IMMIGRATION AND INTEGRATION BY ADJUDICATION IN EUROPE: STATE SOVEREIGNTY UNDER CHALLENGE

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The alien was to be protected, not because he was a member of one's family, clan, religious community or people; but because he was a human being. In the alien, therefore, man discovered the idea of humanity.[1]

I
INTRODUCTION

Much ink has been spilled in an effort to define what sovereignty stands for. Yet, regardless of whether one attributes sovereignty to people or to a state, or some institution within the state, or one refers to popular sovereignty, constitutional sovereignty or post-sovereignty, nearly all of its clustered elements are contested one.[2] Moreover, "sovereignty is not only political concept but also highly politicized one" for it generated many 'for' and 'against' discussions.[3]

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[1] Hermann Cohen, cited in Joseph Weiler, H.H., 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique', *3 EJIL 65* (1992), p. 66.

[2] For more see *e.g.* Neil MacCormick, 'Questioning "Post-Sovereignty"', *29 Eur L Rev 852* (2004); Neil Walker (ed.), *Sovereignty in Transition*, (Hart Publishing 2003); Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, (Cambridge University Press 2012).

[3] Hans Lindahl, 'Sovereignty and Representation in the European Union', in Walker (ed.), *supra* note 2, p. 87.

In the context of immigration and integration, particularly after around 1 million refugees and migrants migrated to Europe only in 2015,[4] the claims to territorial sovereignty of the state regained in significance.[5] Here, territorial sovereignty implies the ability of the state to govern the entry and residence of aliens[6] as well as their potential membership into political community. However, in order to preclude pre-Second World War failings, when many Jewish, who during the 1930s and 1940s wanted to leave Nazi Germany failed to find countries willing to take them in,[7] the international law has developed to address the monopoly of a state in regulating refugee and immigration laws by establishing that the sovereign right of states to refuse entry to an alien is not an absolute one,[8] as is not their sovereign right to expel aliens from their territory.[9]

Various fragmented rules of international law on refugee and human rights protection limit such a right. Namely, the body of international rules which restrict the sovereign prerogative of migration control was built on the basis of a specific regime established for the refugees – 1951 UN Refugee Convention.[10]

[4] See at http://www.reuters.com/article/us-europe-migrants-idUSKBN0U50WI20151222 (last visited May 10, 2017).

[5] Territorial sovereignty differs from the principle of territorial integrity. As a concept, it was established in international jurisprudence and refers to state powers to be founded on sovereignty having a territorial basis. For more see in Cezary Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Concept', in Walker (ed.), *supra* note 2, pp. 377-378.

[6] Under the term of an alien we consider an individual who does not have the nationality of the State in whose territory the individual wishes to enter or is present. See International Law Commission, *Draft articles on the expulsion of aliens, with commentaries*, UN doc. A/69/10, art. 2, 4, available on the Commission's website http://legal.un.org/ilc/texts/9_12.shtml, (last visited May 10, 2017). Expressions "alien" and "non-national" will be used interchangeably throughout the chapter.

[7] At the Evian conference held in 1938 in France, convened to address the refugee problem, the 32 states expressed sympathy for the Jews, but all of them except the Dominic Republic, refused to increase the numbering of refugees they would accept. Australia, for example feared racial problems, while Great Britain expressed fears for the labor market. In the US, many people believe that refugees would compete with them for jobs and overburden social programs set up to assist the needy. For more see Charlotte Kilroy, 'The Role of International and Domestic Law in Creating the Refugee Crisis Which Faces Europe', *6 E.H.R.L. 559* (2015), pp. 562-563.

[8] Robert Jennings, Arthur Watts (eds.), *Oppenheim's International Law*, vol. I (9th ed., Harlow, Longman 1992), p. 940.

[9] International Law Commission, *Preliminary Report on the Expulsion of Aliens, by Mr. Maurice Kamto, Special Rapporteur*, UN doc. A/CN.4/554 (2 June 2005), para. 16, p. 197, at http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_554.pdf&lang=EFSX (last visited May 10, 2017).

[10] Convention relating to the Status of Refugees, 189 UNTS 150, entered into force April 22, 1954.

Substantive and procedural guarantees afforded to refugees have been creeping into the human rights treaties and have been further developed in the subsequent practice of treaty supervisory bodies, granting protection to all aliens within the jurisdiction of a state party to a treaty in question. Additionally, the International Law Commission (ILC), a subsidiary body of the UN General Assembly, recently provided Draft Articles on the Expulsion of Aliens (2014).[11] On the one hand, the Draft Articles are a codification attempt based on a long standing state practice, international practice and different rules that govern some aspects of the topic which are dispersed in several international treaties of universal nature.[12] On the other hand, in respect to some aspects of this topic, where the practice is limited, the ILC has engaged in progressive development of fundamental rules on the expulsion of aliens.[13] To put it simply, international law requires that the decision on inclusion to or exclusion from state's territory – one way or the other – is assessed on the basis of certain refugee and human rights guarantees of substantive and procedural nature. Thus, while granting states sovereign prerogative over the immigration, international law simultaneously sets the limits to it.

Since in the 21st century Europe, the European Union (EU) still represents a most serious effort to integrate Europe, apart from becoming international law concerns, the Schengen and Dublin agreements as well as the creation of EU citizenship, made not only the issues of entry and residence, but also the issue of integration, the Union's issues as well.

Now, the ongoing refugee 'crisis' in Europe (also called 'migration'[14] crisis), has confirmed that issues of immigration and integration revolve around a constant tension between universal human rights of non-nationals seeking international protection and a state sovereignty claims to decide who can enter its territory and who can become a member of its political community. On this account, a legal system operating on the European level, which according to Alec Stone Sweet "broadly conforms to Kantian notions of cosmopolitan Right and

[11] See International Law Commission, *supra* note 6.

[12] *Ibid.*, p. 2, para. 1.

[13] It recommended to the General Assembly to take note of these draft articles in a resolution to which it would annex them and to consider, at a later stage, the elaboration on the convention on the basis of them. See International Law Commission, *supra* note 6, p. 11, para. 42. For the overview of the draft Articles on Expulsion of Aliens see Sean D. Murphy, 'The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission', *107 AJIL 164* (2013).

[14] The terms 'migrant', 'refugee' and 'asylum seeker' have specific legal definitions that distinguish one from the other and carry different sort of obligations for the states and the international community.

justice",[15] has imposed on the European states an obligation to provide 'hospitality' to non-nationals. It is clear that in Kant's view, "hospitality means the right of a stranger not to be treated in a hostile manner by another upon arrival on the other's territory."[16] It is less clear what 'hospitality' stands for today, however.

One of the most persuasive explanations is offered by Seyla Benhabib, who rightly argues that, although sovereignty entails a power of a state to control its borders and adopt rules which create distinctions between 'us' and 'them' (non-nationals), by simple fact that non-nationals are human beings, such sovereignty claims must always be constrained by internationally recognized civil rights of all seeking international protection (asylum seekers, refugees and migrants).[17] Moreover, since, according to her, emigration and immigration are not morally asymmetrical, the idea of freedom encompasses both the right to exit and the right to entry.[18] Emphasizing that in today's world one cannot go anywhere but in someone else's territory, Benhabib insists that an internationally recognized fundamental human right to leave one's own country, requires recognition of an also fundamental right to entry, to admittance.[19] Finally, even though 'hospitality' in Kantian terms does not encompass a right to membership in political community, a right to seek admission into political community is a moral right grounded in the recognition of the individual as an autonomous person entitled to citizenship[20]. In other words, as Hannah Arendt famously claimed, citizenship amounts to 'the right to have rights' or the right of every individual "to belong to some kind of organized community".[21]

Yet, under the need to control a recent massive inflow of refugee and migrants, not only that some EU Member States have been seeking to unilaterally regain control over migration, but an increasingly reserved reception of the refugees and migrants in EU Member States has made their integration into

[15] According to Stone Sweet, the incorporation of the European Convention on Human Rights into national laws resulted in Kantian cosmopolitan legal order, which succeeded in improving national standards of rights protection, was crucial to establishing constitutional democracy in post-authoritarian states and, generally, managed to render justice to all that come under its jurisdiction, without respect to nationality or citizenship. See in Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', *1 Global Constitutionalism 53* (2012), p. 53.

[16] Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, ed. Pauline Kleingeld, trans. David L. Colclasure (Yale University Press 2006), p. 82.

[17] Seyla Benhabib, 'Citizens, Residents, and Aliens in a Changing World: Political Membership in the Global Era', *66 Soc. Res. 709*, (1999), pp. 710-711.

[18] *Ibid.*, pp. 730-731.

[19] *Ibid.*, p. 731.

[20] *Ibid.*, p. 730.

[21] Hannah Arendt, *The Origins of Totalitarianism* (Meridian Books 1958), pp. 296-297.

European society nearly impotent.[22] As a result, Europe is facing a danger that its Kantian cosmopolitan legal order will be redefined via geographical borders.

Having in mind that European 'Kantian cosmopolitan legal order' has been to a great extent a judicial construct, this chapter focuses on the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) to examine whether these courts have managed to curb the states' desire to redefine its territorial sovereignty to the detriment of legal and moral rights of refugees and migrants. Immigration issues will be discussed in the light of ECtHR jurisprudence, while integration issues will be addressed from the perspective of EU citizenship jurisprudence, developed by the CJEU.

II
IMMIGRATION BY ADJUDICATION IN EUROPE: THE POLITICS OF THE ECTHR

While the international rules that pose limits to states' sovereign prerogative of territorial inclusion/exclusion exist, there is no comprehensive normative framework or a coherent institutional setting addressing the issue of migrations.[23] This may seem inevitable, due to the fact that migration is a multifaceted phenomenon.[24] Thus, states have been reluctant to discuss and embrace an all-inclusive approach to it, but prefer to regulate it on a unilateral basis[25] vastly relying on the well-established rule that states have sovereign prerogative to control aliens' entry and stay on their territory. For this reason, the implementation remains almost exclusively at the national level, which leaves many with the impression that international rules are impotent.[26]

However, one can claim the contrary from the point of the substantive protection afforded by the European Court of Human Rights (ECtHR) in the context of border-crossing within the Council of Europe (CoE). This Court has

[22] For more, see Violeta Beširević and Tatjana Papić 'From Sovereignty to Post-Sovereignty and Back: Some Reflections on Immigration and Citizenship Issues in the Perspective of Refugee 'Crisis", *Eur. Rev. Pub. L.*, (2017), forthcoming.

[23] See Report of the Special Rapporteur on the human rights of migrants, UN doc. A/68/283 (5 August 2013), p. 13, para. 36, http://www.ohchr.org/Documents/Issues/SRMigrants/A-68-283.pdf (last visited May 10, 2017).

[24] *Ibid.*, p. 10, para. 27.

[25] *Ibid.*, p. 13, para. 37.

[26] More on that see Sara Dehm, 'Framing International Migration', *3 London Rev. Int'l L 133* (2015), p. 147.

effectively challenged states' sovereign prerogative over territorial inclusion/exclusion, by applying the European Convention on Human Rights and Fundamental Freedoms (ECHR).[27] We will proceed to explain the manner in which this has been done.

II. 1 Notion of Jurisdiction

The first challenge to the exercise of states' sovereign prerogative of migration control is embodied in the way the ECtHR has interpreted the threshold criterion for application of the Convention rights. Under the article 1 of the ECHR, the Convention rights apply as soon as a person, regardless of his/her nationality, finds itself *within the jurisdiction* of a state party (CoE Member State). The ECtHR has interpreted this criterion primarily as within *a state territory*.[28] However, it also holds the position that in exceptional situations, the ECHR rights are to be applied extraterritorially.[29] These exceptional circumstances exist when a state exercises effective control over a foreign territory[30] or individuals[31] or when it exercises *public powers* abroad.[32]

[27] For the claims on the general potency of human rights see Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press 1996); David Jacobson, *Rights across Borders – Immigration and the Decline of Citizenship* (John Hopkins University Press 1997). Cf. with claims that human rights have done a little to help migrants in Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2009), pp. 21-22, 60-66 and Gregor Noll, 'Why Human Rights Fail to Protect Undocumented Migrants', *12 Eur J Migr&L 241* (2010).

[28] ECtHR, *Al Skeini et al. v. the United Kingdom*, App. No. 55721/07, 7 July2011, para. 131.

[29] *Ibid.*, para. 132. The similar interpretation of the jurisdictional clauses from human rights treaties that set the threshold for their application – as being 'within' or 'subject' to a state party jurisdiction – have been offered by the ICJ and other human rights supervising bodies. See U.N. Human Rights Committee, General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 136, 179, para. 109. For more on this in general, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy*, (OUP 2013). In the context of refugee law, see also Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', *53 Colum. J. Transnat'l L. 235* (2015), pp. 287-258; James C. Hathaway, *The Rights of Refugees Under International Law* (CUP 2005), pp. 64-66; See Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*' in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), pp. 100-111.

[30] *Al Skeini*, paras. 138-140.

[31] *Ibid.*, paras. 136-137.

[32] *Ibid.*, para. 135.

On the basis of such approach, attempts of states to introduce *non-entrée*[33] policies[34] such as declaring 'international zones' on the part of territory where legal obligations are said not to be applied were rejected by the ECtHR,[35] as were automatic push-backs of migrants at the high seas.[36]

II.2 Interpretation of the Scope of Certain Substantive Rights

The second challenge to the exercise of sovereign prerogative of migration control has been created on the basis of the ECtHR teleological interpretation of the ECHR.[37] Namely, the ECtHR considers that guarantees from the ECHR are to be interpreted not as "theoretical or illusory" but "*practical and effective*".[38] Moreover, they are to be interpreted in accordance with the spirit of the ECHR "to maintain and promote the ideals and values of a democratic society".[39] Such an approach resulted in the creation of limits to the discretion of states in respect to a decision on territorial inclusion/exclusion, if there is a substantial ground to believe there is a real risk of exposing a person to specific human rights violations. In fact, this is the application of the refugee law principle of *non-refoulement* in the ECHR context.

This principle has been perceived as implied obligation under the absolute prohibition of torture, inhuman or degrading treatment or punishment (art. 3 ECHR),[40] and in some aspects, the right to life (art. 2).[41] Moreover, in exceptional

[33] This term was coined by Hathaway, see James C. Hathaway, 'The Emerging Politics of Non-Entrée', *91 Refugees 40* (1992).

[34] See more in Gammeltoft-Hansen, Hathaway, *supra* note29, pp. 244-247.

[35] See for e.g. ECtHR, *Amuur v. France*, App. No. 19776/92, 25 June 1996.

[36] See ECtHR, *Hirsi Jamaa et al. v. Italy*, App. No. 27765/09, 23 February 2012.

[37] In accordance to the Vienna Convention on the Law of Treaties art. 31(1), 1155 UNTS 331, entered into force 27 January 1980.

[38] ECtHR, *Artico v. Italy*, App. No. 6694/74, 13 May 1980, para. 33; *Soering v. the United Kingdom*, App. No. 14038/88, 7 July 1989, para. 87. Emphasis added.

[39] ECtHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. Nos. 5095/71; 5920/72; 5926/72, 7 December 1976, para. 53.

[40] See for e.g. *Soering*, paras. 90-91; ECtHR, *Cruz Varas et al. v. Sweden*, 20 March 1991, para. 69; *Vilvarajah and Others v. the United Kingdom*, App. Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, 30 October 1991, para. 103; *Jabari v. Turkey*, App. No. 40035/98, 11 July 2000, para. 38; *Salah Sheekh v. the Netherlands*, App. No. 1948/04, 11 January 2007, para. 135; *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08, 2 March 2010, para. 123; *Saadi, v. Italy*, App. No. 37201/06,17 January 2012, para. 125.

[41] See for e.g. ECtHR, *Hakizimana v. Sweden* (dec.), App. No. 37913/05, 27 March 2008; *S.R. v. Sweden* (dec.), App. No. 62806/00, 23 April 2002; *Ismaili v. Germany* (dec.), App. No.

circumstances, the ECtHR even found that a flagrant denial of justice would trigger the *non-refoulement*.[42]

In this way, states' attempts to exercise a migration control – refusing entry or removing a person from the territory – were seriously curtailed if there was a substantial ground to believe there was a real risk of irreparable harm to a person's life or physical and mental integrity. Moreover, the ECtHR found this obligation also to exist in the cases of removing a person to the states prone to transferring a person to a third country where he/she was at such risk.[43]

Other substantive guarantees developed by the ECtHR include the prohibition of discrimination (art. 14)[44]in deciding on the inclusion or exclusion of aliens[45] and, in some circumstances, respect of the right to family life and private life (art. 8 ECHR).[46]

In the cases of territorial exclusion (expulsion or deportation) following a criminal conviction, the ECtHR formulated a standard requiring balancing between the preservation of family unity and the maintenance of public order.[47] Similar criteria were provided in the cases of granting family reunification, with the requirement of balancing between the cohabitation of the family members with the state's prerogative to migration control.[48] Furthermore, in particular circumstances, the ECtHR extended the application of article 8 in respect to the protection it offers to private life – thus, independently of the existence

58128/00, 15 March 2001; *Kaboulov v. Ukraine*, App. No. 41015/04, 19 November 2009;*F.G v. Sweden*, App. No. 43611/11, 23 March 2016; *Al-Saadoon*. If a state knowingly puts the person concerned at such "high risk of losing his life as for the outcome to be near certainty, such an extradition may be regarded as 'intentional deprivation of life', prohibited by Article 2 of the Convention." (see *Kaboulov*, para. 99 citing *Said v. the Netherlands* (dec.), App. No. 2345/02, 5 October 2004; *Dougoz v. Greece* (dec.), App. no. 40907/98, 8 February 2000.

[42] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09, 17 January 2012, paras. 258-261.

[43] ECtHR, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, paras. 286ff.

[44] Accessory to the enjoyment of other substantive rights from the ECHR.

[45] ECtHR, *Abdulaziz et al. v. the United Kingdom*, App. Nos. 9214/80, 9473/81 & 9474/81, 28 May 1985.

[46] For an overview of the ECtHR case-law in respect to the immigration cases and protection of private and family life under art. 8, see Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', 57 *Int'l & Com LQ88* (2008).

[47] ECtHR, *Boultif v. Switzerland*, App. No, 54273/00, 2 August 2001, para. 48; *Üner v. the Netherlands*, App. No. 46410/99, 18 October 2006, paras. 57-58; *Benhebba v. France*, App. No. 53441/99, 10 July 2003, para 33.

[48] ECtHR, *Sen v. the Netherlands*, App. No 31465/96, 21 December 2001; *Tuquabo-Tekle et al. v. the Netherlands*, App. No. 60665/00, 1 December 2005.

and preservation of family bonds – to the legal status of aliens.[49] In these cases, the ECtHR relied on the factual implications of alien's legal status, taking into consideration their uncertainty and precariousness, which affect the network of personal, social and economic relations that constitute private life. [50] In this way, it broadened the ECHR's reach.[51]

Apart from the above described substantive guarantees, the ECtHR has also applied procedural guarantees from the ECHR's protocols that have to be respected in the cases of expulsion.[52] These include minimum due process standards[53] and the prohibition of collective expulsion of all aliens,[54] whether lawfully or unlawfully present at the territory. These do not prevent expulsion as such but they secure that the substantial protection is provided and that the right of expulsion is not abused.

As can be inferred from the overview of the relevant jurisprudence of the ECtHR in the context of territorial inclusion/exclusion, the protection offered by the Court while being very narrow, still is effective as we will proceed to demonstrate.

II.3 Influence Over the Migration Policies of the CoE Member States

The jurisprudence of the ECtHR influenced the implementation and development of the migration policies of the CoE member states, which is in itself indicative of the effectiveness of the Convention system. Namely, states were abandoning different migration policies that the ECtHR found to be contrary to the ECHR.[55] Moreover, they have also started to develop new forms of *non-entrée* policies.[56] Significantly, these are implemented on the territory, or

[49] This has been tagged a new era of its jurisprudence in respect to migrations. Thym, *supra* note 46, p. 89. See ECtHR, *Ariztimuno Mendizabal v. France*, App. No 51431/99, 17 January 2006; *Sisojeva et al. v. Latvia*, App. No. 60654/00, 15 January 2007; *Rodrigues Da Silva &Hoogkamer v. the Netherlands*, App. No 50435/99, 31 January 2006.

[50] See more in Thym, *supra* note 46, p. 98.

[51] *Ibid.*, pp. 97ff.

[52] ECtHR, *Čonka v. Belgium*, App. No. 51564/99, 5 February 2002; *Hirsi Jamaa*; *Georgia v. Russia (I)*, App. No. 13255/07, 3 July 2014; *Sharifi and Others v. Italy and Greece*, App. No. 16643/09, 21 October 2014; *Sharma v. Latvia*, App. No. 28026/05, 24 March 2016.

[53] Protocol No. 7 to the ECHR, art. 1.

[54] Protocol No. 4 to the ECHR, art. 4.

[55] See *Amuur, supra* note 35.

[56] Generally, on these see Gammeltoft-Hansen and Hathaway, *supra* note 29.

within the jurisdiction, of a home state of a potential asylum seeker or a transit country.[57] They are designed to dissuade arrivals of uninvited alien guests who plan to come and stay.[58] Primarily they aim to avoid the reach of the ECHR, without rejecting or calling for modification of the ECHR standards in the context of territorial inclusion/exclusion.[59] In this way, the new *non-entrée* polices paradoxically reiterate the effectiveness of the limits to the exercise of state sovereign prerogative over territorial inclusion/exclusion created by the ECtHR. Indeed, these policies were created because the rules limiting this prerogative exist and have been effectively asserted by the ECtHR. Obviously, the moral cost of the rejection of the *non-refoulement* rule would be too high,[60] as would be the financial cost of closing the borders all together. Thus, the states are trying to avoid the reach of the ECHR standards while not refuting them.[61]

However, one should bear in mind that these new deterrence practices are highly questionable from the point of general international law and can also raise claims of responsibility for violation of the ECHR in the future.[62]

Be that as it may, human rights standards, embodied in the ECHR and interpreted by the ECtHR, forced sovereign states to hold to their international legal obligations.[63] The ECtHR sets the limits to the exercise of the sovereign prerogative in respect to territorial inclusion/exclusion which are narrow but at the same time constitute a very effective challenge to it. In this way, some ECHR's rights (not the citizenship status) became the basic common denominator of the human entitlement[64] on entry or removal from a state's territory. The reason is that human rights are capable of overcoming the claims of sovereignty, at least in respect to the territorial inclusion/exclusion.

[57] *Ibid.*, pp. 248-257. See also Thomas Spijkerboer, 'The Human Cost of Border Control', *9 Eur. J. Migration &L. 127* (2007); Thomas Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law', in Paul Minderhoud & Elspeth Guild (eds.), *The First Decade of EU Migration and Asylum Law* (Brill, Nijhoff, 2011), p. 273.

[58] For e.g. Spain and Italy agreeing with some African states to perform maritime interdiction within their territorial waters, Spain providing financial aid and debt relief to Morocco in return to these countries border control efforts or UK performing immigration control at Prague airport granting or refusing entry to the UK before boarding. For these and other examples see Gammeltoft-Hansen and Hathaway, *supra* note 29; pp. 250-252 and 254, fn. 56, 67, 68, 84 and 85.

[59] *Ibid.*, pp. 240-241.

[60] *Ibid.*, pp. 239-240.

[61] *Ibid.*, pp. 240-241.

[62] For different grounds of international responsibility in respect to the cooperative deterrence policies see more in *ibid.*, pp. 257-283.

[63] Cohen, *supra* note 2, p. 217.

[64] Jacobson, *supra* note 27; David Jacobson, 'Courts across Borders: The Implications of Judicial Agency for Human Rights and Democracy,' 25 *Human Rights Quarterly 74* (2003).

As immigration is a step towards integration, we turn now to the issue of migrants' integration into European Union in light of the Member States' sovereignty claim to decide on membership in their political communities, through the lenses of the CJEU citizenship jurisprudence.

III
INTEGRATION BY ADJUDICATION IN THE EU: THE POLITICS OF THE CJEU

III. 1 A State Sovereignty and Migrant Integration in EU Context

Sovereignty claims appear to be particularly contested in the EU. According to some authors, the EU has deprived Member States of their sovereignty, while according to others, as a transnational polity the EU is based either on the transferred sovereignty of the Member States, divided sovereignty or shared sovereign rights between the EU and Member States or on functionally limited sovereignty of the Member States.[65] Such contested claims have been particularly provoked after the CJEU inaugurated direct effect and the supremacy of EU law doctrines and managed to induce political integration even in the absence of constitutional demos.[66]

Notwithstanding the different opinions on whether the supremacy and direct effect of the EU law led to sovereignty of the European Union, starting from the premise that sovereignty in internal sense refers to exclusive legal capacity to act, it is important to emphasize that the current state of affairs in the EU confirms the European Court of Justice conclusion that "by creating a Community of unlimited duration, ...the Member States have limited their sovereign rights, albeit within limited fields"[67] and that "a permanent limitation of their sovereign rights means that a Member States' subsequent unilateral act incompatible with the concept of Community cannot prevail."[68]

[65] See in Grainne de Burka, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', in Walker (ed.) *supra* note 2, pp. 449-460.

[66] For more see *e.g.* Violeta Beširević, 'Constitutional Review in a Democratic Deficit Setting: The Case of the European Union', in Miodrag Jovanović (ed.), *Constitutional Review and Democracy*, (Eleven Publishing International 2015), pp. 83-107.

[67] Case – 6/64, *Costa v. ENEL*, [1964] ECR 585.

[68] *Ibid.*

What are the ramifications of the conclusion in the field of migrant integration? Consider the following.

First, the ongoing refugee/migrant crisis has shown that the tension between a state sovereign claim to regulate immigration and EU law appears to be particularly high. Thus, the duty of the European Union to provide 'hospitality towards aliens' in Kantian terms, that is to protect third-country nationals or stateless persons who seek international protection, moved from autonomous national policies to minimum common standards facilitated by the Amsterdam Treaty, and then to EU framed policy of the European Common Asylum System, based on the principle of solidarity and the fair distribution of responsibilities, embedded in the Lisbon Treaty.[69]

In accordance with the international law, and particularly in accordance with the 1951 UN Refugee Convention and the ECHR, human rights of asylum seekers within the borders of the EU polity are protected in the EU Charter of Fundamental Rights. The Charter envisages the right to asylum, prohibits collective expulsion, as well as removal, expulsion or extradition in cases of a serious risk that person seeking international protection would be subjected to the death penalty, torture or other inhuman or degrading treatment, and secures the right to effective remedy and a fair trial. A high level of protection is also envisaged in the EU Qualification Directive which is adopted to harmonize EU asylum policy with the above-mentioned Refugee Convention, as well as in the Asylum Procedures Directive which obliged Member States to provide detailed information about asylum procedure to asylum seekers and ensure access to fair procedure for them.[70] The EU asylum standards, which apply also at the borders, leave no possibility for denying access to procedure or unilaterally returning to person.[71]

However, in the current refugee/migrant crisis the obsession with territorial sovereignty of some Member States and their fear from de-territorialization of culture led to physical impediments to prevent border-crossing, the introduction of immigration camps, attacks on physical integrity of non-nationals, and in less severe cases, to thickening state asylum and

[69] For more see Eva-Maria Alexandrova Poptcheva, 'EU legal framework on asylum and irregular immigration 'on arrival' State of play', (EU Parliament Briefing March 2015). at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551333/EPRS_BRI(2015)551333_EN.pdf (last visited May 13, 2017).

[70] For a discussion see Anuscheh Farahat and Nora Markard, 'Forced Migration Governance: In Search of Sovereignty', *17German L. J.923* (2016), p. 930.

[71] *Ibid.*

integration laws.[72] Due to the lack of enforcement mechanism on the EU part, the latest developments have clearly showed that for the time being the Member States still retain control over the substance of immigration.

Second, granting a refugee entry into territory is not only perceived as a part of migration control but also as the first step of potential integration into the host society. In the European Union, the main responsibility for integration on third-country nationals lies on the national level, but the EU can adopt different post-entry rules on immigrants and refugees, vital to their integration.[73]Thus, the apparent rise of civic integration on the European level is manifested trough the adoption of EU Family Reunification and the Long-Term Residence Directives[74], the Stockholm program[75] that boosted integration as an element of immigration policy and the recent European Commission Action Plan on the Integration of Third-Country Nationals.[76]

Yet, a *finalité politique* of integration in any host society is a membership into its political community. This aim is closely connected with the citizenship issue. On one hand, even in liberal democracies aliens are by definition those outside of the political communities: voting, holding office, and engaging in public work are reserved only for citizens.[77] On the other hand, the core of political integration is to be found in 'the right to have rights' amounting to the moral claim of a refugee to citizenship. Since the EU is not only multidimensional system of governance, but a multi-level model of political membership, two issues appear to be decisive for migrant integration policy: who is an EU citizen and who is authorized to decide on the issue.

[72] For more see Beširević and Papić, *supra* note 22.

[73] For EU integration measures, see European Web Site of Integration, at https://ec.europa.eu/migrant-integration/main-menu/eus-work/actions ((last visited May 13, 2017).

[74] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[75] The Stockholm Programme - An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4.5.2010].

[76] The Action Plan is available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160607/factsheet_action_plan_integration_third-country_nationals_en.pdf (last visited May 13, 2017).

[77] Francis J. Conte, 'Sink or Swim Together: *Citizenship, Sovereignty, and Free Movement in the European Union and the United States*', *61 U. Miami L. Rev. 331* (2007), p. 388.

III.2 The Exclusionist Concept of EU Citizenship

Ever since the citizenship clause was included in the Maastricht Treaty as a tool for building a political bound between individuals and the European Union, the EU citizenship has not been in a possession of the European Union itself. Namely, the Maastricht Treaty simply provided that "every person holding the nationality of a Member State shall be a citizen of the Union" but it did not resolve the issue of who an ultimate gatekeeper of the Union citizenship was, because it was silent about the possible converse category of persons who were citizens of the Union but not nationals.[78] The Amsterdam Treaty clarified the issue by stressing that "citizenship of the Union shall complement and not replace national citizenship." The limiting phrase was again highlighted in the Lisbon Treaty, which provides that "citizenship of the Union shall be additional to and not replace national citizenship." The rights included in the EU citizenship package rank from the right to free movement and residence, to the rights ensuring the citizens' political participation in the European entity including the right to vote and to stand for elections to the European Parliament and local municipalities, and rights to petition, information and access to document.[79] The EU 'Citizenship Directive' of 2004 created free movement and residence zone for EU citizens and their family members and linked their rights directly to the status of EU citizenship instead of insisting on economic participation in the internal market.[80]

However, rather than creating inclusiveness, EU citizenship maintains an exclusionist conception of Europe, creating a new division of line between Europeans and Non-Europeans: around 20 million third-country nationals who are residents in the Union, are excluded from EU citizenship scope and are deprived of most of the EU citizenship rights. The only rights the third-country nationals enjoy on the equal footing as EU citizens are the rights to petition, information and access to documents. Although the scope of free movement rights and residence have been constantly broadened to benefit

[78] Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union', *8 Theoretical Inq L 452* (2007), p. 481.

[79] See Article 20 of the Treaty on the Functioning of the European Union (TFEU), a part of the Lisbon Treaty.

[80] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing 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 and 93/96/EEC.

family members of EU citizens, only a small percentage of the third-country nationals can effectively exercise the right to family reunification. The same is valid for the right to vote: third-country nationals are not entitled to exercise the right to vote and to stand for elections to the European Parliament, while some Member States still do not allow third country nationals to vote in local elections.[81]

The exclusionary scope of EU citizenship stems also from its derivate status: since the nationality of a Member State is a condition for acquiring the Union citizenship, this implies that the main issue of who is an EU citizen and who is not, is not to be resolved by the Union but by the Member States. This may sometimes include a portion of confusion and injustice. Thus, the status of individuals, who have potentials to be treated as EU citizens, but who are excluded from all rights corresponding to the Union citizenship because they are not treated as nationals in their Member States, illustrates well this point.[82] The examples extend to the members of Russian minority in Estonia and Latvia, who without having obtained the citizenship status, are treated as stateless persons.[83] There is also an obsolete example of the lawful permanent residents born in Germany who, until the citizenship law reform in 2000, had no legal right to become full members of the political entity and whose non-citizen status prior to the reform, had been transmitted from generation to generation.[84] Until 2014, citizens of Bulgaria and Romania were not considered full EU citizens, because several Member States had restricted their free movement rights. This is now valid for the Croatian citizens: several Member States have temporarily restricted the access of workers from Croatia to their labor markets. Finally, the announced EU policy in the Negotiating Framework for Turkey, envisages the possibility for Turkish citizens to be permanently distinguished from citizens of other Member States in the areas of free movements, structural policies and agriculture.[85]

[81] For a discussion see *e.g.* Theodora Kostakopolou, 'Integrating' Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms', *8 Colum J Eur L 181* (2002); Anja Wiesbrock, 'Granting Citizenship-Related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship', 14 *Eur J Migr&L63* (2012).

[82] Violeta Beširević, 'Troubles with European Public Sphere: What's European Citizenship Got to Do with It?', in Gerard Raulet and Corinne Doria (eds.), *Questioning the European Public Sphere: An Historical and Methodological Approach* (Peter Lang 2016), p. 65.

[83] Stefan Kadelbach, 'Union Citizenship', in Armin V. Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law* (OUP 2011), p. 451.

[84] Ayelet Shachar, 'Citizenship', in Michel Rosenfeld and András Sajó(eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2102), pp. 1004-1005.

[85] See *Negotiating Framework*, 3 Oct., 2005, http:// ec.europa.eu/enlargement /pdf/turkey/st20002_05_tr_framedoc_en.pdf (last visited May 13, 2017).

Because EU citizenship complements and does not replace Member State nationality, it appears that its effect on potential migrants' integration is rather modest. Namely, the fact that EU citizenship has neither minimized inequality of access to citizenship nor provided for an alien franchise in national elections, testifies that social and political integration still depends on the Member States' national self-determination politics. Considering Member States' resistance to recognize the third-country nationals and future newcomers as full members and equal participants in democratic governance and the exclusionary scope of EU citizenship, we turn now to examine whether the European Court of Justice has managed to overcome the restrictiveness of EU Citizenship status and pave the way towards migrants' integration in Europe. We shall focus on the Court's both negative and positive 'integration' citizenship jurisprudence.[86]

III.3 Integration Discourse in CJEU's Citizenship Jurisprudence

The citizenship jurisprudence of the CJEU clearly shows that migrants in the European Union are entitled to membership in a transnational community but not to political participation in a supranational polity. Namely in a supranational entity, like the European Union, allocation of voting rights serves as an indicator for the degree of political integration.[87] From this perspective, the electoral rights attached to the EU citizenship do not facilitate integration through law, predominantly because non-nationals are not allowed to vote on national elections in the Member States. Although the Court has managed to strengthen the voting rights of EU citizens to some extent, in the absence of specific Treaty authorization, it has not attempted to diminish the exclusionist nature of EU citizenship regime regarding political integration, which still serves to protect state sovereignty in the first place.[88] In contrast, it is thanks to the Court that EU citizenship has amounted to what Loïc Azoulai termed "a status of social integration".[89] Consider the following.

[86] Alec Stone Sweet explains the ideas of 'negative' and 'positive' integration: while the former implies the obligation of the Member States to remove barriers to integration from its national laws, the later refers to the creation of new rules to regulate problems common to all Member States. Thus "successful negative integration would erase whole classes of national laws and regulations, leaving important 'holes' which positive integration would then fill with EC laws." See in Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000), p. 157.

[87] Bauböck, *supra* note 78, p. 453.

[88] For a discussion, see *e.g.* Beširević, *supra* note 82, pp. 67-71.

[89] See in Loïc Azoulai, 'La *citoyenneté européenne, un statut d'intégration sociale*', in Claude Blumann, Laurence Burgorgue-Larsen and Jacqueline Dutheil de la Rochère (eds.) *Mélanges en l'honneur de Jean Paul Jacqué*, (Dalloz 2010).

(a) Integration by Naturalization: The Limits of State Sovereignty in Nationality Matters

Paradoxically, the Court's conclusion that "Union citizenship is destined to be the fundamental status of nationals of the Member States,"[90] had a greater impact on the integration of the third country nationals into the EU and the Member States, than it was suggested when structuring a weak concept of EU citizenship.

First and foremost, the fact that international law has confirmed a State exclusive competence to decide "under its own law who their citizens are"[91] has not precluded the CJEU to loosen the grip of the Member States' national law regarding the acquisition and loss of nationality and tie up the issue with the EU law. The first ruling in such a direction (*Micheletti*), set the stage: the Court first reaffirmed a Member State sovereign power to regulate nationality laws, but then, emphasized that this sovereign prerogative had to be exercised with due regard to Community law.[92] This obligation, while not hampering a fundamental power of a Member State to determine who are its nationals, has, however, turned the logic of derivative status of EU citizenship upside down, because "ones acquired, the citizenship of the Union lives a life of its own".[93] Basically, the Court has declared that, notwithstanding a Member State's sovereignty, whenever a nationality law jeopardizes Community/EU freedoms and principles, the Community/EU Law can limit the Member State law.

Thus, in line with this basic rule, a Member State cannot refuse to recognize the nationality of individual given by another Member State.[94] Accordingly, the exceptions provided by international law, in particular the provision of Article 3 (2) of the Council of Europe Convention on Nationality, according to which a State may refuse to accept another State nationality law in accordance with international law, are not applicable in the European Union.

[90] Case C-184/99 *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I- 6193, para. 31.

[91] Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides: "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."

[92] Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239. paras. 10. and para. 15.

[93] Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship', *27 E L Rev 3*, (2002) p. 262.

[94] *Micheletti and Others*, para. 10.

The Court justified this intrusion into a Member State's sovereignty domain by a need to secure effectiveness of the fundamental Community freedom to establishment and equal application of the Community law.[95]

Third, the Court has expressed its readiness to monitor Member States nationality laws particularly in cases in which Member States tend to deprive an individual of its citizenship, because a loss of national citizenship would eventually lead to the loss of the EU Citizenship, as well. First in *Rotmman* and then in *Ruiz Zambrano*, the Court emphasized that "in those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[96] According to the Court, a national measure producing a 'deprivation effect' refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole', due to dependency of third-country national (who is refused a right of residence), either of legal, emotional or financial nature.[97] In other words, a national measure has a 'deprivation effect' if "*either in law or in fact*", it forces a EU citizen to leave the territory of the EU as a whole.[98]

Yet, if an individual, who has potential to be European citizen but who is not recognized as a Member State national for the purpose of EU law, has never come into a situation to enjoy any of the EU rights and freedoms, as UK Overseas citizens, then a Member State has an exclusive jurisdiction to lay down conditions for acquisition and loss of nationality, meaning that a potential European citizen cannot rely on EU law to acquire the residential status in a Member State.[99]

[95] *Ibid.*, paras. 12, 15.

[96] See Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, [2010] ECR I-01449, para. 42; Case C-34/09. Gerardo *Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177, para. 42.

[97] Joined Cases C-356/11 and C-357/11, *O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L.* [2012], ECLI:EU:C:2012:776, para. 56.

[98] Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, (Hart Publishing 2013) p. 58.

[99] See *Case* C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur*, [2001] ECR I-01237. For the comments see *e.g.* Dimitry Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *15 Colum J Eur L 169* (2009), pp. 190-191; Jacqueson, *supra* note 93, pp. 260-262.

Consequently, although the CJEU interventions regarding nationality issues have not deprived Member States of their sovereign power to decide on nationality matters, the Court managed to weaken the Member States' exclusive discretion to rule on this matter by subjecting their decisions to its control. Having in mind that the Court has not avoided to deliver 'integrationist' decisions whenever integration agenda seemed to be marginalized by political actors, this may *prima faciae* symbolize a significant retreat from the Court's integrationist role. Yet, by strengthening EU citizenship role in the division of powers between supranational and national legal orders in the EU, the Court has continued to pursue the process of 'negative integration' and to gradually oblige the States to remove national rules hindering the establishment of 'ever closer Union'. The trend of this 'negative integration, is further confirmed in the Court's 'name' cases.

(b) A Judicial View: Integration is not Assimilation

In a narrow sense, citizenship is not only conceived as a connection to a polity in terms of its tangible components, including status and rights, but also in terms of less tangible concepts, as identity, belonging and sense of home.[100] A decision of an individual to migrate and become a member of a new state may cause a tension between the migrant's need to protect his/her particular identity, including a personal name, and assimilation policy of the host state based on its right to self-determination. In the context of European integration, some national laws on surnames seemed to put the migrant's particular identity in risk, because the laws require the registration of personal names to be done exclusively according to the state's own tradition. However, the CJEU's interpretation of EU citizenship has significantly mitigated that risk.

Thus, contrary to the arguments of the Belgian government that the registration of surname of Belgium nationals who are also nationals of another Member State must be done in accordance with Belgian law, since it 'contributes to facilitating integration' and are 'pursued by the principle of non-discrimination', the CJEU upheld the right of the children to have their surname registered in Belgium in accordance with Spanish tradition of their father.[101] The Court ruled that Belgium rule was neither necessary nor even appropriate for promoting the integration of two children with dual Belgian and Spanish

[100] Shachar, *supra* note 84, pp. 1004-1005.

[101] *Case* C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I -11613, paras. 40-45.

nationality into the Belgium society since, in the context of migration, such a rule conflicts with the freedom of every citizen of the Union to move and reside in the territory of the Member States.[102] According to the Court, having in mind that a particular scale of migration within the EU has already led to the coexistence in the Member States of different systems for the attribution of surnames applicable to residents, the rules regarding registration of names of dual citizens cannot be assessed only by rules of one national state.[103] By linking the particular identity of migrant with the free movement rights and the prohibition of non-discrimination, the Court has managed to secure the legitimate interest of an individual to have the surname constituted according to the law of the State with which the person shared particular interest.

The Court also found that the State's national law on determination of surname cannot override the right of EU citizens to free movement and residence in the territory of the Member State when its own nationals wanted to have their children's name to be registered according to a tradition of the Member State in which the children were born and raised. In *Grunkin Paul* the Court upheld the right of a migrant to acquire identity in accordance with the laws of the host state, by ruling that the refusal of German authorities to accept the registration of the surname in accordance with the Danish tradition, amounted to disproportionate restriction of the rights of Union citizens to free movement and residence.[104]

Accordingly, although the rules governing a person's surname are matters coming within the competence of the Member States, the Court has implicitly suggested that integration does not mean assimilation and that EU citizenship protects against the risk, inherent to migration that original identity will be changed or lost against the will of individual.[105]

(c) Family Status as a Basis for Integration

As said, apart from removing obstacles in national laws for migrant integration, the CJEU has also created new rules in order to boost what Sweet

[102] *Ibid.*, paras. 41-42.

[103] *Ibid.*, para. 43.

[104] Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Standesamt Niebüll* [2008] ECR I-07639, para. 22-28, 36.

[105] Anastasia Iliopoulou Penot, 'The Transnational Character of Union Citizenship', in Michael Dougan, Niamh Nic Shuibhne, and Eleanor Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen*, (Hart Publishing 2012), p. 20.

Stone calls 'positive' integration. Thus, it has had a leading role in establishing a fundamental right to family reunification in the EU.

In early cases, the Court insisted on the necessary connection between family migration and integration by stressing first "the importance for the worker, from a human point of view, of having his entire family with him" and then "the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State."[106] The Court particularly asserted that the right of respect for a family life, protected in Article 8 of the ECHR and as such, in Community law, prevails over the Member States' immigration rules. Thus, in case of the Philippine national, who was a spouse of UK national and who was facing threat of deportation according to UK immigration law, the Court ruled that the right of respect for a family life, recognized as such also by Community law, prevented her deportation, although she had infringed UK immigration rules.[107]In the subsequent case triggering the Belgium immigration law, the Court made clear that third country national spouses' residence rights should not have depended on Member States' approval of their entry.[108]

Following the Court's jurisprudence, the EU institutions adopted the Citizenship Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States in 2004.[109] Despite the fact that this Directive had strengthen the right of Union citizens' family members who were not EU citizens, its provisions related to protection of family life of the Union citizens, had met serious problems of implementation in Member States.[110] Particularly problematic turned to be some Member States' resistance to the Court's non-restriction approach in family reunification cases and the finding of the Court that the right of residence of family members could not be conditioned by a prior lawful residence in another Member State. For example, the Irish, the Finish and the Danish laws implementing the Directive required the family member to demonstrate lawful

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

[107] Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279, paras. 39-46.

[108] Case C-459/99, *Mouvementcontre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECR I-6591, para. 102.

[109] Directive 2004/38, *supra* note 80.

[110] See the European Commission's Report to the European Parliament and the Council on the application of Directive 2004/38, COM (2008) 840.

residence within the EU prior to first entry.[111] On this account, the Danish Ombudsman, criticized the Danish Immigration Service for a rigid and too restrictive interpretation of the EU family reunification rules.[112]

The Court has reacted, and despite the sovereign powers of the Member States in relation to migration control, it managed to give full effect to the derivative right of residence of family members of the EU citizens who were third country nationals.[113] More specifically, in *Metock* case the Court reasoned that a national of a non-member country, the spouse of a Union citizen, who accompanies Union citizen or joins Union citizen in the host Member State, may enjoy rights conferred by the mentioned Directive irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.[114]Accordingly, thanks to the Court, the right to family reunification is now perceived as a European-citizenship related right.[115]

(d) Integration through Equality Lens

A closer look to the CJEU's citizenship jurisprudence reveals that the Court additionally fostered the integration of the third-country nationals by analogues interpretation of rights granted to EU citizens and third-country nationals, mostly relying on the principle of non-discrimination.[116]

The first example refers to the third-country nationals falling under international agreements concluded between the EU and Morocco, Algeria and Tunisia (establishing an association between the EC and these countries) whose legal position has been secured by granting them freedom from discrimination on the basis of nationality in the fields of employment and social security, although these agreements do not confer the right of entry to

[111] Dora Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in Bruno de Witte and Hans-W. Micklitz (eds.) *The European Court of Justice and The Autonomy of the Member States* (Intersentia 2012), p. 188.

[112] For more see Eva Ersbøll, 'Nationality and Identity Issues – A Danish Perspective', *15 German L.J. 835*, (2014), p. 850.

[113] For a discussion see *e.g.* Penot, *supra* note 105, pp. 26-28.

[114] Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008], ECR I-06241, paras. 58-70.

[115] Wiesbrock, *supra* note 81, p. 66.

[116] For a detailed discussion see *ibid.*, pp. 84-89.

the EU.[117] In particular, Article 65 (1) of the Association Agreements, provides that Moroccan, Tunisian and Algerian workers and their family members enjoy equal treatment with nationals with respect to social security benefits. However, some Member States have tried to limit their access to the benefits by interpreting the scope of Article 65(1) rather restrictively. The Court has intervened and referring mostly to equal treatment rights, ruled that social security benefits, regulated under the agreements between EU and Morocco, Algeria and Tunisia, had to be interpreted by analogy to social security contained in the Commission regulation applicable only to EU citizens.[118]

Nonetheless, in the absence of specific legislation, a controversial issue is whether the principle of non-discrimination on the ground of nationality, is an available tool for migrant integration. Thus, having in mind that Article 18 of the TFEU simply provides that any discrimination based on nationality shall be prohibited "within the scope of application of the Treaties" it can be argued that the principle of non-discrimination on grounds of nationality, listed in the Lisbon Treaty under the same heading with EU citizenship and in the EU Charter of Fundamental Rights as a fundamental right, could be instrumental for extending the rights attached to EU citizenship to third-country nationals. Starting from the fact that Article 18 of the TFEU is silent on the issue of whether under the reach of the prohibition come only nationals of a Member State, Anja Wiesbrock argues that the Court's potential finding that the prohibition of discrimination on grounds of nationality is equally applicable to third-country nationals as to EU citizens, would strike at the heart of the national immigration laws and diminish a dividing line between EU citizens and third-country nationals.[119]

Yet, so far, the Court has carefully avoided to provide such a ruling. In fact, it rather explicitly ruled that the principle of non-discrimination on grounds of nationality "is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries."[120] Having in mind that the explanatory memorandum of the EU Charter of Fundamental Rights clarifies that the prohibition of discrimination

[117] For more see in Sergio Carrera and Anja Wiesbrock, 'Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU', *12 Eur J Migr&L 3*, 2010, pp. 337-359.

[118] Case C-276/06, *Mamate El Youssfi v Office national des pensions (ONP)* [2007] ECR I-2851, para. 51-57.

[119] Wiesbrock, *supra* note 81, p.81.

[120] Joined cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585, para. 52.

on grounds of nationality, enshrined in Article 21 (2) the Charter, must be applied in compliance with the Treaty[121], there is a little room to argue that the third-country nationals, in the absence of specific legislation, can rely on the principle of non-discrimination on grounds of nationality in order to benefit from the rights attached to the EU citizenship status. Whether such possibility, as Wiesbrock asserts, can be inferred from the Court's ruling that in cases where Article 18 of the TFEU is not applicable, the general principle of non-discrimination on grounds of nationality applies[122], remains to be seen.

Finally, the most explicit connection between EU citizens' rights and the rights of third-country nationals the Court made in the *Chakroun* case, probably the most decisive case for migrants' integration in EU.[123] In reviewing the Dutch Civic Integration Act, which required migrants who wanted to migrate to the Netherlands for family reunification or formation first to pass a pre-departure integration tests, the Court imposed significant limits to integration measures imposed by Member States and the protection afforded to the right to family life. The Court found that actions taken by states must not be used to undermine the effectiveness of the Family Reunification Directive adopted on the EU level.[124] Insisting on analogy between the case law applicable to EU citizens and third country nationals, it established a uniform norm for protecting the family life of third country nationals and invalidated any distinction made at the national level according to the place or period of time that the marriage was concluded.[125] Although the *Chakroun* case concerns family migration, it has much wider implications since the analogy drawn between EU citizens' rights and third-country nationals' rights could be applied in other situations as well.

IV
CONCLUSIONS

This chapter aimed to examine to what extent judicial intervention could rectify the deficiencies of a state sovereignty claims to control immigration and integration.

[121] See Explanations Relating to the Charter of Fundamental Rights, [*Official Journal of the European Union*, C 303/17, 14.12.2007], p. 24.

[122] See Case C-115/08 *Land and Oberösterreich v ČEZ* [2009] ECR I-10265, para. 88-91. For a discussion, see Wiesbrock, *supra* note 81, p.82.

[123] Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-01839.

[124] *Ibid.*, para. 43.

[125] *Ibid.*, paras. 59-66.

Starting from the Alec Sweet Stone's premise that the incorporation of the ECHR into national laws has established Kantian cosmopolitan legal order in Europe, in the first part of our chapter we discussed the ECtHRs' efforts to bring in line immigration policies in Europe with a Kantian duty to treat aliens with hospitality, meaning with the respect and dignity, and thus to set important limits on a state's sovereign prerogative over immigration control. Our overview of the ECtHR's jurisprudence confirms that human rights are capable of overcoming the claims of sovereignty, at least in respect of territorial inclusion/exclusion. We have demonstrated that the ECtHR effectively challenged states' exercise of the sovereign prerogative over immigration, primarily by applying the refugee law principle of *non-refoulement* in the ECHR context. The protection afforded by the ECtHR is narrow but nevertheless makes human rights (not the citizenship status) the basic common denominator of the human entitlement in the cases of the territorial inclusion/exclusion in the CoE Member States.

The second part of this chapter was built on the idea that the right to seek admission into political community is a moral right grounded in the recognition of the refugee as an autonomous person, who as such is entitled to citizenship. Knowing that most EU Member States have stringent rules on naturalization, we have focused on the citizenship jurisprudence of the Court of Justice of the European Union to assess to what extent transnational judicial review has become a successful mechanism to undermine the monopoly of the Member States in determining the issues of inclusion and identity. Although the Court has not established that EU citizenship represents a significant limit to Member States' sovereign power to decide who are members of their political community and despite EU citizenship exclusionist nature, we have shown that the Court's activist approach has upgraded EU citizenship concept to 'a status of social integration' and thus facilitated the integration of third/country nationals notwithstanding the sovereign right of the Members States to control the integration policy.

Summary

This chapter examines to what extent judicial intervention can rectify the deficiencies of a state sovereignty claims to control immigration and integration. Immigration issues are discussed from the point of the European Court of Human Rights' standards pertaining to the territorial inclusion/exclusion of aliens in/from the Council of Europe (CoE) Member States, while the integration issues are examined through the lenses of the citizenship jurisprudence of the Court of Justice of the European Union.

First, the chapter demonstrates that the European Court of Human Rights effectively challenged CoE's member states' sovereign prerogative in the context of territorial inclusion/exclusion, primarily by applying the refugee law principle of *non-refoulement* in the ECHR context. The protection afforded by the Court is thus narrow but nevertheless makes human rights the basic common denominator of human entitlement in circumstances of the territorial inclusion/exclusion in the CoE member states.

Second, we have showed that although the Court of Justice of the European Union has not established EU citizenship as a significant limit to Member States' sovereign power to decide on the membership in their political community, nevertheless, it has managed to upgrade EU citizenship concept to 'a status of social integration', and facilitate social integration of third country nationals albeit the sovereign right of the Member States to control the integration policy.

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ИМИГРАЦИЈА И ИНТЕГРАЦИЈА ПУТЕМ СУДСКОГ ОДЛУЧИВАЊА У ЕВРОПИ: ПОСЕБНИ ИЗАЗОВИ ЗА СУВЕРЕНИТЕТ ДРЖАВА

Резиме

Смештена у контекст европских интеграција, дискусија у овом поглављу бави се садржајем и дометом права држава да суверено одлучују о политикама имиграција и интеграција. Питање имиграција разматра се на основу праксе Европског суда за људска права која се тиче питања уласка и останка странца на територији држава Савета Европе (СЕ), а питање интеграције кроз призму праксе Суда правде Европске уније која се тиче грађанства Уније.

Ауторке долазе до два закључка. Прво, Европски суд за људска права је делотворно ограничио коришћење суверених прерогатива држава чланица СЕ у односу на имиграцију странца, првенствено примењујући начело *non-refoulement* из избегличког права. Овакво ограничење је уског опсега, но ипак налаже да у одређеним околностима поштовање права буде критеријум уласка на територију (одн. останка на територији) државе СЕ, а не држављанство појединца. Друго, иако Суд правде Европске уније није довео до тога да грађанство Уније представља основ за политичку интеграцију држављана трећих држава, ипак, овај суд је омогућио њихову друштвену и економску интеграцију систематским тумачењем концепта грађанства Уније, које је због тога означено као „статус друштвене интеграције."