralism gained relevance, as it seemed to discuss and apply to a range of legal and societal developments.

For Griffith, legal pluralism relates to “the presence in a social field of more than one legal order.”<sup>268</sup> This very early and consequently simple definition of pluralism does not capture the different approaches within it today:

Pluralism can mean the coexistence of a plurality of specific regimes in international law; the transformation of global society into a complex structure of multiple, independent systems with limited forms of interaction with one another; the only viable alternative in a world characterized by multiple

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<sup>264</sup> Twining, W. (2002). *Globalization and Legal Theory*. Butterworths. p. 83.

<sup>265</sup> *Supra* Bianchi, A. (2016). p. 228; Tamanaha, B.Z. (2011). *The Rule of Law and Legal Pluralism in Development*. *Hague Journal on the Rule of Law*. Vol. 3, 1. pp. 1 – 17.

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*; Also: *Supra* Avbelj. M. (2006).

<sup>268</sup> *Supra* Griffiths, J. (1986). p. 1.

allegiances and centres of gravity in post-national societies; or as an individual professional challenge, a psychological experience entailing a strong sense of individual responsibility.<sup>269</sup>

Each of these describe a version of pluralism with a more or less legal focus. Barber, in reference to Hart's terminology of 'rule of recognition'<sup>270</sup>, introduces pluralism as meaning "that a legal order can contain multiple rules of recognition that lead to the order containing multiple, unranked, legal sources. These rules of recognition are inconsistent, and there is the possibility that they will, in turn, identify inconsistent rules addressed to individuals".<sup>271</sup> Pluralism in this sense relates to the "coexistence of a plurality of specific regimes in international law", but even more so Griffiths' legal pluralism as reflecting the presence of multiple legal orders "in a social field." It is this aspect that unites all approaches of pluralism. Through an "emphasis on, and their interpretation of the significance of, the existence of a multiplicity of distinct and diverse normative systems, and the likelihood of clashes of authority claims and competition for primacy in specific contexts."<sup>272</sup>

This is what makes Legal Pluralism a particularly attractive approach for an analysis of the EU's legal order. The altogether sovereign Member States have voluntarily surrendered elements of their sovereignty to the EU, which is reflected in the framework of competences and jurisprudential structure. It is far too simplistic to argue that as the wider approach of pluralism, or even legal pluralism fits the arrangement of supremacy and direct effect, the EU's legal order is explained and our argument made. Far from it: We need to delve deeper into the streams within legal pluralism in order to be able to evidence the relevance of this approach to our wider analysis. A doctoral thesis could be written on the components to and streams within legal pluralism alone. Within the scope of this thesis a pragmatic decision will have to be made regarding the pluralist concept applied. Consequently, the following part of this chapter will not aim to provide an overview of these approaches. It will rather focus on two approaches within constitutional pluralism.

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<sup>269</sup> Supra Bianchi, A. (2016). e-book abstract: DOI:10.1093/acprof:oso/9780198725114.003.0011.

<sup>270</sup> Hart, H.L.A. (1961). *The Concept of Law*. Clarendon Press. p. 100 f.

<sup>271</sup> Supra Barber, N.W. (2010). p. 145.

<sup>272</sup> deBurca, G. (2011). *The ECJ and the international order: a re-evaluation*. In: Supra De Burca, G. & Weiler, J.H.H. (2011). pp. 105 – 149. p. 130.

Within constitutional pluralism, the offering of focus points and concepts is vast.<sup>273</sup> It can be introduced with pluralism or constitutionalism as a defining factor, both being equally attractive. Pluralism infused with constitutionalist features serves to add value and meaning to a supposedly hollow concept that is in need of re-focussing if it wants to carry any meaning in legal analysis.<sup>274</sup> A pluralised Constitutionalism, on the other hand, engages with the criticism of a state centralistic and consequently outdated conceptualisation of constitutionalism, and widens that viewpoint in order to survive political, legal and societal challenges of our time.<sup>275</sup> These two streams do not necessarily contradict one another, but the different perspectives spill into the detail of their arguments and analysis. Presumably, when discussing constitutional pluralism, one will have to choose which concept one is seeking to 'defend': Pluralism or Constitutionalism.

This thesis is not seeking to inform either of the traditional concepts. It seeks to hover over both concepts by viewing and applying constitutional pluralism as its own meaningful contribution in itself to the post-national discussion of law and legal frameworks. The concept will serve a very specific purpose in supporting the understanding of Alexy's constitutional rights theory as relevant to the analysis of EU law. Using constitutional pluralism in that way can be seen as both infusing Pluralism with meaning and granting Constitutionalism a life outside the domestic sphere.

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<sup>273</sup> With the disclaimer that none is more valid than the other: "The point is that neither discourse is adequate in itself. We miss something of significance if we disregard the internationalist origins, but we surely also miss something of more novel significance if we disregard the subsequent emergence of a mode of institutional thinking at the EU level which bears at least a family resemblance to the forms of institutional thinking with which we are familiar from the constitutional traditions of states." In: Supra Walker, N. (2002). p. 322.

<sup>274</sup> See Barber: "[P]luralism' has become so thin a theory that virtually all respectable writers on legal philosophy would endorse their claims. If everyone is a pluralist, legal pluralism ceases to be an interesting theory — it amounts to little more than the application of standard models of legal orders to a new factual situation." In: Supra Barber, N.W. (2010). p. 145.

<sup>275</sup> Walker introduces his paper by summarising the vast critique modern constitutionalism faces: "The development of new constitutional settlements and languages at state and post-state level has to be balanced against the deepening of a formidable range of sceptical attitudes. These include the claim that constitutionalism remains too state-centred, overstates its capacity to shape political community, exhibits an inherent normative bias against social developments associated with the politics of difference, provides a language easily susceptible to ideological manipulation and, that, consequent upon these challenges, it increasingly represents a fractured and debased conceptual currency." In: Supra Walker, N. (2002). p. 317.

The following sections will explore two distinct concepts within constitutional pluralism: These concepts are the constitutional synthesis as proposed by Augustin José Menéndez, and constitutional pluralism as developed by Neil Walker.<sup>276</sup> These will serve as examples within the vast offering of (constitutional) pluralism approaches and we will see how these seemingly different concepts are indeed supporting our envisaged application of constitutional pluralism similarly.

### **3.3.1. Constitutional Synthesis**

Menéndez claims his constitutional synthesis is the first step to a true European constitutional theory which engages with the fundamental relationship between national and community law and the overall institutional design of the EU and is, therefore, seemingly advancing the idea of (European) constitutional pluralism.<sup>277</sup>

He develops his synthesis as a follow on from MacCormick's wider work regarding constitutional pluralism and, in doing so, narrows the definition of pluralism applied.<sup>278</sup> Constitutions can exist below, above and beyond the nation state: "[W]hen law transcends national borders [...] our understandings of law, the constitution and politics reveal themselves to be inadequate."<sup>279</sup> This inadequacy specifically relates to the definition of sovereignty, which MacCormick challenges in all of his work. Law does not need an omnipotent sovereign in order to be valid law, which contests the traditional positivist approach. The focus shifts so that the argument is made that "all legal systems are based upon a constitutional convention underpinned by citizens".<sup>280</sup> MacCormick's explains this as the functioning mechanism of any constitution: "[W]hat makes [constitutions] work is the will of whichever people conceive the constitution to be their constitution."<sup>281</sup> In this way, European constitutional pluralism becomes "possible because the stability of a legal order is not dependent on the will of one single and

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<sup>276</sup> Supra Menéndez, A. J. (2011); Supra Menéndez, A. J. (2011b); Supra Walker, N. (2002).

<sup>277</sup> Supra Menéndez, A. J. (2011). pp. 75 – 76; Supra Menéndez, A.J. (2011b). p. 240.

<sup>278</sup> MacCormick, N. (1993). Beyond the Sovereign State. *The Modern Law Review*. Vol. 56, 1. pp. 1-18; MacCormick, N. (1999). *Questioning Sovereignty*. Oxford University Press; Supra MacCormick, N. (2007).

<sup>279</sup> Supra Menéndez, A.J. (2011b). p. 222.

<sup>280</sup> Ibid p. 216.

<sup>281</sup> Supra MacCormick, N. (2007). p. 287.

omnipotent sovereign, but on the social practice, on the part of citizens at large, of following the legal norms.”<sup>282</sup>

Menéndez recognises the “central structuring/legitimising role played by constitutions of participating states” and even declares that “national constitutions [are] living a double constitutional life”.<sup>283</sup> He sees both supranational and national constitutional law as simultaneously relevant in the development of a European constitutional theory.<sup>284</sup> MacCormick recognised the relevance of national legal orders mainly in establishing the validity of Community law.

Applying Menéndez’ pluralistic view allows the analysis of the European (constitutional) framework through the application of approaches devised and informed by national legal frameworks and their domestic scholars. When both levels of law need to be given simultaneous account, surely the methods applied within need to do the same. Consequently, we are able to ‘synthesise’ a European constitutional theory. Relating this to our envisaged goal of an application of Alexy’s Constitutional Rights theory to the EU’s legal framework, we would argue that German constitutional law transcends borders and leaks into European constitutional law. Aspects and structures of German constitutional law are therefore shining through parts of European constitutional law. In doing so, the methods used to analyse the national law transcend it. If, therefore, the “validity of Community law continues to be dependent on national constitution[s]”, there is logical space for Community law theory to depend on national constitutional theory, too.<sup>285</sup> By applying Alexy’s theory of constitutional rights in analysis of European law provisions, we recognise the constitutional synthesis of both legal orders in one concept of European constitutional law.

### **3.3.2. Constitutional Pluralism**

The constitutional pluralism as developed by MacCormick and then advanced by Menéndez finds competitors within the field of pluralism applying the same terminology. Whereas MacCormick’s and Menéndez focus was very much a

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<sup>282</sup> Supra Menéndez, A.J. (2011b). p. 224.

<sup>283</sup> Ibid p. 229.

<sup>284</sup> Supra Menéndez, A.J. (2011). pp. 50 ff.

<sup>285</sup> Supra Menéndez, A.J. (2011b). p. 225.

constitutionalised approach to pluralism, Walker aims to give contemporary relevance to the traditional concept of constitutionalism by relating it to pluralist thoughts and aiming to develop a true constitutional pluralism.<sup>286</sup> While focussing on constitutionalism, Walker relates a lot to the EU and ends up defining the structure and legal framework within it as a constitutional pluralist order.

He argues strongly against an assessment of the EU's legal order following traditional approaches within international law as this:

“downgrades an alternative and increasingly influential constitutional account, which would concentrate instead upon the self-affirming constitutional discourse of the European Court of Justice in a series of key early judgments, upon the cue subsequently taken by other European institutions, and upon all that has flowed from that in terms of the flourishing of a broader public debate on European constitutionalism”.<sup>287</sup>

Walker seems to position his approach as an antidote to wider approaches of particularism and holism, but also relates it to federalism.<sup>288</sup> His concept is very much intended to challenge the traditional approaches within constitutionalism by widening the understanding of elements of the constitutionalising process and, most importantly, Walker makes the point that “constitutionalism and constitutionalisation should be conceived of not in black-and-white, all-or-nothing terms but as questions of nuance and gradation [...] that [they] are best conceived of as matters of degree and intensity.”<sup>289</sup> This is where the difference to MacCormick's and Menéndez's work is most visible. Walker aims to ‘modernise’ constitutionalism. Menéndez and his mentor MacCormick argue for a pluralist view of the world and law, and aim to validate their claims by adding ‘constitutional seasoning’.

Walker views his proposal as focusing on a “strong epistemic pluralism”, without any visible direct reference to epistemology as such. His approach seems to follow both rationalism and constructivism, entailing a strong focus on structural and conceptual definitions of constitutional pluralism.<sup>290</sup> He sees the “constitutionalism in a plural

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<sup>286</sup> Supra Walker, N. (2002); Supra Walker, N. (2016).

<sup>287</sup> Supra Walker, N. (2002). p. 322.

<sup>288</sup> Supra Walker, N. (2016). p. 335.

<sup>289</sup> Supra Walker, N. (2002). p. 339 and p. 343.

<sup>290</sup> See among others: Teubner, G. (1989). *How the Law Thinks: Toward a Constructivist Epistemology of Law*. *Law and Society Review*. Vol. 23, 5. pp. 727 – 757; Samuel, G. & Campbell, T.D. (2003). *Epistemology*

order” as a “structural characteristic of the relationship between certain types of political authority or claims to authority situated at different sites or in different processes as well as an internal characteristic of these authoritative claims.”<sup>291</sup> In doing so, he also discusses sovereignty as the “most state-centred” criteria within the definition and search of constitutionalism<sup>292</sup>. He sees value in a “self-conscious constitutional discourse” and consequently positions the two as opponents: “Sovereignty is ‘will’, where discourse is ‘reason’. One relates to the authority of ultimate command, the other to the authority of the argument.”<sup>293</sup> As Walker defines his approach by outlining and responding to the various criteria of constitutionalism, he discussed sovereignty as a “plausible claim to ultimate authority”<sup>294</sup>. He does not discuss this authority in the abstract, but rather views the claim as being “made on behalf of a particular polity”. The polity being those who see the law as applicable to them and, by abiding to it, add substance to the validity and sovereignty of it.<sup>295</sup> Bearing this in mind, a more ‘fluid’ approach to sovereignty becomes a possibility once we accept a polity to exist outside the narrow realms of a state, e.g. through EU citizenship.

Walker consequently proposes that “within the more fragmented, fluid and contested configuration of authority of a multi-dimensional order, sovereignty too, like the other indices of constitutionalism, becomes more amenable to understanding as a graduated and tenuous property of normative order.”<sup>296</sup> In that sense, we can follow Walker’s understanding of constitutions engaging a “continuous process of reconceptualization and reimagination”.<sup>297</sup> Applying this view of constitutionalism and its openness to a pluralist world, with Menéndez’s synthesis approach in mind, we can see the attractiveness of a constitutional pluralist analysis of the EU legal order, despite it aiming for the “lowest common denominator position”.<sup>298</sup>

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and Method in Law. Taylor and Francis; Weber, E.T. (2012). Rawls, Dewey and Constructivism. On the Epistemology of Justice. Bloomsbury.

<sup>291</sup> Supra Walker, N. (2002). p. 340.

<sup>292</sup> Ibid p. 345.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid p. 347.

<sup>297</sup> Ibid p. 344.

<sup>298</sup> Ibid p. 339.

Constitutional pluralism, as applied within this thesis, will inform the underlying understanding of the EU's legal framework and, as such, serve the analysis as a tool when applying the Alexian constitutional rights approach to the European sphere. The next section of this chapter will show how the introduced definitions of pluralism serve that purpose.

#### **4. Pluralism applied**

The constitutional pluralism discussed serves no purpose if it continues to exist as a theoretical analysis of social, political and legal constructs only. The arguments made and the discourse held have the potential to inform an analysis of law in more than just evaluating the system overall. Constitutional pluralism can aid the application of specific understandings of norms and theory, grown in a domestic context, to a legal framework outside its realm of origin; be it a post-national or different domestic order.

The following section of this chapter aims to illustrate how the concept of constitutional pluralism relates to the three main strands within this thesis: the specific functioning of the Court, the Alexian system of constitutional rights norms and the analysis of EU citizenship as a constitutional right. In showing the relationship between the constitutional pluralism debate and these elements, we will see how a pluralist view allows and enriches a constitutional rights discussion outside the domestic order and within a plural globalised (Europeanised) legal world.

##### **4.1. Pluralism in the European Union**

Pluralism seems to have been born for an analysis of the EU framework, be it the social, political or legal constructs created by and within it. The EU is continuously referred to when pluralist, trans-nationalist or post-domestic frameworks are discussed, closely followed by international organisations such as the United Nations and the World Trade Organisation.<sup>299</sup> While pluralism within the EU can be discussed outside a legal analysis

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<sup>299</sup> Ibid p. 337 and others: Douglas-Scott, S. (2002). *Constitutional Law of the EU*. Pearson Longman. pp. 523 ff.; Supra Walker, N. (2016); Supra Goldoni, M. (2012); Itzcovich, G. (2012). *Legal Order, Legal Pluralism, Fundamental Principles, Europe and Its Law in Three Concepts*. *European Law Journal*. Vol. 18, 3. pp. 358 – 384; Supra Barber, N.W. (2006); Supra Avbelj, M. (2006); Snyder, F. (2004). *Three Challenges for European Constitutionalism in the 21<sup>st</sup> Century*. In: Tridimas, T. & Nebbia, P. (2004). *EU Law for the Twenty-First Century*. Vol. 1. *Essays in European law*. Hart. pp. 9 – 15; Breda, V. (2006). *A European*



and with focus on “diverse religious, political and moral doctrines”, we will very much focus on discussions of the law in a pluralist context, not dismissing the complexity of the approach.<sup>300</sup>

Walker argues that his idea of constitutional pluralism suits the EU context, as it “recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims”, which are to be viewed as independent from those of the Member States.<sup>301</sup> For Goldoni, “Constitutional Pluralism stresses the beneficial effects on the normativity of European law of the interplay between two constitutional levels”.<sup>302</sup> He also sees the approach as “capitalising” on the domestic constitutional court’s practice of particular bias towards their domestic legal orders and “national constitutions.”<sup>303</sup>

It is, however, the EU’s particular governance structure, the relationship with the Member States and specific developments born and driven by the Court that invite a pluralist analysis. Walker lines these up effectively and argues that “representative institutions of government, a common currency, influence over macro-economic policy and social welfare policy, a policing capacity and a concern with the security of its own external borders” have invited a particular interest from a constitutional perspective.<sup>304</sup> The pluralist nature of the Union ‘externally’ in relation to the Member state, combined with its specific characteristics ‘internally’ in relation to its institutions, are very welcoming to concepts of constitutional pluralism and constitutional synthesis alike.

In all of this, the role of the Court of Justice of the EU cannot be overstated.<sup>305</sup> The Court is seen as driver of the constitutionalisation of the EU, as competitor to Member State constitutional courts and as constitutional court itself.<sup>306</sup>

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Constitution in a Multinational Europe or a Multinational Constitution for Europe? *European Law Journal*. Vol. 12, 3. pp. 330 – 344.

<sup>300</sup> Supra Douglas-Scott, S. (2002). p. 524.

<sup>301</sup> Supra Walker, N. (2002). p. 337.

<sup>302</sup> Supra Goldoni, M. (2012). p. 386.

<sup>303</sup> Ibid 390.

<sup>304</sup> Supra Walker, N. (2002). p. 318.

<sup>305</sup> Arnulf, A. (1999). *The EU and its Court of Justice*. Oxford University Press. pp. 515 ff.

<sup>306</sup> Supra Weiler, J.H.H. (1999). p. 117 ff; Sweet Stone, A. (2004). *The Judicial Construction of Europe*. DOI:10.1093/019927553X.003.0002. p. 45 ff.

#### 4.2. Pluralism and the Court

It is essential to see how pluralism views and analyse the Court, as it is the Court's jurisprudence that will be at the heart of Alexy's constitutional rights analysis. While it is a theory of norms, in analysing those it relies heavily on a specific reasoning and structure of the Court within that system of constitutional norms.

The CJEU is said to be "striving to forge [...] a transnational European jurisdiction comprising both the [Court] and national judges".<sup>307</sup> It is that connection which constitutional pluralism uses to argue for the benefits of a non-monist approach to law. As the domestic and European constitutional level "interplay", EU institutions in general and the CJEU in particular need to balance a "responsiveness to constitutional concerns" on the EU level "with constitutional claims at the national level".<sup>308</sup>

At the same time the Court claims its own constitutional relevance and role within Union law as guardian of the Treaties. It requires the Member State courts to acknowledge that its role within the EU legal framework is equivalent to that of the national (constitutional) courts within their domestic spheres.<sup>309</sup> In that way not only are we viewing the group of Member states as part of a pluralist constitutional order, but the EU and its very own (constitutional) court become actors within that: "The Community is its Member States and their citizens. The Community is, too, an autonomous identity."<sup>310</sup>

The Court is a constitutional actor and as such also drives constitutional pluralism, as long as it successfully "countervails" its role within the EU's constitutional framework and that of the domestic (constitutional) courts.<sup>311</sup>

#### 4.3. Pluralism and Citizenship

As Pluralism does not only focus on a plurality of legal orders within one structure or framework, its perceptions also inform an analysis of citizenship. While this thesis will very much focus on the analysis of the structure of the citizenship regulation and less on

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<sup>307</sup> Supra Itzcovich, G. (2012). p. 359.

<sup>308</sup> Supra Goldoni, M. (2012). p. 386.

<sup>309</sup> Supra Weiler, J.H.H. (1999).

<sup>310</sup> Ibid.

<sup>311</sup> Supra Goldoni, M. (2012).

the content, a pluralist view of the concept and of how citizens are seen to influence a constitutional debate, be it only as demos, can inform our conception of a European constitutional rights theory.

The view that the EU lacks a consistent EU demos forms part of many constitutional analyses of the EU legal framework. Weiler raises this as a “dilemma of citizenship”, despite arguing that “[t]he Community is its Member States and their citizens”.<sup>312</sup> The relevance for the existence of a demos in constitutional terms relates to the authority embedded within constitutionalist approaches. The demos defines democracy. MacCormick consequently provides a rather dire outlook regarding the EU’s constitutional ambitions: “Where no demos exists, no democracy can exist; no demos exists in Europe, hence further transfers of power to the Union would be unlawful”.<sup>313</sup> The demos owns democratic discourse within its specific realm and consequently forms part of the constitutional identity. As Weiler puts it: “Demos provides another way of expressing the link between citizenship and democracy.”<sup>314</sup>

The demos is defined by citizenship and citizenship is arguably linked to nationality.<sup>315</sup> The solution is a more open and consequently pluralist approach to the demos and therefore citizenship. MacCormick proposed “the possibility of our conceiving such a thing as a ‘civic’ demos, that is, one identified by the relationship of individuals to common institutions of a civic rather than an ethnic or ethnic-cultural kind”.<sup>316</sup> What unites those individuals as one demos is their commitment, their constitutional patriotism (*Verfassungspatriotismus*), to ‘their’ constitutional framework.<sup>317</sup> This demos is formed as one acknowledging the pluralist constitutional framework of the EU.

We will now see how a pluralist understanding of citizenship, demos and constitutionalism is reflected within the application of Alexy’s constitutional rights approach.

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<sup>312</sup> Supra Weiler, J.H.H. (1999). p. 337 and p. 117.

<sup>313</sup> Supra MacCormick, N. (1997). p. 341.

<sup>314</sup> Supra Weiler, J.H.H. (1999). p. 337.

<sup>315</sup> Ibid.

<sup>316</sup> Supra MacCormick, N. (1997).

<sup>317</sup> *Verfassungspatriotismus* is accredited to Habermas and framed by Sternberger. Fleiner discusses the concept and how these versions differ (in German): Fleiner, R. (2003). The three dimensions of Constitutional Patriotism – Sternberger revisited. Österreichische Zeitschrift für Politikwissenschaft (ÖZP). 42. Jg., H. 4. pp. 407 – 424.

#### 4.4. Pluralism and Alexy

The German constitution invites the consideration of constitutional Pluralism. Sweet and Stranz claim that the rights-based constitutional pluralism “characterizes the German legal system”.<sup>318</sup> However, their understanding of pluralism is institutionally focused, whereas the value for pluralism as part of this analysis is a more contextual one. Their focus lies on the German perspective, whereas this analysis aims to take a different view. The original elements of Alexy’s constitutional assessment are purely domestic and, as such, offer no connection to a pluralist constitutional assessment. However, those discussion (constitutional) pluralism offer valuable viewpoints to specific aspects of Alexy’s approach: principles and proportionality. The application of his analysis to the constitutional legal framework of the EU consequently benefits from aspects of constitutional pluralism.

Any attempt to apply the Alexian framework outside its domestic order threatens to be defeated by the argument that any constitutional theory can only apply within the context and in the scope of the constitution to which it refers. Following this, this particular theory of constitutional rights would lose all relevance outside the reach of the German (constitutional) legal order. We have, however, seen how a pluralist view of constitutionalism and constitutions allows domestic concepts and understandings to filter through, and synthesise, at a post-national level.

We know that “[n]ation-state law may be the more relevant form of law in modern societies, but that still does not make it the only form of law”.<sup>319</sup> Goldoni works with Alexy’s approach to principles, when discussing the constitutional traditions that each participant within the pluralist constitutional order seeks to uphold.<sup>320</sup> He particularly embraces the differentiation between rules and principles. What Goldoni draws from this is a principle-led approach to reasoning within the courts of the member States, adding relevance to the Alexian concept outside its domestic sphere.

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<sup>318</sup> Stone Sweet, A. & Stranz, K. (2012). Rights adjudication and constitutional pluralism in Germany and Europe. In: *Journal of European Public Policy*. Vol. 19, 1. pp. 92 – 108. p. 93. DOI: 10.1080/13501763.2012.632148.

<sup>319</sup> *Supra* Menéndez, A.J. (2011b). p. 215.

<sup>320</sup> *Supra* Goldoni, M. (2012). p. 390.

For MacCormick, principles play a role in legal argumentation. Alexy gives them a role in the legal system. However, MacCormick does the same arguing differently. For him law is functionally a matter of rules and argumentatively a matter of principles. Only this makes a legal order beyond the state stable and therefore possible, as principles are the basis and are then progressively “thickened” by the production and/or derivation of rules. Considering Alexy’s approach, one can argue that by taking the European norms on citizenship as constitutional rights norms, one is acknowledging that they are principles of European constitutional law. The European legal order would derive from them and, in constitutional synthesis relevance, would be given to the national and supranational level.

Now, both the EU’s constitutional framework and Alexy’s analysis of constitutional rights embrace a proportionality analysis, which as such “ensures that the laws of a polity can be justified in terms of reasonableness”.<sup>321</sup> Proportionality can however only be effectively assessed if the boundaries within which it operates are defined. If we were to fully embrace constitutional pluralism we would become guilty of weakening proportionality or at least complicating its application, close to making it impossible. Goldoni argues: “The point is that the meaning of this constitutional point of view, at least in Europe, is far from being clear. In fact, according to pluralism, there seems to be several constitutional points of view.”<sup>322</sup> Our analysis will show how far Goldoni’s concerns are relevant or whether Alexy’s proportionality finds its European conceptual sibling to be suitably confined within its (constitutional) pluralist framework.

## **5. Conclusion: The pluralist Constitutional Rights analysis**

What have we then learned in seeking to allow a domestically grown constitutional rights theory to gain relevance within the constitutional pluralism of EU law? There are specific key points we cannot lose sight, if our analysis is to have any value and coherence. Firstly, the EU constitutional framework is far from precisely defined. It is even argued, that it still very much inherently sits within its international law traditions and does not present a constitutional framework of its own. While this is over simplifying

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<sup>321</sup> Ibid.

<sup>322</sup> Ibid p. 392.

the abilities of international law to evolve and undervaluing the extent to which the EU presents a new and unique legal order, it requires consideration when a constitutional rights analysis of EU law is to be carried out.

Secondly, if we were to accept the EU as a unique constitutional concept, we are still faced with a variety of approaches with which we can engage in the constitutional discourse. While traditional Federalism does not suit the European framework at all, elements of it are very much visible and inform the constitutional analysis. More fitting, however, is a pluralist view of the EU constitutional order. Within pluralism, two approaches as a joint offering, seem particularly fitting, for the purpose of this thesis: That of constitutional pluralism and that of constitutional synthesis. Both of these approach constitutional pluralism from opposite sides, with the former aiming to open and modernise traditional concepts of pluralism and the latter wanting to add constitutional gravitas to the wide understandings of pluralism. Together they offer a fitting approach towards the relationship between the European (constitutional) framework and the domestic constitutional entities.

Thirdly, when using those pluralist views in application of Alexy's constitutional rights theory, we need to ensure that where the approaches relate to the Court or citizenship the terminology is used consistently. Principles and proportionality carry differing meanings in pluralist terms and in relation to Alexy, so when discussing case law, we need to consider both and determine the appropriate meaning.

The next chapter will discuss EU citizenship in the context of varying concepts of citizenship and will therefore prepare the analysis of the EU citizenship case law in chapter 5.

## Chapter 4      Citizenship

### 1. Introduction

Barbalet writes: “Citizenship is as old as settled human community.”<sup>323</sup> The concept of citizenship as an expression of political, sociological or legal being, continues to be discussed from all these angles.<sup>324</sup> This shows how an analysis of any citizenship concept cannot be viewed through the lens of the law alone, but needs to appreciate the complexity of citizenship studies and citizenship reality. This is even more relevant when aiming to discuss citizenship outside the confined traditions of the nation state and within a transnational setting. Here, as we continue to build the argument for an EU constitutional rights norm analysis, we will be looking at EU Citizenship. In doing so, we will not only support the constitutional rights argument of this thesis but also add some substance to the discussion of the law, before moving on to a case analysis of CJEU EU citizenship case law in the next chapter.

While the content of the EU citizenship norms is not the focus of this thesis, in discussing the substantive concept of EU citizenship, our case analysis gains depth and relevance. Discussing concepts of citizenship more generally informs our evaluation of EU citizenship as a non-national citizenship concept, but also supports our discourse of the EU’s constitutional legal framework, again vital for a meaningful case analysis.

This chapter will introduce citizenship as a political, social and normative concept outside the context of EU law in section 2. We will discuss citizenship as concept linked to nation-states in section 2.1 and within a transnational setting in section 2.2. This will inform an analysis of EU citizenship in section 3, its scope and value for citizens included as well as excluded in sections 3.1 to 3.2, but also the transformative nature the citizenship concept has when it comes to its position within the EU’s constitutional setting in section 3.3.

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<sup>323</sup> Barbalet, J.M. (1988). *Citizenship. Rights, Struggle and Class inequality*. Open University Press. p. 1.

<sup>324</sup> Clarke, P. B. (1994). *Citizenship*. Pluto Press; Heater, D. (2004). *Citizenship. The Civic Ideal in World History, Politics and Education*. 3<sup>rd</sup> ed. Manchester University Press; Mason, A. (2012). *Living Together as Equals: The Demands of Citizenship*; Andrews, G. (1991). *Citizenship*. Lawrence & Wishart; Ciprut, J.V. (2008). *The Future of Citizenship*. MIT Press; Anderson, B. and Hughes, V. (2015). *Citizenship and Its Others*. Palgrave Macmillan; Lewis, G. (2004). *Citizenship: Personal Lives and Social Policy*. The Policy Press; Isin, E.F. & Wood, P. K. (1999). *Citizenship and Identity*. Sage; Isin, E.F. & Turner, B. S. (2002). *Handbook of Citizenship Studies*. Sage; Miller, D. (2000). *Citizenship and National Identity*. Polity Press.

## 2. Concepts of Citizenship

The public debate and visibility of varying concepts of citizenship has gained momentum in the 21<sup>st</sup> century. As Bellamy puts it: “Whatever the problem – be it the decline in voting, increasing numbers of teenage pregnancies, or climate change – someone has canvassed the revitalization of citizenship as part of the solution.”<sup>325</sup> More recently, civil rights movements such as Black Lives Matter and political earthquakes such as the UK’s notification to leave the EU and the related founding of various independent citizen groups, aiming to secure citizen rights, show citizenship and its meaning have increasingly become subject to public debate.<sup>326</sup> Citizens are increasingly visible in the way they demand their voices to be heard beyond their participation in general elections and referenda.<sup>327</sup> While the movements and activities require the individuals involved to understand themselves as citizens, their collective understanding of citizenship may well vary.

Citizenship is described by some as a “set of practices, [be it] cultural, symbolic [or] economic” or a collection of very specific “civil, political and social” rights and duties.<sup>328</sup> Isin and Wood argue that “citizenship is therefore neither a purely sociological concept nor purely a legal concept but a relationship between the two”.<sup>329</sup> We cannot just focus on a discussion of citizenship in law and ignore the sociological and political reality, as we otherwise risk “detract[ing] from the importance of the distinctively political tasks citizens perform to shape and sustain the collective life of the community”.<sup>330</sup> Consequently, the concepts and understandings of citizenship introduced in this chapter will reflect the legal, political and sociological discourses on citizenship in order to inform the legal analysis.

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<sup>325</sup> Bellamy, R. (2008). *Citizenship: A Very Short Introduction*. Oxford University Press. p. 1.

<sup>326</sup> <http://blacklivesmatter.com/about/> [accessed 08/10/2017]; Citizen groups founded as a result of the UK’s referendum vote on EU membership include the British in Europe <https://britishineurope.org/> [accessed 08/10/2017] and The3Million <https://www.the3million.org.uk/> [accessed 08/10/2017].

<sup>327</sup> Another example are the unrests and demonstrations following the referendum in Catalonia on independence from Spain, e.g. <https://www.theguardian.com/world/2017/oct/07/barcelona-madrid-rallies-urge-leaders-hold-talks-diffuse-catalonia-crisis> [accessed 08/10/2017].

<sup>328</sup> Supra Isin, E.F. & Wood, P. K. (1999). p. 4; Also: Supra Isin, E.F. & Turner, B. S. (2002).

<sup>329</sup> Supra Isin, E.F. & Wood, P. K. (1999).

<sup>330</sup> Supra Bellamy, R. (2008). p. 3; Also: Hoffman, J. (2004). *Citizenship beyond the State*. SAGE. London. p. 13; Supra Mason, A. (2012). p. 25 ff.



## 2.1. Citizens, nationals and subjects

Citizenship seems inextricably linked to the state. Citizenship can be seen as defining our relationship to a particular nation-state. In doing so, nationality and citizenship become almost interchangeable terms.<sup>331</sup> This strong link to the nation state, seeing citizens as “members of the state” united by the “social bond of national identity”, is often dubbed to be the traditional approach.<sup>332</sup> As a result the relevance of this tradition is now seemingly challenged, considering the transnational and international developments in law, politics and society.<sup>333</sup> Arguably, however, the assumption that citizenship’s linked to the nation state resembles the origins of the concept is flawed. The original meaning of the terms *nation* and *citizen* differ vastly, as Habermas summarises: “*Natio* refers, like *gens* and *populous* and unlike *civitas*, to peoples and tribes who were not yet organized in political associations”.<sup>334</sup> Consequently, nationality refers to “people of the same descent, who are integrated geographically, in the form of settlements or neighbourhoods, and culturally by their common language, customs and traditions, but who are not yet politically integrated in the form of state organization.”<sup>335</sup> This understanding did not survive the French revolution, where the nation eventually came to “play a constitutive role in defining the political identity of citizens within a democratic polity”.<sup>336</sup> This is where citizenship became the expression of one’s belonging to a specific political community in the form of the nation-state.

Just as the meaning of nation can mislead us, the terminology regarding the individuals linked to the nation state requires clarity. We can describe an individual’s relationship to their political community as ‘citizen’, ‘national’ or ‘subject’.<sup>337</sup> All of these assume a

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<sup>331</sup> Habermas, J. (1992). Citizenship and national identity: Some reflections on the future of Europe. In: Special section: Citizenship, Democracy and National Identity. Basil Blackwell. pp. 1 – 19. p. 3.

<sup>332</sup> Supra Hoffman, J. (2004). p. 17; Linklater, A. (1998). The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era. Polity Press. p. 179; See also: Fernández, C. (2012). Patriots in the Making? Migrants, Citizens and Demos Building in the EU. Journal on International Migration and Integration, Vol. 13. pp. 147 – 163; Kostakopoulou, T. (2001). Citizenship, identity and immigration in the EU. Between past and future. Manchester University Press. p. 69; Bellamy, R. (2008). Citizenship: A Very Short Introduction. Oxford University Press. p.1; Supra Barbalet, J.M. (1988). p.2; Outlining the misunderstandings within a historic analysis of the term: Heater, D. (2004b). A Brief History of Citizenship. Edinburgh University Press. p. 88 ff.

<sup>333</sup> Supra Hoffman, J. (2004). p. 19.

<sup>334</sup> Supra Habermas, J. (1992). p. 3.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> See among others: Clarke, P.B. (1994). Citizenship. Pluto Press. pp. 83 ff.

specific relationship of the individual with the state as political community and even define the meaning of the nation state itself and its source of sovereignty.<sup>338</sup> Güralp argues that “[c]onstitutionalism constrained the absolutist state, turning subjects into citizens.”<sup>339</sup> The urge to distinguish between those categories and the impact this has on the individual’s accepted role within society is subject to a continuously developing debate. Today, citizenship is almost interchangeably used with nationality, where in the past it used to describe a very “privileged minority of free, Greek, resident males. Slaves, women and foreigners were explicitly excluded.”<sup>340</sup> The historic concept, whichever we prefer to use as starting point, is challenged by modern (21<sup>st</sup> century) society, as the traditional concepts of particularly citizenship are challenged by our, in comparison, more inclusive view on what it takes to be identifiable as citizen.<sup>341</sup> Citizenship can be characterised by a focus on balance of rights and duties stemming from the status within a particular political community.<sup>342</sup>

Depending on the community, then, citizenship is linked with duties including tax payments, military service or other duties relating Citizens’ social responsibilities within their community. Rights linked to the citizenship status are those of security, residency and access to publicly provided funds and infrastructure.<sup>343</sup> Habermas describes citizenship as a status increasingly based on rights, arguing that “[t]he nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the praxis of citizens who actively exercise their civil rights.”<sup>344</sup> Citizenship

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<sup>338</sup> Koessler, M. (1946). Subject, Citizen, National and Permanent Allegiance. *The Yale Law Journal*. Vol. 56, No. 1. pp. 58 – 76; Wynne, B. (2005). Risk as globalizing ‘democratic’ discourse? Framing subjects and citizens. In: Leach, M., Scoones, I. and Wynne, B. (2005). *Science and Citizens: Globalization and the Challenge of Engagement*. pp. 66 – 82; Brandstater, S.; Wade, P. & Woodward, K. (2011). Introduction: rights cultures, subjects, citizens. *Economy and Society*. Vol. 40, 2. pp. 166 – 183; Eckert, J. (2013). From Subjects to Citizens: Legalism from Below and the Homogenisation of the Legal Sphere. In: *The Journal of Legal Pluralism and Unofficial Law*. Vol 38, Issue 53-54. pp. 45 – 75.

<sup>339</sup> Güralp, H. (2013). Citizenship and democracy beyond the nation-state? In: *Cultural Dynamics*. Vol. 25, 1. pp. 29 – 47. p. 29.

<sup>340</sup> Hoffman referring to Aristoteles’s description of citizenship in old Greece, in: Supra Hoffman, J. (2004). p. 18; Also: Supra Heater, D. (2004). *A Brief History of Citizenship*. Edinburgh University Press. p. 15 ff.

<sup>341</sup> As example of debate in early 20<sup>th</sup> century: Coudert, F. R. Jr. (1903). Our New Peoples: Citizens, Subjects, Nationals or Aliens. *Columbia Law Review*, Vol. 3. pp. 13-32; Also see: Supra Heater, D. (2004b).

<sup>342</sup> Yet the validity of the concept does not remain unchallenged, e.g.: Ulriksen, M.S. & Plagerson, S. (2014). *Social Protection: Rethinking Rights and Duties*. *World Development*. Vol. 64. pp. 755 – 765.

<sup>343</sup> Among others: Supra Heater, D. (2004). pp. 360 ff; Supra Mason, A. (2012). p. 25 ff.

<sup>344</sup> Supra Habermas, J. (1992). p. 3.

consequently means more than some form of belonging to a state, but remains linked in its characteristics to the structure of the political community that it relates to.<sup>345</sup>

## 2.2. Beyond the nation state

Bellamy envisages a “transformation of political community, and so of citizenship”, as we see the political, legal and social impact of globalisation and multiculturalism.<sup>346</sup> In this transformation, we can argue that re-shaping citizenship is reflected by the transformed political community or that the newly evolved status is the result of the state transformation itself.<sup>347</sup> Both versions of the transformative process support the idea that citizenship and state remain intrinsically linked as one reacts to developments within the other.

Transformation is a key element of citizenship assessments, either implicitly or explicitly. Barbalet reflects on a different aspect of transformation than to Bellamy, when arguing that “[d]ifferent types of political community [are giving] rise to different forms of citizenship.”<sup>348</sup> While implicitly agreeing on the amendable nature of citizenship, Barbalet viewed the state very much in charge of the relationship, as being “able to influence the nature of [the state’s] appeal and also the orientation of their subjects.”<sup>349</sup> The nature of citizenship moves from being transformative to transformable. Having said that, Barbalet acknowledges that “[f]aced with pressures of change states have three options. They may ignore them, they may accede to them, or they may repress the groups demanding them.”<sup>350</sup> This reflects Bellamy’s vision above, where both state and citizenship are subject to transformation. When discussing Barbalet’s assessment, though, we need to question whether the state is ever in charge of this process, or always only bends to pressure for reform from its citizens. The citizen initiatives referred to in the introduction to this chapter, serve as examples of the “pressure of change” states can face and it is highly questionable whether Barbalet’s proposed option of repression is an effective and legitimate means to respond.

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<sup>345</sup> Supra Bellamy, R. (2008). p.1; Supra Hoffman, J. (2004). p. 17; Supra Habermas, J. (1992). p. 5.

<sup>346</sup> Supra Bellamy, R. (2008). p.2.

<sup>347</sup> Supra Hoffman, J. (2004). p. 17.

<sup>348</sup> Supra Barbalet, J.M. (1988). p. 2.

<sup>349</sup> Ibid p. 110.

<sup>350</sup> Ibid.

Carrying the theme of transformation with us, we can argue that in order to effectively adapt to globalisation in all aspects of society, economy and politics, states need to reform themselves, as their citizens' understandings and views of the world do as well. Considering the constitutional pluralism analysis in chapter 3 in this context, we need to therefore ask whether citizenship "remains too state centred".<sup>351</sup> It is worth reminding ourselves of Walker's assessment of constitutionalism as overstating its "capacity to shape political community [and] increasingly represents a fractured and debased conceptual currency."<sup>352</sup> Using Walker's quote outside the context of constitutionalism but within our citizenship discussion, we can question whether state-centred citizenship is a "debased conceptual currency" all the same. An indication of this is the continuing reference to "ascriptive characteristics of domicile and birth" when citizenship, and belonging to a group of citizens, is determined. This reflects a focus on merely "administrative criteria [attributed] to citizens" to a political entity and evidence how citizenship continues to be facilitated as chained to a state construct.<sup>353</sup>

Citizenship can come of age, if we were to allow it to be thought of independently from the state and as a group-enabling status. This is where citizenship becomes a force of transformation featuring "centrally in the quest for new transnational structures".<sup>354</sup> This is where we can then see individuals "turn 'aliens' into associates in a common venture aiming at ensuring peace, prosperity and the effective protection of rights."<sup>355</sup> From this perspective, social movements become "a way of developing citizenship capacity and responsibility", influencing global society and enabling other non-state actors.<sup>356</sup> We can see indications of the way citizenship transformation is enabled in constitutional structures, which through their foundation of subjective rights empower citizenship and democracy.<sup>357</sup> As and when those subjective rights are entrenched in an international context, citizenship moves beyond traditional state borders with these

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<sup>351</sup> Supra Walker, N. (2002). p. 317.

<sup>352</sup> Ibid.

<sup>353</sup> Supra Habermas, J. (1992). p. 5.

<sup>354</sup> Supra Kostakopoulou, T. (2001). p. 66.

<sup>355</sup> Ibid.

<sup>356</sup> Supra Hoffman, J. (2004). p. 161.

<sup>357</sup> Reich, N. (1999). Bürgerrechte in der Europäischen Union. Nomos. Baden-Baden. p. 48: „Eine auf subjektive Rechte setzende Verfassungsstruktur verwirklicht „Demokratische von unten“, weil sie den Betroffenen eigenen Möglichkeiten gibt, ihre Interessen zu vertreten“.

rights. Consequently, the state “is in the process of becoming a territorial administrative unit of a supranational legal and political order based on human rights.”<sup>358</sup>

While the focus on rights empowers citizens to some extent, we need to acknowledge that it can also have an exclusionary impact, reinforcing the exclusion of “resident noncitizens”.<sup>359</sup> Citizenship concepts outside any national context focus on civil, social, and political rights, which, in order to be meaningful, may still need to be intrinsically linked to the nation state. Rights protection, even if agreed internationally, are entrenched by nation-states. Consequently, rights are only universal for those subjects within their scope, still excluding “long-term resident aliens.”<sup>360</sup>

In search for a true post-national citizenship concept, we find contributors to the debate embracing Kant’s cosmopolitanism in relation to citizenship.<sup>361</sup> Kant envisaged a world citizen who would not necessarily need to cross borders themselves, but rather embrace a specific attitude. One “of recognition, respect, openness, interest, beneficence and concern toward other human individuals, cultures, and peoples as members of one global community”.<sup>362</sup> While this sounds like a truly open and global concept of citizenship, Kant’s view needs to be contextualised: It is worth remembering that Kant’s world citizen is predominantly white and male.<sup>363</sup> The broader concept of world citizenship has, however, outgrown Kant’s discriminatory approach, embracing his ideal only.

Varying versions of cosmopolitan or world citizenship have been developed since and can be understood in varying ways.<sup>364</sup> In order for any of those to become meaningful, we need to discuss practical consequences and relevance for this beyond-state citizenship. Kleingeld discusses the introduction of the International Criminal Court as a

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<sup>358</sup> Koopmans, R., Statham, P., Giugni, M. & Passy, F. (2006). *Contested Citizenship*. University of Minnesota Press. p. 75.

<sup>359</sup> Supra Güllalp, H. (2013). p. 42.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid p. 40.

<sup>362</sup> Kleingeld, P. (2012). *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*. Cambridge University Press. p. 1.

<sup>363</sup> Ibid p. 183.

<sup>364</sup> Ibid p. 199; Heater, D. (2002). *World Citizenship: cosmopolitan thinking and its opponents*. Continuum; Running, K. (2013). *World Citizenship and Concern for Global Warming: Building the Case for a Strong International Society*. Social Forces. Vol. 92, 1. pp. 377 – 399; Golmohamad, M. (2009). *Education for World Citizenship: Beyond National Allegiance*. Educational Philosophy and Theory. Vol. 41, 4. pp. 446 – 486; Carter, A. (2001). *The political theory of global citizenship*. Routledge.

possible example embracing and furthering world citizenship.<sup>365</sup> She recognises that its success largely depends on “whether its enforcement coincides with the interests of the powers”, thus bringing citizenship back into the domain of nation-state influence.<sup>366</sup> Kleingeld, however, also argues that today global citizenship is achievable more than ever: “more advanced means of communication provide the material conditions for a global public sphere.”<sup>367</sup> These means are essential, as they practically enable cosmopolitan citizenship through participation in a “global network of overlapping public spheres and international organizations”.<sup>368</sup> This arguably reads like a citizenship concept, threatening the existence of nation-states.<sup>369</sup> Having said that, we can use the concept and the idea of a unifying means between citizens that does not sit within the nation-state in exploring transnational citizenship further, particularly in the form of EU citizenship.

Being able to escape the seemingly static concept of national citizenship and ascribe to oneself a concept of world citizenship can be appealing.<sup>370</sup> In order to achieve meaningful transnational citizenship, one needs to overcome the notion that “a collective identity which all members are obliged to share” is essential.<sup>371</sup> Rather, an “ethico-political bond” between citizens, unified by “the will to promote the freedom and equality of all”, then widens “moral and political boundaries” to enable a less and less exclusionary citizenship bound by a “universalistic ethical code”.<sup>372</sup> We will see how far EU citizenship reflects this form of unity or can at least support the necessary development.

### 3. European Union Citizenship

Transnational citizenship, or “citizenship beyond the state”, is often discussed in reference to EU Citizenship.<sup>373</sup> Particularly, post-Maastricht Treaty literature refers to

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<sup>365</sup> Supra Kleingeld, P. (2012). p. 35.

<sup>366</sup> Ibid p. 89.

<sup>367</sup> Ibid p. 90.

<sup>368</sup> Ibid p. 90.

<sup>369</sup> Ibid p. 35.

<sup>370</sup> Supra Linklater, A. (1998). p. 179.

<sup>371</sup> Ibid p. 188.

<sup>372</sup> Ibid p. 189.

<sup>373</sup> Among others: Supra Linklater, A. (1998). p. 183; Supra Gülalp, H. (2013). p. 42; Supra Habermas, J. (1992). p. 1; Supra Hoffman, J. (2004). p. 161; Supra Mason, A. (2012). p. 25 ff; Kostakopoulou, D. (1998).

the Unions' citizenship concept when discussing valuable, potential or even dismissible concepts of transnational citizenship.<sup>374</sup> Linklater in 1998 dubbed it a "weak [starting point] but [...] encouraging legal and moral innovations from which more extensive developments may grow".<sup>375</sup> Habermas asked in 1992 whether "there can ever be such a thing as European citizenship", arguing that "genuine civil rights do not reach beyond national borders."<sup>376</sup> While European law, politics and society have come a long way since the Maastricht Treaty, Habermas' point remains valid. Consequently, it is not just its positioning and value as "citizenship beyond the state" that inspires debate. More so, it is the substance of EU citizenship, notwithstanding the Court's proclamations of fundamentality, which determines how far the EU citizenship status is meaningful to those holding it and to those arguing the case for "citizenship beyond the state".

### 3.1. Design and Reality

While this thesis will focus on the norm analysis of EU Citizenship as established by the Maastricht Treaty, and set out in Articles 20 and 21 TFEU, there were and are a number of Directives and Regulations that define the scope and meaning of EU Citizenship in greater detail. While the Treaty norms announce EU citizenship's existence and provide a list of rights entailed by it, secondary legislation ensures those are given practical effect in the Member States through the necessary mechanisms. The Court played a vital role in scoping and validating EU Citizenship as a meaningful status. As an in-depth case analysis, with focus on norm structure, will be provided in chapter 5, the focus of this chapter will be on the definition of EU citizenship and less on its normative functionality.

In engaging with the definition of EU citizenship, we need to acknowledge that the concept was announced with the Maastricht, but hardly effectively implemented.<sup>377</sup>

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Union citizenship as a model of citizenship beyond the nation-state: possibilities and limits. In: Weale, A. and Nentwich, M. (1998). *Political theory and the EU*. Routledge. pp. 158 – 71.

<sup>374</sup> Kadelbach, S. (2010). Union Citizenship. In: von Bogdany, A. & Bast, J. (2010). *Principles of European Constitutional Law*. pp. 443 – 477. p. 444.

<sup>375</sup> Supra Linklater, A. (1998). p. 183.

<sup>376</sup> Supra Habermas, J. (1992). p. 9.

<sup>377</sup> Supra Reich, N. (1999). p. 48 ff. Reich discusses how EU citizenship as provided for in the Treaties, is only providing subjective rights in a selective manner and sees secondary legislation and the rulings of the CJEU as more important when it comes to the legal status of EU citizens. Reich is, in discussing the subjective rights of EU citizens, looking for a 'grassroot democracy' enabled through a constitutional structure based on subjective rights.

Before the Directive on the Right of Citizens and their Family Members to move and reside freely within the territory of the Member States was adopted in 2004,<sup>378</sup> coming into full effect in 2006, a complex network of directives and regulations was in place, focusing on bit-by-bit solutions rather than establishing conclusive provisions on subjective rights.<sup>379</sup> From then onwards the shift from a narrow definition of EU citizenship, as creating and enabling the market citizen, towards a subjective rights based approach focussing on the individual rather than their economic activity, was visible.<sup>380</sup> EU Law moved from mainly, if not solely, protecting the economic freedom to act, to guaranteeing free development of the individual, with a particular focus on free movement.<sup>381</sup> The scope and content of EU citizenship rights, however, remain contested.

While some view the EU Citizen as empowered by individually enforceable rights and privileges,<sup>382</sup> others are far more critical of the actual content of EU citizenship.<sup>383</sup> Eleftheriadis argues that there is no meaningful separate status of EU citizenship, and that Member State nationals are rather subject to “rights under reciprocity, whenever they become active economic agents or stakeholders in another member state.”<sup>384</sup> EU Citizenship is seen as a victim of the EU’s flawed structure, as it can only become a meaningful status “when the Union becomes a multi-national federal state.”<sup>385</sup> Menéndez agrees, in so far that he argues that the creation of “a post-national political community, to render liberty, equality and solidarity beyond pre-political identities possible remains an essential task.”<sup>386</sup> McCormick argues for the constitutionalising effect of EU Citizenship, but only where there is “a sense of European civic identity, and

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<sup>378</sup> European Parliament and Council Directive 2004/38/EC. OJ 2004, L 158/77; same as 2004/58/EC.

<sup>379</sup> The preamble of Directive 2004/38/EC in (4) outlines the then existing complex legislative network entailing Council regulation No 1612/68 and no less than nine Directives: 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, 93/96/EEC.

<sup>380</sup> Among others: Supra Kadelbach, S. (2010). p. 444; Supra Reich, N. (1999). p. 53.

<sup>381</sup> Supra Reich, N. (1999). p.53: „Vom Schutz wirtschaftlicher Handlungsfreiheiten entwickelt sich das Europarecht zur Garantie persönlicher Entfaltungsfreiheit, die im Gemeinschaftsrecht unter anderem vor allem Freizügigkeit beinhaltet.“; „Der grenzüberschreitende Marktbürger hat sich verflüchtigt und dem mobilen Unionsbürger Platz gemacht.“

<sup>382</sup> Ibid p. 148 f.

<sup>383</sup> Among others: Eleftheriadis, P. (2014). The content of European Citizenship. German Law Journal, Vol. 15. pp. 777 – 796.

<sup>384</sup> Ibid p. 792.

<sup>385</sup> Supra Hoffman, J. (2004). p. 17.

<sup>386</sup> Menéndez, A. J. (2014). Which Citizenship? Whose Europe?-The Many Paradoxes of European Citizenship. German Law Journal. Vol. 15. pp. 907 – 933. p. 933.



there with a European civic *demos*.”<sup>387</sup> Whether EU Citizenship is of constitutional significance or not, seems to depend on the way one assesses its value for the individuals holding the status. The more one views the citizen as being empowered through the scope and content of the relevant norms, the more gravitas holds the status within the EU framework. It all depends on the “dissonance between European citizenship’s constitutional design and reality”.<sup>388</sup> To create harmony, or better still, identity, the legally established rights within the status of EU citizenship need to match citizen expectations and pass the test of realism in the Court.

EU citizenship, as a status is subject to ongoing transformation since its introduction in 1992 and has significantly contributed to the transformation of the EU.<sup>389</sup> At first, the EU’s focus lay on “consolidating, rather than constitutionalising”, and an “adaptive stabilisation” of the meaning of EU citizenship, while scholars were vastly critical of the relevance of the status altogether.<sup>390</sup> Eventually, “Union citizenship raised citizen expectations” as conferring and protecting specific rights.<sup>391</sup> The CJEU saw itself increasingly challenged to clarify the meaning of EU citizenship but also its positioning to other rights and principle provisions like the free movement provisions of the single market, most of all free movement of workers (Article 45 TFEU) and non-discrimination (Article 18 TFEU).<sup>392</sup> Eventually, the challenges of a post-national citizenship status inextricably linked to national citizenship became more and more apparent, as Member States saw their sovereignty over matters of exclusive competence, e.g. when to withdraw nationality after naturalisation, threatened.<sup>393</sup> As the Court outgrew its role

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<sup>387</sup> Supra MacCormick, N. (1997). p. 342.

<sup>388</sup> Supra Kostakopoulou, D. (2005). p. 265.

<sup>389</sup> Ibid p. 235 ff; Supra Linklater, A. (1998). p. 188.

<sup>390</sup> Supra Kostakopoulou, D. (2005). pp. 244 ff, viewing this in context of politics and appetite for change at the time.

<sup>391</sup> Ibid p. 246 in reference to the Second Report from the Commission on Citizenship of the Union, COM (97) 230.

<sup>392</sup> *María Martínez Sala v Freistaat Bayern* Case C-85/96 [1998] European Court Reports 1998 I-02691; *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 [2002] European Court Reports I-07091; *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt* Case C-168/91 [1993] ECR I-1191; *Marie-Nathalie D’Hoop v Office national de l’emploi* Case C-224/98 [2002] ECR I-06191.

<sup>393</sup> *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* Case C-184/99 [2001] ECR I-06193; *Carlos Garcia Avello v État belge* Case C-148/02 [2003] ECR I – 11613; *Janko Rottman v Freistaat Bayern* Case C-135/08 ECR 2010 I-01449; *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* Case C-34/09 [2011] European Court Reports 2011 I-01177.

as faithful servant of the interests of the Member States,<sup>394</sup> it seemed to transform itself into a citizen court.<sup>395</sup> Yet only for those, who “activated their EU citizenship by crossing borders. Excluded remained, and continue to remain to a significant extent, EU citizens who have never exercised any free movement rights and non-EU citizens resident within a Member State as Third Country nationals.”<sup>396</sup>

### 3.2. Rights and Responsibilities

EU citizenship can be described as a project, continuously evolving and transforming itself and the EU legal framework.<sup>397</sup> This evolvement can be discussed with a focus on rights, but it would miss an intrinsic part of citizenship itself. While we have so far mainly focussed on a discussion of the rights protected and awarded by the status of EU citizenship, we have introduced the idea of citizen duties at the beginning of the chapter as another part of the debate, albeit not an unchallenged one.<sup>398</sup> As the demand for citizenship duties in broader citizenship debates is already a focus point, it is no surprise that “duties” are no less controversial in the EU citizenship context.<sup>399</sup>

Article 20 (2) TFEU is clear that EU citizens are subject to both, rights and duties. Yet, the existence, character and relevance of EU citizenship duties remains contested.<sup>400</sup> Kochenov argues that citizenship duties “cannot be simply implied from rights”, but

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<sup>394</sup> A phrase borrowed from: Supra Kostakopoulou, D. (2005). p. 256 in reference to Garrett, G., Kelemen, R.D. and Schulz, H. (1998). *The European Court of Justice, National Governments, and Legal Integration in the EU*. International Organisation. Vol. 52. pp. 149 – 176.

<sup>395</sup> Supra Kadelbach, S. (2010). p. 443; Supra Kostakopoulou, T. (2001). p. 68.

<sup>396</sup> Supra Eleftheriadis, P. (2014). p. 779; Supra Reich, N. (1999). p. 61; Teune, H. (2008). *Citizenship Deterritorialized: Global Citizenships*. In: Ciprut, J.V. (2008). *The Future of Citizenship*. MIT Press. pp. 229 – 252. p. 245; Close, P. (1995). *Citizenship, Europe and Change*. Macmillan Press. p. 135; Oliveira, A.C. (1998). *The Position of Resident Third-Country Nationals: Is it too Early to Grant them Union Citizenship?* In: La Torre, M. (1998). *European Citizenship – An Institutional Challenge*. pp. 185 – 200; Anderson, B. (2015). *Immigration and the Worker Citizen*. In: Anderson, B. and Hughes, V. (2015). *Citizenship and Its Others*. Palgrave Macmillan. pp. 41 – 71. pp. 52 ff; Dell’Olio, F. (2005). *The Europeanization of Citizenship*. Ashgate. pp. 55 ff; Kostakopoulou, T. (2001b). *Invisible Citizens? Long-Term Resident Third-Country Nationals in the EU and their Struggle for Recognition*. In: Bellamy, R. & Warleigh, A. (2001). *Citizenship and Governance in the EU*. pp. 180 – 205; Sørensen, J.M. (1996). *The Exclusive European Citizenship*. Ashgate.

<sup>397</sup> Supra Kostakopoulou, D. (2005). p. 263.

<sup>398</sup> See section 2.1 in this chapter.

<sup>399</sup> Supra Heater, D. (2004). pp. 360 ff.

<sup>400</sup> Among others: Supra Kochenov, D. (2014); Davis, R. (2002). *Citizenship of the Union: Rights for All?* *European Law Review*. Vol. 27. pp. 121 - 137; Everson, M. (1995). *The Legacy of the Market Citizen*. In: Shaw, J. and More, G. (1995) *New Legal Dynamics of EU*. Clarendon Press. pp. 73 – 89; Shaw, J. (1997b). *Citizenship of the union: Towards Post-National Membership?* Harvard Jean Monnet Working Paper No.6/97 <https://jeanmonnetprogram.org/archive/papers/97/97-06-.html> [accessed 03/04/2018].

need to be “explicit in the law”.<sup>401</sup> Article 20 (2) TFEU is not followed with a list of duties, but rather rights, and no explicit reference to EU citizenship duties is made. Davis sees the lack of specific citizenship duties as a differentiating criterion between national and this specific transnational form of citizenship.<sup>402</sup> Everson even suggests, the reason for a lack of duties to be a lack of “allegiance” of the citizens, based on their inherent “self-interest” as market citizens.<sup>403</sup> While we have established the assumption of pure market citizenship to be flawed and the EU citizenship has outgrown that limiting mould, the question of allegiance is an interesting one. Kochenov goes as far as to suggest that the “promotion of exclusion and stigmatisation of difference”, which were enabled by traditional duties citizens owed to the state, are even “antithetical” to the EU objectives and, consequently, “there is no possible place for citizenship duties in EU law.”<sup>404</sup> Davis proposes a list of implicit duties including “the duty to obey the law; the duty to participate in defence of one's polity; the duty to pay tax; the duty to seek employment; and a duty to vote”.<sup>405</sup> These duties arise from correlating to rights: “the duty to vote correlating to the right to vote”.<sup>406</sup> As they arise from a sense of allegiance, EU citizens are required to develop a notion of identity and community.<sup>407</sup>

Consequently, EU citizens seem to be required to be much more conscious of their citizen obligations compared to national citizens, particularly when it comes to their relationship to the political community. As a community not linked through and defined by cultural heritage, language or nationality, EU citizens are expected to form a transnational social bond.<sup>408</sup> As citizen rights span across national borders, including ‘political status’ and ‘social protection’, citizens are bound through their “right to equal treatment by other political communities” e.g., a Member State (be it of origin or new found residence).<sup>409</sup> Eleftheriadis therefore argues that it is the reciprocity between citizens that characterises both rights and duties of EU citizens.<sup>410</sup> While Reich argues

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<sup>401</sup> Supra Kochenov, D. (2014). p. 485.

<sup>402</sup> Supra Davis, R. (2002). p. 123.

<sup>403</sup> Supra Everson, M. (1995). pp. 87 – 90.

<sup>404</sup> Supra Kochenov, D. (2014). p. 486.

<sup>405</sup> Supra Davis, R. (2002). p. 123.

<sup>406</sup> Ibid in reference to Supra Shaw, J. (1997b). FN 439 – 445.

<sup>407</sup> Supra Shaw, J. (1997b). FN. 446 – 447.

<sup>408</sup> Supra Linklater, A. (1998). p. 179.

<sup>409</sup> Supra Eleftheriadis, P. (2014). p. 778.

<sup>410</sup> Ibid p. 785.

that the community duties stay within the context of economic competences of the EU and are to be seen in context with the single market provisions,<sup>411</sup> Habermas suggests a more open approach, accounting for the role of EU citizens outside the market setting. Habermas sees EU citizens owing a series of duties to their peers and their transnational political community, relating to the readiness to engage “in the political cultures of their new home”, as those duties confirm the belonging to the community and, as such, help to define the citizens’ identity.<sup>412</sup> Mulgan sees citizens as providing a needed balance. In order to solve the “world’s deficits of responsibilities”, rights developments and “accretion of freedoms” are welcome, but they require a “strong individual ethic” or a set of responsibilities.<sup>413</sup>

The idea of an identity depending, or at least political awareness requiring, ethic citizenship allows us to remove ourselves from a stringent discussion of duties. If we were to open the seemingly strict notion of duties to a question of responsibilities and obligations for citizens in general and EU citizens in particular, we may find ourselves part of a more meaningful debate regarding the role EU citizens can be expected to play within their political community and in the constitutional legal framework. This rights and responsibilities discussion, then, requires us to consider the idea of allegiance further, as well as politicisation.

In doing so, we need to apply a holistic approach to EU citizenship, encompassing perspectives “from history, politics, law and sociology”.<sup>414</sup> We have established how the concept itself has matured from a market citizen biased concept to one encompassing the realities resulting from a transnational citizenship status of this kind. Where there was a focus on “free movement of labour”, a shift towards “equal treatment” and consequently non-discrimination followed.<sup>415</sup> Mobility was followed with equality.<sup>416</sup> That equality is where the allegiance, the responsibility as EU citizens is formed: “A European public that is freed from nationalistic trappings and mythical foundations, is

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<sup>411</sup> Supra Reich, N. (1999). p. 52.

<sup>412</sup> Supra Habermas, J. (1992). p. 16 ff.

<sup>413</sup> Mulgan, G. (1991). Citizenship and Responsibilities. In: Andrews, G. (1991). Citizenship. Lawrence & Wishart. pp. 37 - 49. p. 38.

<sup>414</sup> Supra Kostakopoulou, D. (2014). p. 427.

<sup>415</sup> Ibid p. 428.

<sup>416</sup> Ibid p. 430.

comfortable with diversity, values inclusion by replacing nationality with domicile, and actively seeks the deepening of democracy at all levels of governance.”<sup>417</sup> Embracing means of public participation, as and where possible, is one element of that.<sup>418</sup> We can see EU citizenship as a “self-actualization as well as for connectivity and reciprocal equal recognition”.<sup>419</sup> Within that reciprocal recognition lies the sense of social solidarity. In the spirit of a wholesome approach to EU citizenship Kostakopoulou proposes four citizenship duties, some only indirectly addressed to the citizen itself. The duty to promote equal standing of all citizens in the EU and inclusive access to resources, rights and opportunities in one of the Member States and the Union itself. She follows this with proposing an “institutional equality duty applying to all levels of policymaking” and a duty between citizens of non-discrimination followed by a duty to solidarity.<sup>420</sup> Kostakopoulou is not alone in viewing solidarity to be essential to the success of the EU.<sup>421</sup> It is another form of transformative capacity within a solidarity approach that can be seen as central in the constitutional arrangements of the EU in general and EU citizenship in particular.<sup>422</sup>

### 3.3. Constitution and Structure

We keep coming back to the relevance of EU citizenship to the constitutional framework of the Union, be it in the context of its design and content or in relation to the way rights and responsibilities are enshrined. EU citizenship is, in an experimental way, pushing the limits of the constitutional understandings of Member States and Union alike.<sup>423</sup> It is seen as a transformative force, enabling, as well as demanding, institutional and constitutional change.<sup>424</sup> EU citizenship as a status itself has seen a major transformation

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<sup>417</sup> Ibid p. 431.

<sup>418</sup> Supra Kostakopoulou, D. (2005). p. 240.

<sup>419</sup> Ibid.

<sup>420</sup> Supra Kostakopoulou, D. (2014). p. 434.

<sup>421</sup> See among others: Ross, M. & Borgmann-Prebil, Y. (2010). *Promoting Solidarity in the EU*. Oxford University Press.

<sup>422</sup> Ross, M. (2010). *Solidarity – A New Constitutional Paradigm for the EU?* In: Supra Ross, M. & Borgmann-Prebil, Y. (2010). pp. 23 – 45. pp. 36 f.

<sup>423</sup> Kostakopoulou sees the need for EU citizenship to be experimental: Supra Kostakopoulou, D. (2014). p. 434.

<sup>424</sup> Supra Linklater, A. (1998). p. 185; Supra Menéndez, A. J. (2014). p. 932; Supra Kostakopoulou, D. (2014); Supra Ross, M. (2010); Supra Reich, N. (1999). p. 48; Shaw, J. (2007). *The Transformation of Citizenship in the EU*. Cambridge University Press; Montero, C. (2001). *Between EU Constitution and Individuals' Self: European Citizenship Law and Philosophy*. Vol. 20, 3. pp. 345 – 371; Supra Menéndez, A. J. (2011). p. 71; Bellamy, R. (2001). *The 'Right to Have Rights': Citizenship Practice and the Political Constitution of the EU*.

since its introduction with the Maastricht Treaty. Its ‘fundamentality’ has been shaped by CJEU case law, entrenched by secondary legislation and continues to be defined through EU citizens themselves in their exercise of rights and responsibilities. It has impacted the “political constitution of the EU” as much as the “juridical”.<sup>425</sup> It led to institutional reform and continues to inspire the Court to inform the EU’s constitutional framework.<sup>426</sup> The rights, responsibilities and status of EU citizenship have driven these constitutional developments. The norm itself, however, also provides us with clues regarding its constitutional relevance.

Through its introduction with the Maastricht Treaty, EU citizenship occupied a constitutionally crucial place within the amending Treaty.<sup>427</sup> Introduced as part of the Treaty’s constitutional principles, the relevance of the provision for the EU’s constitutional framework is evident from the start.<sup>428</sup> Articles 20 and 21 TFEU sit within part II of the TFEU, together with non-discrimination provisions. Its introduction is arguably a turning point in the way the European Communities developed to form the EU as we know today. EU citizenship shifted the focus from economically driven policies towards issues of European democracy, legitimacy and especially European constitutionalism.<sup>429</sup> Its constitutionalising characteristic is enabled and reflected by the way its outlining norm is structured. As EU citizenship has been installed as a constitutional principle within the Treaty, we can see the relation to Alexy’s view of the role of constitutional rights norms within the legal system.

EU citizenship as a constitutional rights norm within the EU legal order enables the aforementioned constitutional transformations, developments and reforms through its characteristics and as a source for derivative norms. Its open-texture has allowed and required the establishment of a series of derivative constitutional rights norms, be it in the form of case law or directives and regulations.<sup>430</sup> All three categories derive their

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In: Bellamy, R. & Warleigh, A. (2001). *Citizenship and Governance in the EU*. Continuum. pp. 41 – 70; More critical: Wiener, A. and Della Salla, V. (1997). *Constitution-making and citizenship practice: Bridging the democracy gap in the EU?* *Journal of Common Market Studies*. Vol.35, 4. pp. 595-614; Supra Weiler, J.H.H. (1999). p. 344 f.

<sup>425</sup> Supra Bellamy, R. (2001). pp. 50 ff.

<sup>426</sup> Supra Kostakopoulou, D. (2014); Supra Montero, C. (2001).

<sup>427</sup> Supra La Torre, M. (1998). p. 436.

<sup>428</sup> Ibid.

<sup>429</sup> Supra Kostakopoulou, D. (2005). p. 233.

<sup>430</sup> Introduced chapter 2, section 2.3.; Supra Alexy, R. (2002). p. 36.

fundamentality and constitutional relevance from the constitutional rights norm established through the TFEU, while they fulfil their clarifying and substantiating function.<sup>431</sup> EU citizenship is a principle that, in its fundamentality and subjective rights, seeks to be fulfilled to the optimum extent possible,<sup>432</sup> when balanced with other principles, such as intergovernmental considerations, Member State obligations and concerns and institutional effectiveness.

This process of balancing is what defines the development of derivative constitutional rights norms through case law. The role of the CJEU in engaging with the gaps between secondary legislation and primary treaty legislation, visualised through cases brought before it, is crucial when analysing the norm structure and constitutional role of EU citizenship. It was, and continues to be, the Court that ensures a system of rights protections exists where EU citizenship is concerned.<sup>433</sup>

#### **4. Conclusion**

The concept of EU Citizenship is novel insofar as it prompts us to re-think “membership with a view to opening up new forms of political community.”<sup>434</sup> The discussion of EU citizenship as status, the rights attached to it and its transformative nature inform the norm analysis following this chapter by providing the constitutional, as well as socio-political, context that define the norm and its functionality. This approach allows us to view and analyse this constitutional provision through a theoretical framework that is not rooted within traditional national approaches to citizenship, immigration and community, but rather focusses on the norm structure as analytical starting point.<sup>435</sup> We are not forced to look at the “similarity between national and European rights”, but are, through the process of balancing constitutional rights principles, enabled to see a “transnational solidarity which gives effect to the moral responsibilities of Member States and their peoples”.<sup>436</sup> By detangling the citizenship rights discussion from “quasi-nationalist trappings” through a focus on norm structure rather than a discussion of

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<sup>431</sup> See chapter 2, section 2.3; Supra Alexy, R. (2002). Ibid p. 35.

<sup>432</sup> See chapter 2, section 3.1.1; Supra Alexy, R. (2002). p. 48.

<sup>433</sup> Supra Reich, N. (1999). p. 56.

<sup>434</sup> Supra Kostakopoulou, T. (2001). p. 67.

<sup>435</sup> Ibid p. 1.

<sup>436</sup> Supra Eleftheriadis, P. (2014). p. 796.

scope and content,<sup>437</sup> we are able to develop a European constitutional rights theory that appreciates the norm functionality, as well as its impact on the individual.

Whereas a transnational citizenship would otherwise “have to be interpreted from the vantage point of different national traditions and histories”, a constitutional rights norms approach can, through its focus on structure and functionality, provide the basis for an “overlapping consensus of a common, supranational shared political culture” based on constitutional rights norms and those derived from it.<sup>438</sup> This is where citizenship is “underpinned with new formulations of freedom and autonomy”, as it is reframed as a constitutional rights norm principle, sitting and influencing the EU’s constitutional core.<sup>439</sup>

This chapter focussed on the investigation of EU citizenship as a concept in order to show how the constitutional developments within EU legal framework have been influenced by the norm’s constitutional rights norm characteristics. The following chapter will lead on from this analysis and explore the functionality of EU citizenship as a constitutional rights norm through the Court’s decision-making and reasoning in EU citizenship cases. The chapter will therefore provide an analysis of selected judgments of the CJEU where the EU citizenship Treaty provisions were applied directly. We will see how the Court, by creating these derived constitutional rights norms in the form of case law through an application of the Treaty norms, significantly substantiates the constitutional rights norm of EU Citizenship.

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<sup>437</sup> Kostakopoulou, D. (2005). Ibid p. 243.

<sup>438</sup> Habermas, J. (1992). Citizenship and national identity: Some reflections on the future of Europe. In: Special section: Citizenship, Democracy and National Identity. Basil Blackwell. pp. 1-19. p. 7.

<sup>439</sup> Hoffman, J. (2004). Citizenship beyond the State. SAGE. London. p. 18.



## **Chapter 5      European Union citizenship as constitutional right**

### **1. Introduction**

EU citizenship is of fundamental significance for the constitutional framework of the EU and its Member States.<sup>440</sup> We have seen how the concept of citizenship is understood and how far EU citizenship relates to those. This chapter will focus on the way the CJEU has developed the concept of EU citizenship and how far the Court's reasoning allows us to argue EU citizenship norms to be seen as constitutional rights norms thus entailing constitutional rights. The EU citizenship provisions will be explored for their functionality and formal structure, as reflected by the reasoning of the Court. It will be argued that they are indeed constitutional rights norms that require optimization, in line with Alexy's theory of constitutional rights.

In order to discuss the Court's case law effectively, the chapter will start by briefly exploring the Court itself and how far claims of judicial activism are over-simplifying the Court's role and dismissing its contribution. Before we can work with the Court reasoning, we need to gain some understanding of the way the Court is perceived to be working. We will then, within section 2, discuss a range of EU citizenship cases, all mainly or exclusively applying Article 20 and 21 TFEU and consequently allowing us to test Alexy's constitutional rights thesis as a theory applicable to EU primary law. The cases are meant to illustrate the width of issues arising from a concept of citizenship applied beyond the borders of a domestic legal order and across a range of constitutional frameworks.

### **2. The Court of Justice as constitutional court**

The Court was particularly prone to pass constitutionalising case law in its founding years and the early years of the European Communities.<sup>441</sup> It started emancipating the

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<sup>440</sup> Kochenov, D. (2017). *EU Citizenship and Federalism – The Role of Rights*. Cambridge University Press. p. 1.

<sup>441</sup> Maduro, M. P. (1998). *We. the court. The European Court of Justice & the European Economic Constitution*. Hart Publishing. p. 7 ff; See also: Mancini, G. F. (1989). *The Making of a Constitution for Europe*. *Common Market Law Review*. Vol. 26. pp. 595 – 614; Bauer, L. (2009). *The European Court of Justice as a Constitutional Court*. *Vienna Journal on International Constitutional Law*. Vol. 3, 4. pp. 268 – 287; Burley, A-M. & Mattli, W. (1993). *Europe before the Court: A Political Theory of Legal Integration*. *International Organizations*. Vol. 47, 1. World Peace Foundation and the Massachusetts Institute of Technology. pp. 41 – 76; Caquero Cruz, J. (2006). *The Changing Constitutional Role of the European Court*

developing EU legal order from its international law foundations when it announced that “the treaty [had] created its own legal system”.<sup>442</sup> This constitutional court “fashioned a judicially enforceable constitution out of international treaty law”.<sup>443</sup> It matured a Treaty binding individual Member States to a constitutional framework guaranteeing rights of individuals.<sup>444</sup> Some even claim the Court successfully “fashioned a constitutional framework for a federal-type structure in Europe”.<sup>445</sup>

Within this process, the Court encountered much criticism regarding its approach to the Treaties, despite its aim “to ensure that the constitution would be effective and its major aims would be realized.”<sup>446</sup> Some critiques disagree with the methods of legal interpretation and reasoning used by the Court as “totally different [...] and nothing like so exact or so good” as those of the domestic courts.<sup>447</sup> Others claim the Court is “in the pursuit of an agenda of its own about the political shape of Europe”, making it a judicially activist and political court rather than one firmly accepting the separation of powers.<sup>448</sup>

We will discuss the role of the Court, its reasoning and the claim of judicial activism before examining EU citizenship as a constitutional right, by discussing some examples of the Court’s EU citizenship jurisprudence.

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of Justice. *International Journal of Legal Information*. Vol. 34, 2. pp. 223 – 245; Itzcovich, G. (2014). The European Court of Justice as a Constitutional Court. *Legal Reasoning in a Comparative Perspective*. STALS Research paper 4/2004; Vesterdorf, B. (2006). A constitutional court for the EU? *International Journal of Constitutional Law*. Vol. 4, 4. pp. 607 – 617.

<sup>442</sup> Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66; See also Supra Maduro, M.P. (1998).

<sup>443</sup> Stone-Sweet, A. (2000). *Governing with Judges: Constitutional Politics in Europe*. Oxford University Press. p. 153.

<sup>444</sup> Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

<sup>445</sup> Stein, E. (1981). Lawyers, Judges, and the Making of a Transnational Constitution. *American Journal of International Law*. Vol. 75. pp. 1 - 27. p. 1.

<sup>446</sup> Supra Bengoetxea, J. (1993). p. vi.

<sup>447</sup> Thatcher, M. (1993). *European Communities (Amendment) Bill* HL Deb 07 June 1993. Vol. 546 Col. 544 -702. Col. 563 – 564. Available online at: <https://api.parliament.uk/historic-hansard/lords/1993/jun/07/european-communities-amendment-bill> [accessed 02/06/2018].

<sup>448</sup> Supra Arnull, A. (1999). p. 1; Blauburger, M. & Schmidt, S.K. (2017). The European Court of Justice and its political impact. *West European Politics*. Vol. 40, No. 4. pp. 907-918. DOI: 10.1080/01402382.2017.1281652; Barani, L. (2005). The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling. *Journal of Contemporary European Research*. Vol. 1, 1. pp. 42-58; Naurin, D. & Cramer, P. (2009). The European Court of Justice as a political actor and arena: Analyzing member state’s observations under the preliminary reference procedure. *Statsvetenskaplig Tidskrift*. Årg 111, Nr 1. pp. 80 – 85; Garrett, G. (1995). The Politics of Legal Integration in the European Union. *International Organization*. Vol. 49. pp. 171 – 181.

## 2.1. The political Court

Judicial activism by the CJEU is claimed whenever existing understandings of the law are challenged with a decision and “expectations confounded”.<sup>449</sup> It is the subjectivity of this claim, showing “an ‘I know activism when I see it’ attitude”, that infused much of the debate in the founding years of the Communities and its Court.<sup>450</sup> The Court did not always encounter this criticism, though. It was Rasmussen’s account of the Court which marked a turn from praise and admiration and a “benevolent approach” to the CJEU towards claims of political activity and judicial activism.<sup>451</sup> While Rasmussen’s work was not received unchallenged, it functioned as a catalyst for criticism from political and legal scholars alike.<sup>452</sup> Early accounts of the Court’s role, function, and reasoning are now often dismissed for their “normative deficiencies”; the underlying theme of criticism and challenge to the Court’s approach and focus on integration continue to be voiced.<sup>453</sup>

Besides disagreeing about its merits, there also seems to be no consensus between the critiques and defenders of the Court when it comes to defining judicial activism itself. The only and very broad agreement about judicial activism is that it is no commendation of the Court’s work, but a fundamentally critical and opposing assessment, at times in a tone of deep revulsion.<sup>454</sup> The criticism is particularly intense when the Court “is seen to involve the setting of policy or choosing of policy outcomes” or “when it extends its own jurisdiction”.<sup>455</sup> Some regard the Court as “pursuing a given agenda” and having “already made up its mind on how [a case] is to be decided” before it analyses the case at hand and engages with its issues.<sup>456</sup> Others are clearly concerned over the impact “intolerably

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<sup>449</sup> Supra Arnall, A. (2013). p. 231; Supra Neill, Sir P. (1995).

<sup>450</sup> Supra Rasmussen, H. (1986). p. 6.

<sup>451</sup> de Waele, H. & van der Vleuten, A. (2013). Judicial Activism in the European Court of Justice – The Case of LGBT Rights. *Michigan State Journal of International Law*. Vol. 19, 3. pp. 639 – 666. p. 649; Pre-Rasmussen: Schermers, H. G. (1974). The European Court of Justice: Promoter of European Integration. *The American Journal of Comparative Law*. Vol. 22, 3. pp. 444 – 464.

<sup>452</sup> In direct opposition to Rasmussen: Cappelletti, M. (1987). Is the European Court of Justice “Running Wild”? *European Law Review*. Vol. 12, 1. pp. 3 – 17; Weiler, J.H.H. (1987). The Court of Justice on Trial. *Common Market Law Review*. Vol. 24. pp. 555 – 589.

<sup>453</sup> Perju, V. F. (2009). Reason and Authority in the European Court of Justice. *Virginia Journal of International Law*. Vol. 49, 2. pp. 307 – 377. p. 310, FN. 10; Supra Grimm, A. (2014b).

<sup>454</sup> Supra de Visser, M. (2013). p. 188; Supra Grimm, A. (2014). p. 75.

<sup>455</sup> Supra de Visser, M. (2013). p. 191.

<sup>456</sup> Supra Bengoetxea, J. (2015). p. 213.

activist” behaviour will have on the EU as a whole, fearing the Court will lose “authority – and the Community momentum”.<sup>457</sup>

While it is not within this thesis’ remit to discuss judicial activism of the CJEU as a political, legal or even constitutional issue in itself, the claim for the Court’s activism supports the search for alternative, or additional, means to analyse its jurisprudence. The claim of activism has not disappeared, despite the Court currently being, in comparison, almost minimalist when applying and interpreting Treaty provisions.<sup>458</sup> The CJEU is in an impossible position to protect the rights of individuals, as it itself guarantees the Treaty that enshrines them, and ensure the functionality of the Treaties as binding the Member States. As the EU endeavours to shift from a Union of member states to a Union of citizens, the Court’s dual role within this dialogue is visible and continues to keep feeding into claims of judicial activism.<sup>459</sup> The political objectives underlying and furthering the aims of the EU and its legal order will continue to fuel those claims.<sup>460</sup>

Whenever “apparently settled principles” are overturned “without adequate justification or explanation”, the crowd supporting these claims cheers louder.<sup>461</sup> Interestingly enough, that criticism is not entirely focussed on the result itself, but more directed at the way in which the Court arrived at the decision and the reasoning it provides as justification.<sup>462</sup>

As we analyse the Court’s case law in the area of EU citizenship, we will be tempted to discuss the Court’s reasoning with a particular view on the methods of interpretation applied. This thesis is not interested in a discussion of interpretative methods of courts in general or the CJEU in particular, and does not aim to contribute to the discourse of judicial reasoning. Having said that, within this discourse we will find contributions

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<sup>457</sup> Kuper, R. (1998). *The Politics of the European Court of Justice*. Kogan Page. p. 18. In an attempt to explain Rasmussen’s “anger”.

<sup>458</sup> In the context of European Union Citizenship as introduced in 1993: Supra Kostakopoulou, D. (2005). p. 244.

<sup>459</sup> Dhoooghe, V., Franken, R. & Opgenhaffen, T. (2015). *Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context*. *Tilburg Law Review*. Vol. 20, Issue 2. pp. 122 – 141.

<sup>460</sup> Lenz, C.O. (1988). *The Court of Justice of the European Communities 35 Years on*. The Dominik Lasok Lecture in European Community Law. University of Exeter Faculty of Law Centre for European Legal Studies. p. 16.

<sup>461</sup> Supra Arnall, A. (2013). p. 231.

<sup>462</sup> Ibid.

considering norm theory, or even Alexy's theories of argumentation, discourse and constitutional rights referenced as the CJEU's reasoning. Understanding the approaches to CJEU reasoning and the conclusions drawn from it, will contextualise the norm-focussed approach this thesis provides.

## 2.2. Legal reasoning

Practical and legal reasoning are subject to discussion amongst philosophers and legal scholars alike.<sup>463</sup> While a specific understanding of legal reasoning will underpin any discussion of legal reasoning, this thesis will not offer a substantial contribution to this area of research itself, as it will be unable to do it justice. Instead, we will focus on assessments of the CJEU's reasoning. In this context, Beck provides an overview of legal reasoning by discussing the differences between normative, descriptive and heuristic approaches.<sup>464</sup> While the descriptive account of legal reasoning simply "seeks to explain how judges in fact decide cases", the other categories are more ambitious.<sup>465</sup> One can argue that the normative and heuristic approaches stand on opposing sides of the spectrum, with the former as a "theory of adjudication [...] presuppos[ing] a specific legal method, formula, decision-making procedure or theory of some kind which judges must follow to arrive at correct decisions."<sup>466</sup> By applying a heuristic view of legal reasoning, one will deny precisely that. Instead judicial decisions are seen as "revealing discernible heuristics or patterns consisting of recurring legal and extra-legal explanatory factors

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<sup>463</sup> Hirsch Levi, E. (1948). *An Introduction to Legal Reasoning*. University of Chicago Law Review. Vol. 15, No. 3. pp. 510 – 574; Haakonssen, K. (1981). *The Science of a Legislator. The Natural Jurisprudence of David Hume and Adam Smith*. Cambridge University Press; Kratochwil, F.V. (1989). *Rules, Norms, and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge University Press; Aarnio, A. & MacCormick, N. (1992). *Legal Reasoning*. Aldershot; MacCormick, N. (1994). *Legal Reasoning and Legal Theory*. Oxford University Press; Alexander, L. & Sherwin, E. (2008). *Demystifying Legal Reasoning*. Cambridge University Press; MacCormick, N. (2005). *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*. Oxford University Press; Ellsworth, P.C. (2005). *Legal Reasoning*. pp. 685 - 704. In: Holyoak, K.J. & Morrison Jr., R.G. (2005). *The Cambridge Handbook of Thinking and Reasoning*. Cambridge University Press; Husa, J. & van Hoecke, M. (2013). *Objectivity in law and legal reasoning*. Hart; Berteau, S. (2008). *Law and Legal Reasoning*. Northern Ireland Legal Quarterly. Vol. 59, No. 1. pp. 5 – 20 (An issue of the journal themed: *Rhetoric and the Rule of Law: An Author's Day with Neil MacCormick*).

<sup>464</sup> Beck, G. (2013). *The Legal Reasoning of the Court of Justice of the EU*. Hart. pp. 1-3; See also: Jakab, A. (2013). *Judicial reasoning in constitutional courts: A European perspective*. German Law Journal. Vol. 14, 8. pp. 1215 – 1278; Heuristic science and decision making is of growing interest in the context of psychology, an overview is provided by: Gigerenzer, G. & Gaissmaier, W. (2011). *Heuristic Decision Making*. Annual Review of Psychology. Vol. 62. pp. 451 – 482.

<sup>465</sup> Supra Beck, G. (2013). p. 1.

<sup>466</sup> Ibid.

and constraints of judicial decision-making” which can vary between cases, as not all factors are always relevant.<sup>467</sup> This is reflected in the “unpredictability of judicial decisions” narrowing predictability of judicial decisions to reckonability, considering “outcomes may be correctly predicted in most but not all cases”.<sup>468</sup> If we were to consider Alexy’s approach to constitutional rights norms within the context of legal reasoning, the heuristic view seems most fitting.<sup>469</sup> He does not argue for the predictability of decisions made. His conclusion that in cases where the scenarios are identical and interests weighed balance in the same way the result is the same, match the assumptions made under reckonability.<sup>470</sup>

Following the assessment of approaches to legal reasoning, must follow a brief introduction of methods of interpretation. Most common characteristics of the differing views on legal interpretation include “a priority of ordinary textual meaning and the potential relevance of evidence of drafter’s intention.”<sup>471</sup> As we analyse the Court’s case law in the area of EU citizenship, we will be tempted to discuss the Court’s reasoning with a particular view of the methods of interpretation applied. Again, a discussion of interpretative methods of Courts in general, or the CJEU in particular, will not be the focus of this thesis. Contributions to the discourse of judicial reasoning, and methods of interpretation, will be referred to and contextualised only in order to enable the analysis of EU citizenship as constitutional rights norm.

### **2.3. Methods of interpretation**

Bengoetxea has concluded that the Court’s jurisprudence is of critical relevance for the EU legal order, as “any study of [EU] law from a legal-theoretical viewpoint will neglect the jurisprudence of the [CJEU] at its own peril”.<sup>472</sup> In order to avert this, he has proposed combining “legal theory and theories of legal reasoning with the theory of

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<sup>467</sup> Ibid p. 2-3.

<sup>468</sup> Ibid p. 3.

<sup>469</sup> See also: Heidemann, C. (2007). The Concept of Validity in Theory of Social Action. In: Supra Pavlakos, G. (2007). pp. 301 – 317. p. 309 f.

<sup>470</sup> Contextualising and testing Alexy’s approach to legal reasoning, with particular reference to his discourse theory, is recently: Kaptein, H. & Velden, B. (2018). *Analogy and Exemplary Reasoning in Legal Discourse*. Amsterdam University Press.

<sup>471</sup> Supra Conway, G. (2012). p. 281.

<sup>472</sup> Supra Bengoetxea, J. (1993). p. 19.

social action” when approaching EU law.<sup>473</sup> Bengoetxea recognised and embraced the Court’s specificities and is critical of the focus on political theory in the analyses of the Court, with particular reference to Rasmussen.<sup>474</sup> It is his focus on the interpretation of EU Law by the CJEU, including its justification and reconstruction, and not a discussion of EU law interpretation more generally, that makes his work very relevant for this thesis.<sup>475</sup> Just as we are here not focussing on substantive law as such, Bengoetxea introduces his work setting out the interpretation of said law by the Court as his focus point.<sup>476</sup>

Other approaches to the Court’s reasoning focus on evidencing a hidden agenda. Conway accuses the Court of evolving “an approach to interpretation that allows it to freely alter and manipulate levels of generality in its reasoning.”<sup>477</sup> He views this as furthering “the role of the judiciary in contemporary politics and increasingly transfer public policy decisions to the judicial domain.”<sup>478</sup> Bengoetxea considers Conway’s and other contributions to the analysis of CJEU reasoning and is less concerned with the Court’s “openly communautaire” agenda.<sup>479</sup> He counteracts Conway’s criticism by arguing that legal reasoning as subject of debate “has gained ground due to law’s and the courts’ central role in contemporary liberal democracy”.<sup>480</sup> He views this role to be both “enabling and constraining political power”, while at the same time mediating between politics and society.<sup>481</sup> In its early years, the Court would do so without receiving much attention, “out of sight out of mind by virtue of its location in the fairy-tale Grand Duchy of Luxembourg”.<sup>482</sup> The “neglect of the media” allowed it to “fashion a constitutional framework” applying the communautaire agenda Conway despises.<sup>483</sup>

Conway argues for decisions to be made based on “the legal tradition of the Member States” as “conserving standard” and prioritising the “ordinary textual meaning”. This

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<sup>473</sup> Ibid.

<sup>474</sup> Ibid p. 5.

<sup>475</sup> Ibid p. 7.

<sup>476</sup> Ibid p. 3.

<sup>477</sup> Supra Conway, G. (2012). p. 280.

<sup>478</sup> Ibid p. 282.

<sup>479</sup> Supra Bengoetxea, J. (2015). p. 213.

<sup>480</sup> Ibid p. 215.

<sup>481</sup> Ibid.

<sup>482</sup> Supra Mancini, G.F. (1989). p. 597.

<sup>483</sup> Ibid p. 596.

proposal does not acknowledge one vital aspect of EU jurisprudence: multilingualism. While French is the official working language of the Court, not all cases are held in French and all judgments are publicised in all official EU languages.<sup>484</sup> EU law itself is drafted by representatives from multiple Member States with multiple languages, supported by a complex apparatus of interpreters. As Bengoetxea puts it: “EU law is multilingual law and no linguistic version overrides the rest.”<sup>485</sup> There can consequently not be an informed discussion of “intended meaning” of EU law, and an assessment of Court reasoning based on this, as multilingualism makes it impossible to guarantee wording as a neutral starting point.<sup>486</sup>

Within no other court is it so crucial to recognise diversity. Judges, Advocates General, in fact all personnel involved, are engaging with the proceedings of the CJEU with their individual, cultural, domestic-legal background influencing them consciously or unconsciously.<sup>487</sup> Speaking with one voice as a court then requires a conscious effort; not allowing dissenting opinions is one effort to do so, as a separate opinion is not only a “publicly indicated disagreement with the majority” it is also offering an alternative reasoning for the case at hand, challenging the decision made.<sup>488</sup> There is more behind this collegiate approach to jurisprudence than the length of the processes involved.<sup>489</sup> Dissenting opinions challenge the majority reasoning, questioning the decision reached, providing diverging reasoning that is seeking to be convincing. The acceptance of the Court’s reasoning is therein threatened; the reasoning provided is less convincing.<sup>490</sup> The Court relies on a collegiate approach to eliminate the conscious divergence, which makes the agreed reasoning the result of compromise. If decisions were to be taken as the result of a consideration of legal traditions of the Member States as proposed by Conway we would be seeing a compromised, weakened Court only.

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<sup>484</sup> On the impact of French as main language: Cohen, M. (2016). On the linguistic design of multinational courts: The French capture. *ICON*. Vol. 14, 2. pp. 498 – 517.

<sup>485</sup> *Supra* Bengoetxea, J. (2015). p. 188.

<sup>486</sup> *Ibid*.

<sup>487</sup> *Supra* Sankari, S. (2013). p. 3.

<sup>488</sup> Perju, V. (2009). Reason and Authority in the European Court of Justice. *Virginia Journal of International Law*. Vol. 49, 2. pp. 307 – 377. p. 350.

<sup>489</sup> Azizi, J. (2011). Unveiling the EU Court’s Internal Decision-Making Process: A Case for Dissenting Opinions? *ERA Forum*. Vol. 12, 2. pp. 49 – 68.

<sup>490</sup> *Ibid* pp. 58, 60.



The reasoning of the CJEU needs to be viewed and contextualised within the specific setting of this unique constitutional court. The analysis of reasoning of this Court needs to acknowledge the restraining factors limiting it in its decision-making process and leading to an almost minimalist approach in its reasoning.<sup>491</sup> Accepting this, we can focus on what the Court is actually reasoning with and about. Removing itself a step further, this thesis does not seek to evaluate the Court's reasoning. It will moreover use the Court's reasoning as evidence of the way it views the applied and interpreted norms to function, EU citizenship cases being the particular example used. This evidence will support the application of Alexy's constitutional rights theory to the Treaty norms and suggest that EU citizenship provisions, as outlined within the Treaty, are European constitutional rights norms.

### **3. European constitutional rights norms**

We introduced and discussed Alexy's concept of constitutional rights norms in chapter 2. This section will show how far his norm theory, based on the characterisation of constitutional rights norms as optimization requiring principles, is applicable to the EU legal framework, focussing on EU citizenship as example. Just as Alexy uses the reasoning of the German FCC in selected cases as evidence, we will be looking at specific judgments by the CJEU in the area of EU citizenship.

We will find fewer examples of constitutional rights norms characteristics within the Court's reasoning in earlier case law than we will in cases decided in the second decade of the 2000s. The Court, while engaging with EU citizenship from its introduction as Article 8 in the Maastricht Treaty,<sup>492</sup> "made tactical interventions" rather than actively pursuing the establishment of the newly introduced norms.<sup>493</sup> It tried to relate pre-existing legislation to Article 8, be it in the form of directives, regulations or other Treaty norms. The characteristics of the norms applied are most visible in those cases where the Court pushed and seemingly extended the scope and meaning of EU citizenship. Analysing these cases, which have been widely criticised for the way the Court seemed to have widened or narrowed citizenship, brings the norm's characteristics and

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<sup>491</sup> Supra Sankari, S. (2013). p. 249 ff.

<sup>492</sup> Treaty on European Union 92/C 191/01.

<sup>493</sup> Supra Kostakopoulou, D. (2005). p. 235.

functionality forward, allowing us to consider the relevance of Alexy's theoretical framework. Consequently, *Grzelczyk*, *Rottmann* and *Zambrano* are key cases to consider.<sup>494</sup> We will use these as a starting point for the differentiation, as the Court's reasoning is more extensive here, equipping us with more evidence than otherwise available. Other cases will be considered as the three aforementioned are discussed. In focus will be the way the Court has engaged with the Treaty norms. As such, citizenship cases that have otherwise fundamentally influenced EU citizenship, with the Court relying on references to the Charter of Fundamental Rights or directives and regulations, will not be given prominence despite their unquestionable importance for the development of EU citizen rights. While cases such as *Sala* and *Baumbast* have been vital in establishing the meaning and scope of EU citizenship, they have done little in relation to the norm structure.<sup>495</sup> This thesis does not seek to discuss EU citizenship rights, but rather aims to provide a norm theoretical analysis of Articles 20 and 21 TFEU governing EU citizenship.

### 3.1. Fundamental status

In applying the theory of constitutional rights to EU citizenship and the CJEU jurisprudence, we will consider first the status of constitutional rights norms as fundamental within their legal order.<sup>496</sup> Alexy considered the formal and substantive status. Formally, constitutional rights norms show their fundamentality as directly binding the legislature, executive and judiciary.<sup>497</sup> Article 20 and 21 TFEU offer such binding nature, going so far as awarding EU citizenship to every national of a Member State regardless of how that nationality was awarded. Substantively, the fundamental status of constitutional rights norms is reflected in their relevance for the "basic normative structure of state and society".<sup>498</sup> EU citizenship substantively defines the

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<sup>494</sup> *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2001] ECR I-06193; *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* Case C-34/09 [2011] European Court Reports 2011 I-01177; *Janko Rottman v Freistaat Bayern* Case C-135/08 ECR 2010 I-01449.

<sup>495</sup> *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 [2002] European Court Reports I-07091; Dougan, M. (2006). The constitutional dimension to the case law on Union citizenship. *European Law Review*. Vol. 21, 5. pp. 613 – 641.

<sup>496</sup> Alexy discusses the legal status of constitutional rights at length, we will be focussing on the argument of fundamentality here, see *supra* Alexy, R. (2002). pp. 163 – 173.

<sup>497</sup> *Ibid* p. 349.

<sup>498</sup> *Ibid* p. 350.

European society's structure.<sup>499</sup> Citizens form a structural link between state and society. Consequently, who is granted citizen status and the rights such a status entails influence and characterise societies' development and structure.

The status of the concept of constitutional rights norms and the actual norm(s) governing EU citizenship are of comparable fundamentality, notwithstanding the Court's own declaration.<sup>500</sup> Even before *Grzelczyk*, the Court emphasized the fundamental nature of EU citizenship and the provisions governing it. In *Sala* the Court assessed the *ratione personae* and *ratione materiae* of EU citizenship by focussing on Treaty provisions.<sup>501</sup> While the Court mainly undertook an assessment of scope, we are given an insight into the way the Court envisaged these norms to function. The only explicit reference made to the Treaty provisions on EU citizenship was made in connection to the *ratione personae* of Treaty provisions more generally. Citizenship was then linked to the right "not to suffer discrimination on grounds of nationality", which suggests that the norms are also linked structurally, or were at the time.<sup>502</sup> The connection to this fundamental principle of EU law suggests that the fundamental status of the Treaty norm had been acknowledged by the Court before it was ready to declare it explicitly.

### 3.1.1. *Grzelczyk*

The Court was given the opportunity to express its view on the fundamentality again three years later, in the *Grzelczyk* case, relating to a French national, who had moved to Belgium to study. He unsuccessfully applied for a Belgian non-contributory social benefit in his final year of study (minimax), as "the person concerned is an EEC national enrolled as a student".<sup>503</sup> It is in par 31 of the judgment that the Court shows its confidence to

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<sup>499</sup> See amongst others: Wernicke, S. (2007). Au nom de qui? The European Court of Justice between Member States, Civil Society and Union Citizens. *European Law Journal*, Vol. 13. pp. 380 – 407. Wernicke summarises: "The ECJ incorporates civil society actors and citizens, beyond notions of representative (citizenship) and participatory (civil society) democracy, into the body of law and thereby reworks its own and the Union's identity. [...] The analysis shows that the court is disentangling itself from the state-oriented Treaty situation and drawing legitimacy directly from citizens themselves so that judgments should be pronounced 'In the Name of the Citizens of the European Union.'" p. 380.

<sup>500</sup> *Supra Grzelczyk*. I – 6242. par 3.

<sup>501</sup> *María Martínez Sala v Freistaat Bayern* Case C-85/96 [1998] *European Court Reports* 1998 I-02691, para 60-62. I-2725.

<sup>502</sup> *Ibid.*

<sup>503</sup> *Supra Grzelczyk*. I – 6236. par 12.

proclaim: “Union citizenship is destined to be 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.”<sup>504</sup> Whilst not providing us with great explanation of the consequence of this ‘fundamental status’,<sup>505</sup> the Court showed that the addition of EU citizenship to the EU legal framework is seen to have an impact on the “the exercise of the fundamental freedoms [...] and [...] the exercise of the right to move and reside freely in another Member State.”<sup>506</sup>

It is therefore particularly interesting how the Court contextualised references to the Treaty, Directive and Regulation and EU citizenship with no clear sense of structural boundaries. We can take this as supporting the constitutionalising efforts the Court is claimed to undertake.<sup>507</sup> The Court, however, seemed focussed on reiterating how EU citizenship in its functionality was already present within the EU legal order, before the Treaty norm entrenched it directly.<sup>508</sup> Proclaiming the fundamental status of EU citizenship within this particular case was a bold move, marking the transition from the introductory phase of EU citizenship cases to one aimed to manifest its status and relevance. It is precisely the proclaimed fundamentality, however thin in substantial meaning at the time, which supports the formal status of the norm within the EU constitutional norm hierarchy.

### **3.1.2. Rottmann**

The Court went on to reiterate the fundamentality of Article 20 TFEU in the case of *Rottmann*.<sup>509</sup> Rottmann, Austrian by birth, was in danger of becoming stateless and losing his EU citizenship as Germany withdrew his naturalisation as German due to fraudulent behaviour by Rottmann himself.<sup>510</sup> Rottmann had lost his Austrian citizenship, in accordance with Austrian law, when naturalising as German. Before even

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<sup>504</sup> Ibid I – 6242 par 31.

<sup>505</sup> Using Eleftheriadis’ words: “The Court derives rights from a fundamental status that does not yet exist.” In: Supra Eleftheriadis, P. (2014). p. 780.

<sup>506</sup> Supra *Grzelczyk*. I – 6243. par 33.

<sup>507</sup> E.g.: Supra McCormick, N. (1997). p. 336; Supra Menéndez, A.J. (2014). p. 932.

<sup>508</sup> Kostakopoulou contextualises the early case law also in reference to the Commission report on Citizenship of the Union, in: Supra Kostakopoulou, D. (2005). p. 244 ff.

<sup>509</sup> Supra *Janko*.

<sup>510</sup> Ibid I – 01481.

discussing the citizenship issue, the Court had to show that it was right to hear and decide the case at all. After all, Rottmann was arguably, until recently, a naturalised German engaged in legal proceedings with German authorities; a purely internal situation and consequently no reason for the Court to be involved and EU law to be applied.<sup>511</sup>

This is not how the Court views it. Rather, and with using Article 20 TFEU in an almost self-evident manner, the Court declares with reference to *Micheletti* that the matter at hand is one within EU law, as “Member States must, when exercising their powers in the sphere of nationality, have due regard to EU Law”.<sup>512</sup> The EU law it explicitly refers to is its own ruling on the fundamental status of EU citizenship.<sup>513</sup> The fundamentality of Article 20 TFEU consequently pulls matters of Member State competence into the realm of EU law. While others view this as a judicially activist extension of EU competence, it can as convincingly be perceived as first evidence for the constitutional rights norm character of EU citizenship.<sup>514</sup>

### 3.2. Rules or Principles

The main argument within this application of the constitutional rights norm theory to EU law needs to be based on the norm differentiation. We need to evidence that EU citizenship is indeed a principle, following Alexy, before we can argue that the principle characteristics influence the Court’s application of the norm. In doing so, we need to ensure the argument does not become a circular one, as relying on Court reasoning can serve both the differentiation of rules and principles and the evidence of principle functionality. Generally, we will see the characteristics of principles reflected in the way the Court engages with the principle of proportionality and engages in the balancing and

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<sup>511</sup> Ibid I – 01486 par 38.

<sup>512</sup> Ibid I – 01487 par 45.

<sup>513</sup> Ibid par 43.

<sup>514</sup> E.g. Kruma, K. (2015). A Hopeful Transmission: Searching for Citizenship beyond the State. *European Journal of Migration and Law*. Vol. 17. pp. 361 – 393. pp. 366 ff; Mann, D.-J. & Purnhagen, K. P. (2011). The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship. A comparative analysis of the Rottmann Ruling / How to Avoid a European Dred Scott Decision? *Wisconsin International Law Journal*. Vol. 29, 3. pp. 484-533; d’Oliveira, J. H.U., de Groot, G.R. & Seling, A. (2011). Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottman v. Freistaat Bayern Case Note 1 Decoupling Nationality and Union Citizenship? Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters. *European Constitutional Law Review*. Vol. 7, 1. pp. 138 – 160.

weighing of interests. As these interests are entrenched through right bearing norms, in our example EU citizenship, the exercise of balancing can be treated as a reflection on their structural characteristics as principles. Additionally, the way in which the Court reasons in cases where it relies on Articles 20 and 21 TFEU and Directives will reflect the open-texture of the EU citizenship norms, in line with Alexy's analysis.<sup>515</sup>

Interestingly, we saw reference made to EU citizenship as a principle in *Grzelczyk*, too. Albeit not in the norm theory sense, the Belgian and Danish governments submitted that "the principle of citizenship of the Union" was without any independent meaning but rather entrenched within other Treaty provisions.<sup>516</sup> While the two Member States did not want to support an argument of fundamentality, dubbing EU citizenship a principle may have well worked in the Court's favour. However, we know that Alexy's theory of constitutional rights norms is less concerned with the content of norms than their structure.<sup>517</sup> In order for us to test the relevance of Alexy's theory of constitutional rights in the context of EU law, we need to determine whether his differentiation between rules and principles is as visible within the EU legal framework as it is within the context of German constitutional law.

### 3.2.1. *Rottmann* revisited

We can start doing so by returning to the case of *Rottmann*. We know the Court argued with normative fundamentality to establish its jurisdiction over the case at hand, pulling it out of the purely internal Member State context and into EU law. As this is the first attempt to analyse an EU norm as a constitutional rights norm, we will do so step by step.

Article 20 TFEU clearly states that only those persons holding the nationality of a Member State are also citizens of the EU. The normative statement is clear. The rights awarded in Articles 20 and ff. are awarded to those that hold the nationality of one of the Member States only. Starting the analysis by reading Article 20 TFEU as a rule, we can simplify it to mean: EU citizens are those who are nationals of a Member State. The normative statement is to be read as a rigid deontic expression of a norm, an explicit

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<sup>515</sup> Supra Alexy, R. (2002). p. 33 ff.

<sup>516</sup> Supra *Grzelczyk*. I – 6239. par 21.

<sup>517</sup> Supra Kumm, M. (2004).

example being: Only Member State nationals shall be EU citizens. Considering this rule, Rottmann loses his EU citizenship status the moment German citizenship is rescinded. The rule ceases to apply to him.

The Court outlined a series of norms potentially applying to the case. Following the argument that Article 20 TFEU may be read as a rule, it is worth considering that list, and the Court's reference to it, in an attempt to establish whether Rottmann's situation falls within the scope of a norm that can be read as an exception to the rule of Article 20 TFEU. Rottmann not only loses his EU and German citizenship, but he also becomes stateless as a result. There are provisions within German law and within International law seeking to prevent this: Paragraph 16 of the German Constitution clearly states that citizenship may only be withdrawn so long as the individual affected does not become stateless. Article 7 of the Convention on the Reduction of Statelessness prohibits the loss of nationality where it creates statelessness. While these seem to be ideal exceptions to the rule of Article 20 TFEU, following the rigid nature of rules we come to realise they are not, as they do not directly relate to the normative statement of this rule. The exception "No withdrawal of citizenship can lead to statelessness" cannot be read into the rule "Only Member State nationals shall be EU citizens".

Moving away from the norms and considering the Court's reasoning, we also see no indication that the Court applied these norms with a view to apply rigid rules. Establishing the principle characteristics of Article 20 TFEU is more easily done when one moves away from the provision itself first and then focusses on how the Court works with it. Where the Court reasoned the fundamentality of EU citizenship, it made it also very clear that it was "by reason of [the situation's] nature and its consequences" that the case was brought into the remit of EU law. The fact that the ultimate loss of rights with the loss of EU citizenship was imminent provided the Court with jurisdiction over the case. The nature and consequences of the loss of citizenship concern the Court. It refers to the functionality of the norm within the EU legal order, but also its relevance for the individual affected. All these are considerations that lie outside the norm itself. While the norm semantics merely state who can be an EU citizen, the Court reads it also as entailing statements regarding its fundamentality, the rights awarded to the individual in norms following Article 20 TFEU and consequences of its loss. It does not

apply the norm in a rigid manner, but rather contextualises it as sitting within a network of provisions influencing one another. This is a reflection of the open-texture of EU citizenship provisions, Article 20 TFEU being the focus. The norm in itself carries little meaning. Its fundamentality, rights and functionality only become apparent as they are applied within the wider context of EU law, tested in relation to Member State legal orders and even international law.<sup>518</sup> It is only in this way that the norms come to fulfil their inherent practical function within the specifics of the legal system they are applicable to. Otherwise, they remain abstract, applicable to the narrowest of cases with limited applicability and functionality; not what the Court views EU citizenship to be.

### 3.2.2. *Zambrano*

This becomes even more evident when considering *Zambrano*, a case that has significantly impacted the EU's legal framework and free movement law within the EU context.<sup>519</sup> *Zambrano* concerns third country national parents of EU citizen minors who were refused residence rights and working permits in Belgium, risking the Zambrano family's forced removal.<sup>520</sup> The Court relied heavily on Articles 20 and 21 TFEU in its reasoning and, while relevant to the case, made no reference to the right to family life or other provisions. Crucially, the Court held that any measure that "deprive[s EU citizen minors] of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen" is prohibited by Article 20 TFEU.<sup>521</sup> While some received *Zambrano* as the "next logical step" in the Court's attempt to "increase the scope of EU citizenship step by step" or "stone by stone", others view it as a fundamental extension of competences and scope.<sup>522</sup> It is a difficult case to examine by focussing on Court reasoning alone, as

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<sup>518</sup> In *Rottmann* the Court gives particular consideration to the Convention on the reduction of statelessness and the Universal Declaration of Human Rights: Supra *Rottmann*. I – 1489. para 52 – 53.

<sup>519</sup> *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* Case C-34/09 [2011] European Court Reports 2011 I-01177 [*Zambrano*]; Guth, J. & Mowlam, E. (2012). The evolution of European Union citizenship – where does Zambrano take us? *The Law Teacher*. Vol. 46, 1. pp. 75 – 82; Lenaerts, K. (2015). EU citizenship and the European Court of Justice's 'stone-by-stone' approach. *International Comparative Jurisprudence*. Vol. 1. pp. 1-10; Lenaerts, K. (2013). How the ECJ thinks: A Study on Judicial Legitimacy. *Fordham International Law Journal*. Vol. 36, 5. pp. 1302 – 1371. pp. 1354 ff; Wollenschläger, F. (2012). The Judiciary, the legislature and the evolution of Union citizenship. In: Syrpis, P. (2012). *The Judiciary, the Legislature and the EU Internal Market*. Cambridge University Press. pp. 302 – 330.

<sup>520</sup> The European Commission provides a summary of the case, available online: [http://ec.europa.eu/dgs/legal\\_service/arrets/09c034\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/09c034_en.pdf) [accessed 17/06/2018].

<sup>521</sup> Supra *Zambrano* I – 1253.

<sup>522</sup> Supra Guth, J. & Mowlam, E. (2012). p. 80; Supra Lenaerts, K. (2015). p. 2 ff; Supra Lenaerts, K. (2013). p. 1351 ff; Kochenov, D. (2011). A Real European Citizenship: A New Jurisdiction test: A Novel Chapter in



the Court provides us with “frustratingly” little, offering an outline of the law in about half of the judgment’s 22 pages.<sup>523</sup> In fact, the Court spends all but three pages, ten paragraphs, responding to the questions submitted for preliminary ruling.

The relevance of *Rottmann* in relation to *Zambrano* becomes particularly apparent in AG Sharpston’s opinion.<sup>524</sup> AG Sharpston sees *Zambrano* indeed as a next step in relation to *Rottmann*, particularly in overcoming the fact that again the situation is focussed on one Member State only, without any cross-border element.<sup>525</sup> We will return to *Zambrano*’s more substantial discussion later in this chapter, and will here focus on the way the Court pulls the scenario into an EU law context, again arguably widening the scope of the provision and its jurisdiction.<sup>526</sup> As Directive 2004/38 did not apply to the case, the Court looked again at Treaty provisions when deciding the case.<sup>527</sup> Whereas in *Rottmann* the Court argued based on the “nature and consequence” of the loss of citizenship, in *Zambrano* it reasoned that “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment” of their EU citizen rights.<sup>528</sup> In *Rottmann*, the threat of having EU citizenship withdrawn pulled the case into the Court’s jurisdiction, whereas in *Zambrano* the impact on the ability to enjoy the rights conferred through that status where sufficient to achieve the same result.

Were Article 20 TFEU to be read as a rule, the scope of the provision could not be easily widened. Its fundamentality could not be influenced and strengthened by consideration of individual scenarios. The rule would either apply (which arguably in *Rottmann* it would not, whereas in *Zambrano* it would) or not. It would then either in its scope award

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the Development of the Union in Europe. *Columbian Journal of European Law*. Vol. 18, 1. pp. 55 – 109. pp. 91 ff; Horsley, T. (2013). Reflections on the role of the Court of Justice as the “motor” of European integration: Legal limits to judicial lawmaking. *Common Market Law Review*. Vol. 50, 4. pp. 931 – 964; Lansbergen, A. & Miller, N. (2011). Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEM)*. *European Constitutional Law Review*. Vol. 7, 2. pp. 287 – 307.

<sup>523</sup> Supra Lansbergen, A. & Miller, N. (2011). p. 287.

<sup>524</sup> Opinion of Advocate General Sharpston delivered on 30 September 2010. *European Court Reports* 2011 I-01177. ECLI:EU:C:2010:560. I – 1206 ff.

<sup>525</sup> Ibid I-1206 para 95.

<sup>526</sup> Supra Lenaerts, K. (2013). pp. 1342 ff.; Supra Horsley, T. (2013). pp. 934 ff.

<sup>527</sup> Supra *Zambrano* I – 1251. par 39.

<sup>528</sup> Ibid I – 1252. par 42, referring to Supra *Rottmann* I – 1487. par 42.

protection in the specific situation, or not. The *Zambrano* case would not have been decided satisfactory if Article 20 TFEU would have been read as a hard-set rule. The rigidity of the norm would not have allowed a widening of scope. The Court would have been able to recommend a reform of the existing law, but nothing more.

Clearly, Article 20 TFEU functions like an open-textured principle, allowing its scope to be widened and narrowed. Now that we can see how characterising Article 20 TFEU as a principle, in norm category terms, is supported by the way the Court enables this particular provision's, and wider EU law's, application in these cases, we can see whether there is evidence supporting the treatment of Article 20 and 21 TFEU as optimization requirements.

### **3.3. Competing and radiating optimization requirements**

It is over simplistic to differentiate between rules and principles by way of their scope. Moreover, we need to investigate how far Alexy's characterisation of principles as optimization requirements is reflected by the EU citizenship Treaty norms. We can do so, similarly to Alexy, by considering the way in which these norms interact with conflicting provisions and interests.

#### **3.3.1. *Zambrano* revisited**

The *Zambrano* case appeals to this analysis as the Court decided to widen the scope of the EU citizenship principle in a way that the norm extends rights beyond the remit of the EU citizen itself. Arguably, the principle of EU citizenship has a different optimum fulfilment in this case, to that of, e.g., *Rottmann* and, consequently, the scope is extended to that new optimum scope, within the factually and legally possible.

The principle of Article 20 TFEU competes with different rules, and potential principles, in various ways. A first conflict can be seen in the way the Court establishes its jurisdiction over the case, by bringing this seemingly purely internal situation within the remits of EU law.<sup>529</sup> Here, the norms competing with the principle within the TFEU are the Member States' interests, going so far as to become a matter of Member State sovereignty. The Court does not allow us to see the decision-making process, but simply

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<sup>529</sup> Supra Lenaerts, K. (2013). pp. 1350 ff.

proclaims the fundamentality of the norm and the detrimental impact on the individual. This competition is won by Article 20 TFEU and the case becomes one of EU law.

The more prominent conflict of norms arises where the Court then reasons with the established fundamentality as opposed to the interests of the Member States and their sovereignty in immigration policy matters. We know the result: The EU citizen rights of the Zambrano children are to be extended, in their effect, to the third-country national parents; but how does the Court get to this point? It engages in an exercise of balancing and weighing of opposing principles in order to determine the optimum substance of the principle entailed within the EU citizenship provisions, in line with the factually and legally possible.

The norm principle(s) of EU citizenship, within its core, entails the protection of the rights of the individual EU citizen by awarding them a specific status. Opposing this stand the norms governing Member States' sovereignty in immigration matters.<sup>530</sup> EU citizenship, as established by the Treaty norms, is consequently contested by these provisions determining Member State interests. This is, at the substantive level of these norms, nothing remarkable – it is the standard in cases before the CJEU. Here it serves as the determination of the legally possible. What we are then adding with this analysis is a consideration of the limitation as being rooted within the structure of the norms competing in this case, not purely within their substance. The judgment is not just the result of an analysis of substantive law, but also influenced by the specific structure of the EU citizenship norm, as constitutional rights norm, open to, and in need of, a balancing and weighing process involving all opposing interests in order to determine its substance in this particular case.

On the one hand, the Court had to consider the risks for Member States and the impact on their policies and policymaking powers. It had to consider the Member States' arguments regarding the status of the Zambrano parents as undocumented migrants and the consequential irregular employment without working permit over a considerable time period, as in doing so the Zambranos were in breach of domestic law.<sup>531</sup> On the other hand, it had to consider the rights of the Union citizens, the two

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<sup>530</sup> No assumption is made on the norm characteristics (rules or principles) of Member State interests.

<sup>531</sup> *Supra Zambrano* I- 1243 ff.

Zambrano children born in Belgium. This sets out the scales and the weights on each side. The Court does not, in the little reasoning we are given, diminish the Member State interests or disprove their application to the case at hand. Within the process of balancing, the Court rather declares that depriving “the genuine enjoyment of the substance” of EU citizen rights derived from the status of EU citizenship itself is prohibited within the scope of the EU citizenship treaty norms.<sup>532</sup> It consequently alters the legally possible, pushing the existing substance of the norm further, extending its scope to outweigh the opposing norm. It extends Article 20 TFEU to mean not only “EU citizens” but also non-EU citizen “carers where [the EU citizens] are minors”.<sup>533</sup>

This particular extension of the *ratione personae* speaks partly to Alexy’s radiation thesis.<sup>534</sup> He discusses the “radiating effect” of constitutional rights norms in relation to horizontal effect and his approach is firmly situated within German constitutional rights theory, relying on jurisprudence of the FCC.<sup>535</sup> This part of his approach wants to show how constitutional rights norms influence not only the state-citizen, but also the citizen-citizen, or third-party, relationship. As another “effect of constitutional rights and constitutional rights norms on the legal system”, this relationship is impacted as well, as these norms “embody an objective order of values, which applies to all areas of law”.<sup>536</sup> Considering the approach the Court of Justice took in *Zambrano*, it is arguable that a similar radiating effect arises from EU citizenship provisions. Although it remains defensive of rights between the citizen and the state (here Belgium) the provision radiates onto non-right holders in order to prevent the loss of rights for the right holders themselves. The Court significantly expands the core of Union citizenship and consequently allows this norm principle room to radiate, in its effects, onto individuals who do not qualify as protected individuals themselves. In doing so, it further limits the scope of the opposing norms governing Member State interests. EU citizenship is of such

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<sup>532</sup> Ibid I- 1252. par 42.

<sup>533</sup> Supra Kochenov, D. (2011). pp. 64 ff.; Rauceau, C. (2016). European Citizenship and the Right to Reside: ‘No One on the Outside has a Right to be Inside?’. European Law Journal. Vol. 22, 4. pp. 470 – 491; Legomsky, S.H. (2011). Rationing family values in Europe and America: An immigration tug of war between states and their supra-national associations. Georgetown Immigration Law Journal. Vol. 25, 4. pp. 807 – 858.

<sup>534</sup> Supra Alexy, R. (2002). pp. 352 ff.

<sup>535</sup> See chapter 2 section 2.2.1.; Also in relation to horizontal effect and fundamental rights: Ferreira, N. (2011). Fundamental rights and private law in Europe: the case of tort law and children. Routledge.

<sup>536</sup> Supra Alexy, R. (2002). p. 352.

fundamentality that it radiates onto non-EU citizens in order to prevent significant limitation to the fundamental status of Union citizenship. The Court also provides a limitation of this radiation with the enjoyment principle. Radiation is only triggered where there is the possibility that the core Union citizen be “depriv[ed] [...] of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union [...]”.<sup>537</sup> The principle of Union citizenship therefore does not automatically radiate onto non-protected individuals. Only when a directly protected individual has their rights significantly impacted due to another individual falling out of scope of the protecting norm, does this specific radiating effect of the norm become apparent. The Court creates some form of trigger in *Zambrano*, viewing the EU citizen minors in immediate danger of forfeiting the enjoyment of their citizenship rights as the element allowing the radiating effect.

Consequently, our analysis of the legally possible suggests that EU citizenship is optimising its scope through radiation. In line with Alexy’s thesis this result does not render the opposing principle completely and indefinitely invalid, which a conflict between norm rules might. In this particular scenario, the Court decision reflects the optimum fulfilment of the optimization requirements in the EU citizenship constitutional rights norm. It does, for identical conflicts, create a rule regarding the decision of this case: The genuine enjoyment test.<sup>538</sup>

*Zambrano* was received as almost revolutionary in furthering EU citizenship rights.<sup>539</sup> We have seen how the interests of the individuals outweighed that of the public authorities and Member States. It is a case that lends itself to a particularly biased analysis of the Court’s approach to EU citizenship and its potential structure as constitutional rights norms, suggesting that rights of the individual will outweigh competing interests. This is, however, not what Alexy’s theory of constitutional rights norms proposes. The result will in each case depend on the factually and legally possible and each case will be determined on its own terms, influencing the scope of EU

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<sup>537</sup> Supra *Zambrano*. I- 1252. par 42.

<sup>538</sup> Ibid par 45.

<sup>539</sup> Supra Lenaerts, K. (2013). pp. 1351 f; Supra Kochenov, D. (2011). p. 80 f.

citizenship again. We are therefore going to consider a series of cases where the individual was not successful in raising their claim based on EU citizenship provisions.

### 3.3.2. *McCarthy*

*Zambrano* was followed by seemingly similar cases, one example being *McCarthy*.<sup>540</sup> *McCarthy* gave the Court the opportunity to reiterate the established genuine enjoyment test and clarify the way in which it saw the scope of EU citizenship being widened in relation to competences. It was a case with enormous significance for the UK's strict immigration system, concerning the way in which UK spouses of non-UK spouses can bring their partner into the country to reside together.<sup>541</sup> *McCarthy*, holding UK and Irish citizenship, resided in the UK and wanted to continue to do so with her Jamaican spouse. The claim under EU law was made, based on McCarthy's EU citizenship status. Whereas in *Rottmann* and *Zambrano* the Court went to great lengths to use the fundamentality of EU citizenship in order to pull the case into its jurisdiction and within EU law, it was very firm that in McCarthy's case there was no need to do so. Indeed, the Court held this not to be a case where the individual was deprived of the genuine enjoyment of their EU citizenship rights.<sup>542</sup> McCarthy clearly saw herself affected in a comparable way to the Zambrano children. The Court disagreed, arguing that it was not the fact that McCarthy held dual citizenship and had not exercised her Treaty rights by moving away from the UK that let this case fall outside the scope of Article 20 and 21 TFEU but the fact that McCarthy was not, through the domestic legislation at hand, affected in her EU citizenship rights.<sup>543</sup> Looking at this from a norm structural point, we are consequently not even reaching the stage of a balancing of interests. Although the Court considered the interests of McCarthy and related the case to previous judgments, it did not actually engage in a balancing exercise. It did not see a conflict of norms. For

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<sup>540</sup> *McCarthy v. Secretary of State for the Home Department* Case C-434/09 [2011] European Court Reports I – 03375 ECLI:EU:C:2011:277.

<sup>541</sup> Harrison, E. (2017). Couples speak of pain over spouse visa rules. BBC News UK. Available online at: <https://www.bbc.co.uk/news/uk-35552289> [accessed 23/06/2018].

<sup>542</sup> *Supra McCarthy* par 49. Similarly: *Murat Dereci and Others v Bundesministerium für Inneres* [2011] Case C-256/11 European Court Reports I-11315.

<sup>543</sup> Lenaerts calls this the differentiation between the "deprivation effect" and the "impeding effect": *Supra* Lenaerts, K. (2013). p. 1358 f; See also: Hinarejos, A. (2012). Citizenship of the EU: Clarifying 'genuine enjoyment of the substance' of citizenship rights. *The Cambridge Law Journal*. Vol. 71, 2. pp. 279 – 282.

the Court, the UK's immigration policies and laws relevant to the case are not in fact in conflict with the core scope of EU citizenship.

### 3.3.3. *Dano*

While *McCarthy* was received as welcomed clarification of the genuine enjoyment test, the 2014 judgment in *Dano* resulted in some arguing the Court to now be threatening integration rather than furthering it.<sup>544</sup> We will see whether the Court actually narrowed the scope of EU citizenship. The Danos, mother and son, were both Romanian nationals with the son being born in Germany. The action brought before a Social Court in Germany fought the German authorities' decision not to grant them certain social benefits.<sup>545</sup> While previously discussed cases were lacking aspects of EU citizen mobility, this case is complicated by the high mobility of the Danos (they continuously moved between their Member State of origin and their host Member State), which is particularly relevant as the Court had to determine whether to reason with the Directive 2004/38 or the Treaty provisions or both. The Court mainly relied on the Directive, which again hinders us from considering a possible conflict of constitutional rights norms.

While this thesis has narrowed its scope to only focus on treaty norms, *Dano* highlights the noteworthy relationship between the Directives and the Treaties. In arguing for the application of Directive 2004/38 to the case, rather than the Treaty norms, the Court argues that these are "given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens".<sup>546</sup> While not referring to all provisions relevant to the case, the Court seems to be applying a *lex specialis* reasoning regarding some of the Treaty provisions and focus on their substance. Structurally, the fundamental status of EU citizenship remains intact. We can analyse *Dano* through Alexy's radiation thesis first. It is arguable that directives and regulations translate derived constitutional rights norms, whose open-texture and need for balancing as optimization requirements support the Court's assessment of the case. This way, Directive 2004/38 can be seen through the

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<sup>544</sup> *Elisabeta Dano, Florin Dano v Jobcenter Leipzig* Case C-333/13 ECLI:EU:C:2014:2358; See among others: Zahn, R. (2015). 'Common Sense' or a Threat to EU Integration? The Court, Economically Inactive EU Citizens and Social Benefits. *Industrial Law Journal*. Vol. 44, No 4 pp. 573 – 585.

<sup>545</sup> The German welfare system is too complex to be discussed here in depth. The benefits in question were meant to provide basic provision for jobseekers under SGBII (Sozialgesetzbuch II). The court classified these benefits as special non-contributory cash benefits, see *supra Dano* C-333/13 par 47.

<sup>546</sup> *Supra Dano* C-333/13 par 61.

lens of constitutional rights norms theory. Evidencing the characteristics of directive and regulation norms is not within the scope of this thesis. Therefore, focussing on the Treaty norms only, we will have to dismiss *Dano* as a case not applying constitutional rights norms, consequently again not reflecting any balancing of interests that the Court would have to consider. *Dano* continues to be an interesting case in relation to the wider scope of EU citizenship, but not in relation to an analysis of the structure of the norm and core of EU citizenship.

### 3.3.4. *Petruhhin*

The cases discussed so far all focus on the right to reside as the main aspect of EU citizenship that unites them. EU citizenship was discussed from a very different angle in *Petruhhin*.<sup>547</sup> Here, Russian authorities sought the extradition of an Estonian national from the host Member State Latvia on grounds of drug-trafficking offences. While Latvia had domestic legislation in place protecting Latvian citizens from extradition, non-Latvian EU citizens were not subject to this legislation.<sup>548</sup> The Court had no need to argue with EU citizenship fundamentality in order to evidence its jurisdiction over the case, as Petruhhin had actually exercised his free movement rights as EU citizen. Consequently, the Court relied on Article 21 TFEU, and the impact the Latvian law has on the free movement rights of EU citizens, when discussing the case.<sup>549</sup> It found that “the discriminatory design of Latvian rules on extradition” resulted in the restriction of EU citizen rights.<sup>550</sup>

In discussing *Petruhhin* we will consider the way in which constitutional rights can be limited. Alexy discusses restriction of constitutional rights by discussing the limits of constitutional rights as *Grundrechtsschranken*.<sup>551</sup> These are limitations entrenched within the constitutional rights provisions of the Basic Law, allowing only measures falling within the scope of these limitations to restrict the constitutional right.<sup>552</sup>

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<sup>547</sup> *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra* Case C-182/15 [2016] ECLI:EU:C:2016:630.

<sup>548</sup> *Ibid* para 3-9.

<sup>549</sup> *Ibid* para 32 – 33.

<sup>550</sup> Fontanelli, F. (2017). Case C-182/15, proceedings relating to the extradition of Aleksei Petruhhin (C.J.E.U.). *International Legal Materials*. Vol. 56, 1. pp. 147 – 158. p. 147.

<sup>551</sup> *Supra* Alexy, R. (2002). pp. 178 ff.; *Supra* Alexy, R. (1994). pp.249 ff.

<sup>552</sup> Spallek, J. (2011). *Die Verfassungsschranken bei Grundrechtseingriffen des Gesetzgebers: ein Beitrag zur Spannungssituation zwischen Mensch, Recht und Staat [Constitutional limitations in case of*



*Petruhhin* discusses how far domestic law can limit the constitutional rights of EU citizenship. The Court acknowledges the effect the Latvian norms have on EU citizen rights, first raising their discriminatory nature and second outlining the effect on free movement.<sup>553</sup> While Alexy views only those norms that are themselves constitutional as able to limit a constitutional right, the Court moves to an application of the principle of proportionality, testing whether there was a less restrictive measure available to the Latvian legislator.

It is crucial that, when relating Alexy's approach to constitutional rights norms to this case, we are not confusing elements of the proportionality assessment with an application of the principle theory.<sup>554</sup> Only one aspects of the proportionality test applied by the Court directly relate to principle theory and the competition of norms: the balancing exercise itself.<sup>555</sup> The Court's application of the proportionality test and its focus on seeking a less restrictive measure in order to balance the interests at hand can at the same time be read as a characterisation of EU citizenship as a constitutional rights norm.

What the Court concludes to be a legitimate objective (Latvia's aim to prevent the risk of impunity) can also be read as the outlining of the opposing norms balanced in this conflict of norms.<sup>556</sup> Its efforts to identify a less restrictive measure with similar effect reflect the balancing process, as the Court discusses the scope of the norms involved aiming to establish the factually and legally possible.<sup>557</sup> The Court ruled that a justifiable, yet less restrictive, limitation of EU citizenship is the EU citizen's extradition to their MS of origin, so long they can be prosecuted for an offence committed outside the EU's jurisdiction there.<sup>558</sup> It saw the Latvian norm in need of being narrowed to allow this measure and at the same time EU citizenship being protected in its core rights. The greatest extent to which the principle of EU citizenship could be optimised here was the

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*constitutional right infringements through the legislator: a contribution discussing the tensions between individual, law and state*. Author.

<sup>553</sup> No analysis is offered on the norm character and structure of the Latvian norms relevant to the case.

<sup>554</sup> *Supra* Reimer, P. (2013). p. 30.

<sup>555</sup> *Ibid* p. 39 f.

<sup>556</sup> See, *supra* *Petruhhin* para 35-37. Reimer explains how the aspects of the proportionality test are reflected in principle theory: *Supra* Reimer, P. (2013). p. 40.

<sup>557</sup> *Supra* *Petruhhin* par 38.

<sup>558</sup> *Ibid* para 49-50.

limitation of free movement (bound to Member State of origin) instead of removal from the Union (extradition to third State, here Russia).

*Petruhhin* offers us the opportunity to see the theory of constitutional rights norms applied in a very particular conflict of norms. Compared to cases previously discussed, the impact on free movement rights here is different in character, the connection between Member State, EU and EU citizen interests being unique.<sup>559</sup> This allowed us to see more of the Court's working with EU citizenship norms, away from generic statements of fundamentality. In the Court's application of the principle of proportionality, we were able to identify a reflection of the characteristics of EU citizenship as constitutional rights norm.

### 3.3.5. *Chavez-Vilchez*

We will see how far the case of *Chavez-Vilchez* will allow us to reach the same conclusion.<sup>560</sup> *Zambrano* left us wondering where EU citizenship would be going from there.<sup>561</sup> *Chavez-Vilchez* promised some insight, as the claimants' situation was comparable: The case saw eight third-country nationals, all mothers to EU citizen minors, claiming a right to reside together with access to child benefits. The Court therefore relied unsurprisingly heavily on *Zambrano* and the genuine enjoyment test in its reasoning.<sup>562</sup> In *Zambrano* the Court constructed "derivative residence rights" stemming from a "relationship of strong dependence between third-country nationals and the Union citizen family members".<sup>563</sup> Applying the theory of constitutional rights norms, we saw a radiation of the children's EU citizenship onto the non-EU citizen parents.<sup>564</sup> In *Chavez-Vilchez* the situation of each of the families involved differed,

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<sup>559</sup> See among others: Efrat, A. (2018). Assessing mutual trust among EU members: evidence from the European Arrest Warrant. *Journal of European Public Policy*. DOI: 10.1080/13501763.2018.1478877; Vojislav, Đ. (2012). The European arrest warrant. *Zbornik Radova: Pravni Fakultet u Novom Sadu*. Vol. 46, 1. pp. 21 – 37; Haggemüller, O. (2013). The Principle of Proportionality and the European Arrest Warrant. *Oñati Socio-Legal Series*. Vol. 3, 1. pp. 95 – 106.

<sup>560</sup> *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* Case C-133/15 ECLI:EU:C:2017:354.

<sup>561</sup> *Supra* Guth, J. & Mowlam, E. (2012).

<sup>562</sup> *Supra Chavez-Vilchez* ECLI:EU:C:2017:354. para 36, 49, 53, 60 ff, 65, 69.

<sup>563</sup> Staiano, F. (2018). Derivative residence rights for parents of Union citizen children under Article 20 TFEU: *Chavez-Vilchez*. *Common Market Law Review*. Vol. 55, 1. pp. 225 – 241. p. 226.

<sup>564</sup> The term derivative was avoided so not to create a confusion with Alexy's derivative constitutional rights norms.

which Advocate General (AG) Szpuna acknowledged by offering solutions under Directive 2004/38 and Article 20 and 21 TFEU.<sup>565</sup> The Court, however, while agreeing that the situations differed, found in each scenario the need to bring the case directly under Article 20 TFEU.<sup>566</sup> It also distinguished its judgment from the AG opinion with its complete silence on any aspects of the principle of proportionality, to which Szpuna had devoted a whole section and substantial aspects of his argument.<sup>567</sup>

The lack of direct reference to the principle of proportionality does not mean the Court did not engage in an exercise of balancing and weighing of opposing interests. The norms opposing one another in *Chavez-Vilchez* see EU citizenship, on the one side, and the Netherlands's legislation concerning the right to reside and access to child benefits of third-country national parents to EU citizen minors, on the other.<sup>568</sup> The domestic legislation also required the consideration of the children's best interest in deciding this case.<sup>569</sup>

We know that any norm conflict establishes with its solution a new rule that can then, should the factually and legally possible be identical, be re-applied to other cases where the same norm conflict arises. The Court saw *Chavez-Vilchez* to be such a case and re-applied the *Zambrano* rule of genuine enjoyment to the conflict of norms and found it to solve the norm conflict.<sup>570</sup> While applying the *Zambrano* rule, the Court also offered a more detailed understanding of the norm principle of EU citizenship and the rule itself. It was the first time the Court was able to clarify the *Zambrano* rule in relation to situations where an EU citizen parent was available for care.<sup>571</sup> Instead of taking this as reason to distinguish the case from *Zambrano* and consequently needing to engage in another process of balancing and weighing, it saw the *Zambrano* rule to be applicable,

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<sup>565</sup> Opinion of Advocate General Szpunar delivered on 8 September 2016. *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* Case C-133/15 ECLI:EU:C:2016:659. para 48 ff.

<sup>566</sup> Supra *Chavez-Vilchez* para 48 – 58, while leaving it to the domestic courts to determine whether the Directive applied to some of the families involved or not.

<sup>567</sup> Supra Opinion of Advocate General Szpunar para 94 – 97.

<sup>568</sup> No analysis is offered on the norm character and structure of the domestic norms of the Netherlands.

<sup>569</sup> Supra *Chavez-Vilchez* para 70 – 72.

<sup>570</sup> Ibid para 72.

<sup>571</sup> Supra Staiano, F. (2018). p. 232.

viewing the EU citizenship scope to be applicable in the same way as it was in *Zambrano* and not in any way narrowed.

*Chavez-Vilchez* allows us to see how the Court works with established rules on norm conflicts. The way the Court refers to *Zambrano* without an explicit process of balancing of interests indicates that it did not see a need to do so, as the result of that process in *Chavez-Vilchez* was pre-determined through the *Zambrano* rule. Legal certainty was created, although at least one of the norms involved was an open-textured principle, requiring optimization.<sup>572</sup>

### 3.3.6. *Lounes*

*Lounes* is a case that was received with particular interest in the UK due to the political climate in which the judgment came through: The case concerned a dual British-Spanish citizen and only a couple of months before the judgment was passed the UK had given notice of its intention to withdraw from the EU as Member State.<sup>573</sup>

*Lounes*, an Algerian national, married Ormazábal, a Spanish citizen by birth who, in addition, naturalised as British. *Lounes* was served a removal notice from the UK authorities upon applying for a residence card as spouse to an EU national.<sup>574</sup> The case was referred to the CJEU, with the questions focussing on the application of Directive 2004/38, which seemed to limit the Court in its scope. The Court, however, started its judgment outlining the relevance of Article 21 TFEU in the given scenario. It needed to assert the relevance of the Treaty provision, as the Directive could not apply in situations where “nationals [...] enjoy an unconditional right of residence”, which was the case for Ormazábal as British-Spanish citizen.<sup>575</sup> AG Bot assessed how Ormazábal’s “legal situation [had] been profoundly altered, both in EU law and in national law, on account

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<sup>572</sup> This is also reflected in the Court’s recent judgment *K.A. and Others*, where the Court again relies on the established rule in *Zambrano* when discussing the varying scenarios in the case: *K.A. and Others v Belgische Staat* Case C-82/16 [2018] ECLI:EU:C:2018:308.

<sup>573</sup> *Toufik Lounes v Secretary of State for the Home Department* Case C-165/16 [2017] ECLI:EU:C:2017:862.

<sup>574</sup> Summarising the case: Tryfonidou, A. (2016). What’s wrong with the UK immigration rules governing the rights of dual-British and EU citizens? Comment on the *Lounes* reference. EU Law Analysis Blog. <http://eulawanalysis.blogspot.com/2016/03/whats-wrong-with-uk-immigration-rules.html> [accessed 08/07/2018]; Peers, S. (2017). Dual citizens and EU citizenship: clarification from the ECJ. EU Law Analysis Blog. <http://eulawanalysis.blogspot.com/2017/11/dual-citizens-and-eu-citizenship.html?m=1> [accessed 08/07/2018]; Supra *Lounes* para 14 – 27.

<sup>575</sup> Supra *Lounes* para 37 and 42.

of her naturalisation”, leading to the “paradoxical” exclusion of Ormazábal from the scope of the Directive, as she was now fully integrated into her host Member State.<sup>576</sup> Consequently, Lounes could not rely on the Directive in seeking to establish a derived right to reside from Ormazábal’s residency rights.

Integration is the key element of this case. Both the Court and AG Bot focussed on the integrational aim of Directive 2004/38. AG Bot assigned the Directive’s offering of permanent residency the status of a “genuine vehicle for integration”, taken to “its logical conclusion” by Ormazábal when she naturalised.<sup>577</sup>

Integration was discussed as inherent to EU law earlier in this thesis.<sup>578</sup> *Lounes* is, therefore, an interesting addition to our analysis, as it shows the presence and relevance of integration particularly in relation to EU citizenship, bringing it to the forefront of the “ever closer Union”. The Court used integration as a means to differentiate Ormazábal’s situation from that of non-dual British citizens. It argued that:

“it would be contrary to the underlying logic of gradual integration that informs Article 21 (1) TFEU to hold that such citizens, who have acquired rights under [Directive 2004/38] as a result of having exercised their freedom of movement, must forgo those rights [...] by becoming naturalised in that Member State”.<sup>579</sup>

Ormazábal acquired the permanent right to reside under the Directive while she lawfully resided in the UK. She lost the right to reside as awarded to her by the Directive when she naturalised, as she then gained residency rights intrinsic to her British citizenship status. The Court argued that this differentiates her from a UK-EU citizen who has never exercised free movement rights, Directive or Treaty based, and consequently cannot rely on EU law – a clear reference to *McCarthy*, where the Court avoided a conflict of norms by viewing the case as not affecting EU citizenship rights.<sup>580</sup>

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<sup>576</sup> Opinion of Advocate General Bot delivered on 30 May 2017. *Toufik Lounes v Secretary of State for the Home Department* Case C-165/16 ECLI:EU:C:2017:407. para 61 ff.

<sup>577</sup> Supra Opinion of Advocate General Bot. para 85.

<sup>578</sup> See chapter 3 section 3.

<sup>579</sup> Supra *Lounes* par 58.

<sup>580</sup> See section 3.3.2. above; Also: Sánchez, S.I. (2018). Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned? *European Constitutional Law Review*. Vol. 14, 7. pp. 7 – 36.

The case is similar to cases such as *Grzelczyk* and *Zambrano*, as it significantly widens the scope of the principle of EU citizenship. The Court focussed on the integration element within EU citizenship. It argued that integration within the EU and among its people is included within the norm Article 21 TFEU. In EU citizenship cases before *Lounes*, the Court arguably saw no need to explicitly express this part of the principle within Article 21 TFEU. More convincingly, though, the Court extended the scope of Article 21 TFEU in order to close a gap between the Treaty norm and the Directive that would otherwise occur in situations similar to that of *Lounes*. Following this reasoning, the Court found that Lounes can rely on his wife's EU citizenship status when seeking the right to reside. The scope of the constitutional rights norm of Article 21 and the principle entailed also award protection to dual-citizens, when the dual nationality is the result of furthered integration.

This is not a case where principles compete; rather, the open-texture of the constitutional rights norm in Article 21 TFEU is reflected in the way the Court brings out the integrational elements and seeks to connect the TFEU norm with the Directive.<sup>581</sup> The Court is allowed to do so, as the norm does not make a narrow normative statement that either applies or not. Instead, it expresses a principle, seeking to be fulfilled to the greatest extent possible. This case's widening of the scope of Article 21 TFEU is a reflection of the norm's principle character.

#### 4. Conclusion

The way the Court applies and reasons with EU citizenship norms matches the way Alexy sees constitutional rights norms to function. From the early establishment of the fundamental status, to the introduction of the genuine enjoyment test, the Court's unique approach to EU citizenship can be evaluated as a reflection of the Treaty norms structure. Discussing the Court's case law in this way, allows us to outgrow continuing claims of normative immaturity and judicial activism. Claiming the CJEU to be a political court that follows its own agenda when entering new territory and passing activist judgments is an over simplistic assessment of the Court's competences and underestimates the normative characteristics of the EU's governing Treaties.

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<sup>581</sup> See chapter 2 section 2.1.

Reading EU citizenship as a constitutional rights norm, and therefore principle, allows us to add an objective and structural argument to the list of substantive and subjective reasons cases are decided in a particular way. It is then not simply a court decision based on what is morally right, which in turn avoids the philosophical discourse around morality of the law. Consideration of influences outside the norm itself become a legal possibility and normative necessity, through the reflection on characteristics of the norm applied. Consequently, norms continuously renew themselves to ensure they are at their most efficient, or optimum, in securing the rights they entail.

The following, and final, chapter will summarise the findings of this thesis with particular reference to the conclusions drawn within this chapter.

## Chapter 6 Conclusion

### 1. European Union constitutional rights norms

This thesis set out to explore how far a constitutional rights theory can inform the discourse of constitutional law within the EU legal framework in order to support the CJEU's approach to reasoning with specific Treaty norms. Discussing constitutionalism in relation to any legal order that is not edged within a sovereign nation state is faced with complications deriving from differing legal traditions and understandings of constitutional rights.<sup>582</sup> Constitutional frameworks are created as national set ups, and do not evolve in the way the EU's legal framework has. The EU continues to be dismissed as a political Union subject to the Member States' good will.<sup>583</sup> Any analysis of the EU's legal order as constitutional framework, with the CJEU as constitutional Court, is faced with the claim of an underlying political agenda entrenched within the constitution and reflected in the jurisprudence.<sup>584</sup>

The EU's legal order has outgrown its international law roots, not least owing to the CJEU's constitutionalising jurisprudence.<sup>585</sup> This thesis explored the EU constitutional order by introducing and then applying a constitutional rights theory when analysing EU citizenship legislation and CJEU jurisprudence. In doing so, it explored the nature of the EU legal framework and its constitutional order, discussing its international roots and how far, and with the help of CJEU jurisprudence, it emancipated itself to become a legal order in its own right.<sup>586</sup> Mistaken for judicial activism, the Court's case law reflects these constitutionalising efforts, often pushing the boundaries of the competences of EU law and its institutions and, as such, going beyond a strict teleological approach to legal interpretation and reasoning. As Möller has argued: "What is desperately needed is a theory of constitutional rights that sheds some light on the practice employed by most constitutional courts today."<sup>587</sup>

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<sup>582</sup> Chapter 3 section 3 f.

<sup>583</sup> Among others: Schroeder, W. (2016). *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*. Bloomsbury. p. 244 f; Supra Sánchez, S.I. (2018). p. 7.

<sup>584</sup> See chapter 5 section 2.1.

<sup>585</sup> Chapter 3 section 3.

<sup>586</sup> Chapter 2 section 2.1.

<sup>587</sup> Supra Möller, K. (2007). p. 453.



The analysis of the CJEU's reasoning has so far exclusively focussed on a comparative analysis with other jurisdictions and the interpretation methods applied.<sup>588</sup> This thesis, while using the Court's reasoning as evidence, offers another perspective to the discourse around the CJEU's jurisprudence and role by arguing that the Court considers some Treaty norms as constitutional rights norms. The 'judicially activist' case law becomes the result of a specific norm structure, consequently legitimising the Court's approach of interpretation and application of Treaty norms.

Norm analysis, particularly constitutional norm analysis, is an inherently German endeavour. The structure of the German constitution entrenches specific mechanisms, leading the German FCC to apply these particular constitutional rights norms in a particular way. These particularities are visibly comparable to the CJEU's approach to the Treaties, in its consideration of deciding factors outside the norm itself and the inherent balancing of interests.<sup>589</sup> This particular way of engaging with the law is reflected well by Robert Alexy's theory of constitutional rights norms. Dubbed "one of the most penetrating, analytically refined, and influential general accounts of constitutional rights available," Alexy offers a structural approach to norm analysis.<sup>590</sup> His theory of constitutional rights norms moves away from an analysis of the substance of the law. Instead of offering a contribution to the content of rights, it focusses on an analysis of the structure of the norms entailing those rights. In doing so, it adds an objective layer to a subjective (rights and morals based) debate.

The theory of constitutional rights differentiates two groups of norms: rules and principles. It characterises principles as optimization requirements, showing a *prima facie* character that requires clarification in line with the legally and factually possible in any given scenario.<sup>591</sup> Where norms are in conflict and interests are in opposition, principles are weighed and balanced with one another, with the outcome of this process formulating a rule applicable to the scenario at hand and identical scenarios in the future.<sup>592</sup>

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<sup>588</sup> Chapter 5 section 2; Conway, G. (2012); Sankari, S. (2013); Bengoetxea, J. (1993); Beck, G. (2013).

<sup>589</sup> Chapter 5 section 3.

<sup>590</sup> *Supra* Kumm, M. (2004). p. 596.

<sup>591</sup> Chapter 3 section 3.1.2. f.

<sup>592</sup> Chapter 3 section 3.2.1. f.

Alexy's work understands "law as social practice" fulfilling a practical function.<sup>593</sup> This is how the theory of constitutional rights is closely "related to other forms of practical reasoning", specifically those considering morality and ethics.<sup>594</sup> It is this understanding of law that enables a wider interrogation of court reasoning, with a particular focus on the way courts discuss and apply specific norms as evidence of norm structure. By focussing on a practical function of the law and analysing it as a social practice in this context, Alexy challenges various academic views not only on law in general, but on jurisprudence in particular.<sup>595</sup>

"Constitutional rights are an enigmatic species", which Alexy aims to demystify.<sup>596</sup> His work has much wider implications for the general discourse of norm theory and legal theory, making his contribution relevant for many legal frameworks. While Alexy's work has been discussed in relation to human rights and fundamental rights, no attempt has been made to review a post-national legal framework outside that specific rights context.<sup>597</sup> This thesis used the theory of constitutional rights norms to attempt an EU norm theory, with a particular focus on the jurisprudence of the CJEU when applying norms of the TFEU. A view on norm structure strengthens the constitutional status of the norm content and the Treaty construct overall. Showing how these Treaty norms function, similarly to constitutional rights norms within a domestic constitution, evidences their constitutional standing not only based on subjectively assessing the rights they are entailing, but also on more objective means.

The analysis focussed on EU citizenship as constitutional rights norm. EU citizenship case law serves as prime example of the existence of constitutional rights norms in the EU constitutional order. Articles 20 and 21 TFEU, in particular, show the open-texture and principle characteristics of constitutional rights norms. This thesis consequently

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<sup>593</sup> Supra Alexy, R. (2002); Supra Pavlakos, G. (2007). p. 1 f

<sup>594</sup> Supra Pavlakos, G. (2007). p. 1 f.

<sup>595</sup> Supra Kumm, M. (2004). pp. 594 ff.

<sup>596</sup> Supra Möller, K. (2007).

<sup>597</sup> See Laciaková, V. & Michalicková, J. (2013). Rights and Principles - Is there a need to distinguish them in the Charter of Fundamental Rights of the European Union? *Contemporary Readings in Law and Social Justice*. Vol. 5, 2. pp. 235 – 243; Martin, N.B. (2016). Interpretation of Fundamental Rights: Some Thoughts on the Theory of Weights and the Principle of Proportion in the work of R. Alexy. [*in Spanish*] *Revista Eletrônica de Direito Processual*. Vol. 17, 17. pp. 487 – 514; Greer, S. (2004). Balancing and the European Court of Human Rights: A Contribution to the Habermas – Alexy Debate. *The Cambridge Law Journal*. Vol. 63, 2. pp. 412 – 434.

discussed post-Maastricht case law, after contextualising EU citizenship within citizenship scholarship.<sup>598</sup> Particularly, the analysis of *Grzelczyk*, *Rottmann* and *Zambrano* showed how the Court's approach to EU citizenship reflects the norm characteristics established by Alexy's theoretical framework. The Court's reasoning within these cases, or the outcome where the reasoning provided is limited, can be evaluated as a reflection of an understanding of EU citizenship as an open-texture norm of fundamental status, in line with the characteristics of constitutional rights norms.<sup>599</sup> Once this possibility was established, the analysis was tested with cases such as *McCarthy*, where the claim of the individual was unsuccessful, to see whether the Court had applied a similar approach.<sup>600</sup> *Petruhhin* showed the relevance of this analytical approach also in cases that were not focussed on an assessment of the right to reside. *Chavez-Vilchez* served as an example for the application of a previously established balancing result and how far the Court's jurisprudence reflects this part of Alexy's approach.

Through the analysis of a selection of CJEU EU citizenship case law, we have found evidence to support the conclusion that the theory of constitutional rights norms is applicable to the EU legal order and its constitutional framework. EU citizenship norms can be characterised as constitutional rights norms, requiring optimization in relation to the legally and factually possible in any given scenario. By acknowledging this, we can add a norm theory to the tools through which we discuss and evaluate the jurisprudence of the CJEU and its constitutionalising efforts for the EU's legal order.

## 2. Constitutional rights theory and fundamental rights

The relevance of Alexy's constitutional rights theory has been explored in relation to fundamental rights generally and in relation to the Charter of Fundamental Rights in particular.<sup>601</sup> Rivers, for example, highlighted the relevance of Alexy's theoretical framework for the analysis of fundamental rights in relation to the UK 1998 Human Rights Act.<sup>602</sup> Fundamental rights are certainly closer in their functionality to the

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<sup>598</sup> Chapter 4 section 3.1.

<sup>599</sup> Chapter 5 section 3.

<sup>600</sup> Chapter 5 section 3.3.

<sup>601</sup> Supra Laciaková, V. & Michalicková, J. (2013).

<sup>602</sup> Supra Rivers, J. (2002). pp. xvii ff.

constitutional rights of the German Basic Law, for which this framework was originally established.

Some even review Alexy's theory as a theory of fundamental rights first, and constitutional norm theory second, with little to no link to the constitutional setting in which it was established.<sup>603</sup> Alexy's principle theory and the inherent need for a balancing exercise has been received critically in relation to fundamental rights, one argument being that this approach is "a danger to liberty".<sup>604</sup> The theory of constitutional rights will be considered differently depending on whether it is assessed as a fundamental rights theory or a theory of constitutional rights norms. The expectations a fundamental rights thesis raises differ to those of a constitutional rights thesis. It is, therefore, intentionally that Rivers translates the German *Grundrechte* into constitutional rights, and not into fundamental rights, highlighting the place this theory takes within the system of Alexy's legal analysis and not limiting its scope to a set of specific norms. Rivers then ensures that the fundamental rights relevance is not lost, by adding to his introduction a focus on fundamental rights.

It fell outside the scope of this thesis to explore the differences between reading Alexy's approach as a fundamental rights thesis first and constitutional rights thesis second, and vice versa. Exploring these, can arguably enhance Alexy's application to legal frameworks by clarifying how Alexy's findings relate to both sets of norms. While his approach tends to be dismissed as unsuitable by some in relation to fundamental rights, this thesis has shown a way in which it contributes to the discourse on constitutional rights. Leading on from this, it is also worth exploring the correlation between fundamental rights and citizenship in order to determine whether such a link supports or disproves the relevance of Alexy's constitutional rights framework.<sup>605</sup>

### **3. Superfluous European constitutional rights theory?**

The differentiation between norms as principles and norms as rules does not go unchallenged.<sup>606</sup> Simply dismissing the existence of two separate categories presents

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<sup>603</sup> Supravan Niekerk, P. (1991). pp. 158 – 170.

<sup>604</sup> Tschentscher, A. (2012). Interpreting Fundamental Rights: Freedom vs. Optimization. Available at SSRN: <https://ssrn.com/abstract=1630393>. p. 14.

<sup>605</sup> Compare: Supra Sánchez, S.I. (2014).

<sup>606</sup> Chapter 2 section 3. Supar Jakab, A. (2016); Supra Möller, K. (2007).

the strongest opposition to the approach. Others tread more carefully, engaging with the perceived gaps in Alexy's approach and offering alternatives.

The theory of constitutional rights norms does not present itself as being the solution to all flaws within a constitutional law debate. Rather it offers a structural and objective characterisation of norms that can ground complex and heated contributions regarding individual constitutional rights in a normative analysis, focussed on the practical function of the law. Alexy published his theory of constitutional rights in German in 1987. Since its translation into English in 2002, it has led to opening many debates in philosophy, law and politics outside the limited bounds of German jurisprudence. A structural norm analysis is a beneficial one, albeit not without its inner contradictions.

Jakab's assertion that the solutions offered and characteristics evidenced can be explained through existing mechanisms is not necessarily untrue, but does not add value. Where Jakab seeks to shut down discourse, Alexy's approach pushes the debate even further. As we are discussing the impact of norms on a legal order and the way the competent court within a jurisdiction engages with them, considering the structure of these norms informs that discourse and enriches the debate on rights. It can serve as an objective starting point for the global discourse of constitutionalism and constitutional rights. By focussing on the structure of the norm and its functionality within a practical, solution focussed legal order, we are removing key elements such as subjective legal traditions and cultures from the conversation. We may not agree on the detail, but we agree to debate.

#### **4. Where do we go from here?**

We know that not all norms are constitutional rights norms and not all norms can be characterised as principles.<sup>607</sup> As such, this research can be developed further in search for a clearer differentiation between those norm categories and how far they really are distinguishable, and also whether it remains practical to do so. Exploring the differentiation of principles and rules further and considering the norm functionality within any legal system (or an ideal legal system) will need to rely on legal philosophy.

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<sup>607</sup> Chapter 2 section 2.

The research projects proposed below to further this field focus on other elements of this thesis and may consequently be less philosophical, offering insights into very particular issues of our time.

#### **4.1. European Union citizenship**

It would be interesting to see how far Alexy's theoretical framework can be applied to the framework of directives and regulations governing EU citizenship rights. The majority of cases consider cross-border scenarios, where Directive 2004/38 is the main source of analysis and not the Treaty norms. While this thesis focussed on constitutional rights norms themselves, a future project could explore how Alexy's concepts of radiation and derivative constitutional rights norms relate to the EU's body of primary and secondary legislation.

The provisions of Directive 2004/38 can be tested in a way similar to the way this thesis tested Articles 20 and 21 TFEU, in order to establish whether these EU citizenship related norms qualify as constitutional rights norms in their own right.<sup>608</sup> The analysis could focus on cases in which the Court relied on the Directive exclusively, or mainly, looking for evidence of norm characteristics, showing whether the Directive provisions qualify as principles. Once this analysis establishes whether Directive 2004/38 entails constitutional rights norms, it is worth expanding the scope of research to test the hypothesis with legislation passed before the EU citizenship Treaty provisions were introduced, in order to assess whether the norm structures are comparable.

This would lead to a more holistic view on EU citizenship as status itself and as connected with free movement rights. This thesis only considered cases that relied on Articles 20 and 21 TFEU in their reasoning, whereas other cases have been similarly relevant in scoping the EU citizenship status and the rights linked to it.<sup>609</sup> EU citizenship itself cannot be fully assessed without consideration of secondary legislation.

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<sup>608</sup> As opposed to derivative constitutional rights norms, see chapter 2 section 2.3.

<sup>609</sup> E.g.: *Supra Baumbast*; *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* Case C-370/90 [1992] European Case Reports I-04265 ECLI:EU:C:1992:296; *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* Case C-456/12 [2014] ECLI:EU:C:2014:135.

Furthermore, considering the flaws within EU citizenship as a status and its limited application to people living in the EU, a widened analysis of the status itself as a constitutional right can inform the enhancement of this status to true citizenship.<sup>610</sup> Mobility rights are seen as a threat to state sovereignty and manipulated to be perceived as negative for domestic communities.<sup>611</sup> Considering the focus on immigration to the EU, the push to strengthen “fortress Europe” by closing borders taints the status of EU citizenship as one of privilege, unreachable for many, while at the same time challenging the EU as a whole.<sup>612</sup> As migrants are expected to fit in and not “call into question the culturally and historically specific understandings embodied by” their state of residence, EU citizenship should serve to overcome the dictatorship of norms “by the dominant” group and, as a true constitutional right, inform a system of immigration that fulfils a practical function of the law for society, not political agendas.<sup>613</sup> This is what a more holistic review of the norm characteristics of EU citizenship legislation can support.

#### **4.2. European Union constitutional rights norms**

EU citizenship is only one example of the many potential constitutional rights norms in the EU legal order. The single market provisions within the TFEU are examples of other norms that may qualify as constitutional rights norms upon closer observation.

The obvious example is the free movement of workers.<sup>614</sup> Particularly, early cases like *Walrave*, *Bosman* and *Angonese* show similar signs of balancing and reasoning by the CJEU, allowing the analysis of Article 45 TFEU in light of Alexy’s theory of constitutional rights norms.<sup>615</sup>

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<sup>610</sup> Chapter 4 section 3; chapter 5 section 3.

<sup>611</sup> See among others: Garton Ash, T. (2012). *The Crisis of Europe: How the Union Came Together and Why It's Falling Apart*. Foreign Affairs. Vol. 91, 5. pp. 2 – 15; Rudolph, C. (2003). *Security and the Political Economy of International Migration*. The American Political Science Review. Vol. 97, 4. pp. 603 – 620.

<sup>612</sup> One example of the use of “Fortress Europe” in the context of immigration: Traublinger, J. (2014). *Boat Refugees in the Mediterranean: Tackle the Root Causes or Build Fortress Europe?* Diplomica Verlag; Discussing contemporary challenges: Shaw, J. (2018). *EU citizenship: still a fundamental status?* EUI Working Papers. RSCAS 2018/4. Available online at <http://hdl.handle.net/1814/52224> [accessed 01/07/2018].

<sup>613</sup> *Supra* Kostakopoulou, D. (2005). p. 240.

<sup>614</sup> Discussing the coherence of free movement provisions among others: Shuibhne, N.N. (2013). *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*. Oxford University Press.

<sup>615</sup> *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* Case 36-74 [1974] European Court Reports 01405

In *Walrave*, e.g., the Court considered the horizontal effect of the free movement of workers, and other, provisions, while at the same time establishing that a sportive activity can fall within the scope of free movement of workers “in so far as it constitutes an economic activity”.<sup>616</sup> In *Angonese* the Court used the opportunity to extend the horizontal effect credited to the free movement of workers further as ruling that the prohibition of discrimination was also “applying to private persons”.<sup>617</sup> In *Bosman* the Court clarified horizontal effect and ruled specific rules in relation to football transfers and participation prohibited as discrimination under free movement of workers.<sup>618</sup>

The way the CJEU developed its free movement of workers jurisprudence reflects our findings of the analysis of EU citizenship as constitutional rights norm, as it continuously adjusted the scope of the provision, eventually establishing horizontal effect. Testing Alexy’s theoretical framework in relation to free movement of workers will consider the aforementioned cases in depth, relating them also to Alexy’s approach to horizontal effect of constitutional rights norms.

In search for other constitutional rights norms within the EU’s constitutional framework, free movement of workers is a suitable next step.

#### 4.3. European Union constitutional framework

Adding a structure-focussed norm analysis to the means through which the EU legal framework in general and EU citizenship in particular are discussed, offers an objective approach to the wider EU rights discourse. Bringing an appreciation of norm structure to the attention of EU legal scholars is an attempt to enhance the analysis of the EU’s constitutional order. Normative statements developed with an understanding of structural difference and potential consequences, can inform legislative processes within the EU, as well as the jurisprudence of the CJEU. Any further exploration can

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ECLI:EU:C:1974:140; *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* Case C-415/93 [1995] European Court Reports I-04921 ECLI:EU:C:1995:463; *Roman Angonese v Cassa di Risparmio di Bolzano SpA* Case C-281/98 [2000] European Court Reports I-04139 ECLI:EU:C:2000:296.

<sup>616</sup> Supra *Walrave* para 4 and 13 ff.

<sup>617</sup> Supra *Angonese* par 36.

<sup>618</sup> Supra *Bosman* para 73 ff.



consider how far other forms of EU legislation can be considered as constitutional rights norms or a derivative thereof.

As the EU is challenged by contrary political views, pulling policy focus from one end of the political spectrum to the other, going so far as doubting and endangering the envisaged 'ever closer Union among the peoples of Europe' all together, an objective norm analysis can serve as a neutral starting point in discussions about new legislation and approaches to law and, as such, fulfils almost a diplomatic function of reason.

The most recent elections in Italy,<sup>619</sup> political and legal developments in Poland and Hungary,<sup>620</sup> the UK's progressing withdrawal as a Member State, and reforms across the EU Member States, all reflect the desire to challenge the established views of the European integration direction. The privileges awarded to individuals within the sphere of the EU legal order are not felt by all EU citizens. Those moving across borders are still more likely to support EU ideals and policy compared to those who remain within their communities of origin.<sup>621</sup> Although there has been an increase in EU citizen mobility, people embrace the EU's open borders too slowly in order to counteract populist and nationalist politics.<sup>622</sup>

An objective analysis, to complement the assessment of subjective rights, as a means to neutralise opposing political views in that process, may well be too abstract to save the EU of people. It does, however, offer a midway point, removed from political association and individual gain, to start an important conversation: What is this Union of European sovereign states and where do we want to take it?

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<sup>619</sup> Legorano, G. (2018). Italy Populists Form Governing Coalition --- Antiestablishment 5 Star and League settle on line up that satisfies President Mattarella. Wall Street Journal. June 1<sup>st</sup> 2018. p. A. 7.

<sup>620</sup> European Commission (2017). Rule of Law: European Commission acts to defend judicial independence in Poland. Press Release. Available online at: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm) [accessed 06/07/2018]; Hinshaw, D. & Sevesvari, C. (2018). Migration issue faces test in Hungary. Wall Street Journal. April 3<sup>rd</sup> 2018. p. A. 6.

<sup>621</sup> Mahendran, K. (2017). Public narratives on human mobility: Countering technocratic and humanitarian refugee narratives with a "one-world" solidarity narrative. Journal of Community & Applied Social Psychology. Vol. 27, 2. pp. 147 – 157.

<sup>622</sup> Eurostat (2017). Key Figures on Europe — 2017 edition <http://ec.europa.eu/eurostat/en/web/products-statistical-books/-/KS-EI-17-001>. p. 24 f.

#### **4.4. Understanding constitutions**

Focussing more on the arguments made in relation to the EU's legal order and constitutionalism, the understanding of the functionality of constitutional rights norms arising from Alexy's theory is worth exploring in the wider context of constitutional law and philosophy.

Constitutionalism is a challenged understanding of the law, not least owing to its historic bound with nationalist, state limited, and consequently narrow view on legal orders.<sup>623</sup> Instead of focussing on the way constitutional understandings are entrenched in specific cultural and historic context, a structural analysis and understanding of the law as fulfilling a practical function can open constitutionalism to a wider discourse, even outgrowing approaches of constitutional pluralism.

In a world where legal orders are challenged by globalisation, populism and technology, legal analysis cannot but go beyond the continuing consideration of norm content. Considering the structure of those norms informs the globalised legal world and has the potential to serve as translator between interacting legal cultures.

#### **4.5. Understanding the Court**

This thesis focussed on a doctrinal approach to the research questions and in doing so relied on the analysis of primary and secondary sources of law. Further research into the way EU citizenship is applied and developed by the Court could seek to apply an empirical approach by directly engaging with judges and Court personnel on questions arising from the doctrinal analysis. This research would seek to explore how far thought is given to normative structure as cases progress through the Court, either explicitly or impliedly. This project would lead the herein developed research away from a purely norm theoretical analysis focussing on the norm structural argument it is seeking to make, towards a discussion of norm structural relevance in practice, in line with Alexy's view of law fulfilling a practical function.

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<sup>623</sup> Chapter 3 section 3.

## **5. Concluding**

This thesis contributes to debates of judicial activism, court reasoning, and assessments of the EU's legal order, as well as EU citizenship. It offers a new approach to the analysis of EU legislation and proposes an objective means to discuss constitutional rights. Alexy's theory of constitutional rights has proven a valuable asset in assessing EU citizenship's functionality and role within the EU's legal framework. Any future work building on this thesis will show how far a constitutional rights theory can truly enhance the conception of EU rights in order to serve the underlying practical function of law.

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