EUROPE INSIDE OUT

EUROPEAN CITIZENSHIP AS A QUESTION OF INCLUSION VERSUS EXCLUSION

CONTENTS

PROLOGUE

This will be an unconventional prologue; similar to the unconventionality of this BA thesis, perhaps. The thesis can be seen as a hybrid between an academic empirical piece of research on European asylum policy and a more conceptual and theoretical essay on what European citizenship does or could entail. These two topics might seem highly unrelated, yet there is no need to worry. The link between the two will be thoroughly, and hopefully coherently, explained in the upcoming eighteen thousand or so words.

The unconventionality of this prologue lies in the fact that I am not quite sure whether it is appropriate to write a prologue to a BA thesis. The main reason for this prologue's existence, however, is the existence of its counterpart: the epilogue. In this epilogue, I am ending this thesis on a personal note. It is however recommended to read the rest of the thesis first. An epilogue should be accompanied by a prologue, I figured, for nothing exists without its antithetical other. This fascination with binary oppositions also offers the foundation for scrutinizing European citizenship as a matter of inclusion and exclusion. However, by stating this I do not dare to imply that the world is black and white. That would be a very narrow-minded view, specifically when it comes to international relations, which are colored in many grey hues after all.

Now that this prologue has come into existence, I would like to use it to firstly thank my supervisor Dr. Mathieu Segers for all the time he has spent listening to my incoherent ideas, reading my long-winded concept versions and explaining to me what I was thinking before I understood it myself. A thank you is also in order towards my parents, who never cease to support me in everything I do and wherever I go. The last thank you is for the best of friends who still talk to me after months of being able to talk about one topic only, namely European citizenship.

With this thesis I am concluding four years of studying at Utrecht University. It was good.

1. INTRODUCTION

'It is about Europe, it is about YOU.' The European Union (EU) uses this credo to promote its newest milestone: 2013 has been appointed as the Year of the European Citizen.[1] Such a shame however that the European citizens will not be joining in on the festivities. This is not even because the Euro crisis has spoilt their mood; the problem is that they simply do not know that they are the ones who are supposed to celebrate. As subsequent Eurobarometer surveys on European identity[2] and European citizenship show, only few citizens feel to be part of a European transnational citizenry.[3] And even less people know what this term entails.[4]

The number of people that states to feel European is slight compared to people who express strong feelings towards their national identity: a mere 53 percent compared to 90 percent.[5] Moreover, only 46 percent of respondents say they know what the term European Citizenship means.[6] In politics and media, expressions of national identity are amplified[7]. Skeptics claim that no such thing as 'a European identity' ever existed, but that it has always been solely an elitist project imposed by Eurobureaucrats and Europhiles. They argue that inhabitants of Member States have cultures, traditions and religions so different from each other that they could never converge into a communal citizenry. Moreover, they say that the crisis has shown that the people of Europe do not feel any sense of solidarity towards each other.[8] Is perhaps European Citizenship merely an illusion and has, in fact, national citizenship always remained the status quo of how to interpret identity in Europe?

Regardless of the criticism and even though this transnational interpretation of citizenship does not seem to play a significant role in the daily lives of Europe's people, the term 'European citizenship' does exist institutionally. The official definition of this notion has been laid down in the treaties of the European Union.[9] The institutionalization of EU citizenship proves that, apparently, European institutions as well as Member States have considered the establishment of a notion of European citizenship to be relevant. Relevant yes, but clear? No. The European institutions have not clarified what the essence of European Citizenship exactly is; this thus forms a fertile matter for discussion in politics as well as in academics. The general notion of citizenship can be interpreted in many ways,

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[1] European Union, 'European Year of Citizens 2013', (version 8 May 2013) http://europa.eu/citizens-2013/ (14 June 2013).

[2] To be sure, identity is not the same as citizenship and the terms are not interchangeable. However, the connection between identity and citizenship is taken as a starting point of this thesis. Citizenship is thus seen as a proxy of identity.

[3] H. Zimmerman and A. Dür, 'Can There Be a Common European Identity?' in: *Key Controversies In European Integration* (Houndmills 2012) 95.

[4] European Commission, 'Flash Eurobarometer 365: European Union Citizenship', (February 2013), obtained at: http://ec.europa.eu/public_opinion/index_en.htm (14 June 2013).

[5] Zimmerman and Dür, 'Can There Be a Common European Identity?', 95.

[6] European Commission, 'Flash Eurobarometer 365: European Union Citizenship', (February 2013), obtained at: http://ec.europa.eu/public_opinion/index_en.htm (14 June 2013).

[7] M. Sommer, 'Het zit niet snor met de Europese identiteit en Timmermans weet het', *De Volkskrant online,* 24 February 2013, http://www.volkskrant.nl/vk/nl/6235/Martin-Sommer/article/detail/3399142/2013/02/24/Het-zit-niet-snor-met-de-Europese-identiteit-en-Timmermans-weet-het.dhtml (14 June 2013).

[8] S. Jenkins, 'Europe is turning back to national identity – and it's exhilarating', *The Guardian online*, 15 September 2011, http://www.guardian.co.uk/commentisfree/2011/sep/15/europe-national-identity-debt-crisis (14 June 2013).

[9] European Union, Amsterdam Treaty (10 November 1997) obtained at: www.eur-lex.europa.eu (14 June 2013).

and indeed history has brought about many different explanations of this term. European citizenship specifically is even more complicated to grasp, because its transnational character is unprecedented in history.

This thesis will scrutinize European citizenship and attempt to contribute to the discussion of what this transnational interpretation of identity can entail. To do this, this thesis will take a possibly unexpected approach. This thesis will closely investigate European asylum policy, to this way learn more about what citizenship entails when regarding it as a matter of inclusion and exclusion.[10] This approach is based on the reasoning that the way the European Union deals with its outsiders can shed new light on the way it sees its insiders: its citizenry. Therefore, this paper will research the development of European asylum policy since its communalization in the Amsterdam Treaty of 1997.

Asylum policy can be seen as a question that is conceptually, and often also practically, located on the boundaries between inclusion and exclusion. Asylum seekers are outsiders at first, but enter the insider's realm and attempt to become part of what it means to be an insider.[11] This thesis will try to explore how the development of European asylum policy has influenced the interpretation of European citizenship. Because European asylum policy as a whole is too broad a subject for the limited scope of this thesis, the focus of this thesis will be on the Dublin II Regulation of 2003 and its evolution up to recent days. This specific case study is chosen because it is the most talked about as well as contested part of European asylum policy.

The outline of this thesis is as follows. In section two, I will discuss different theories on (European) citizenship. Afterwards, in section three, the perhaps not directly obvious connection between citizenship and asylum policy will be further elucidated and the main research question will be posed. After the theoretical and conceptual framework, I will investigate empirical documents concerning European asylum policy. In the fourth section, I will analyze the cornerstones of communal European asylum policy as established in the Amsterdam Treaty of 1997. Subsequently, I will go into the provisions of the 2003 Dublin II Regulation in depth. In section five, I will discuss Dublin II's evolution throughout the years, as well as the effects that Dublin II has had on communal asylum policy within two categories: first, the human rights of the asylum seeker and second, European Member State solidarity. Then, in section six, I will synthesize the empirical analysis with the theoretical framework of section two to discuss the effects of the Dublin II Regulation on European citizenship. In this section I will also take a more abstract stance on what European Citizenship could mean, based on this thesis's theoretical framework. Finally, I will put forth my concluding remarks in section seven.

This thesis is not simply built on conceptual ideas: it will combine primary and secondary sources into an empirical analysis of firstly the Dublin II Regulation and secondly the theoretical ideas about European Citizenship when considered as a proxy of identity. The primary empirical sources used are mostly reports and legal documents published by the European Union institutions, concerning European asylum policy and the Dublin II Regulation in particular. The theoretical framework on European Citizenship consists of

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[10] I understand that the inclusion-exclusion opposition can be connected to many contemporary discussions regarding the morality of European asylum policy. However, to exert moral statements on European asylum policy, I believe, does not contribute to the main goal of my thesis.
[11] Although immigration policy is closely connected to asylum policy and also deals with outsiders of the European Union, this research paper will solely focus on asylum policy. This decision is simply due to the fact that both topics of policy would be too much to discuss within the scope of this thesis.

relevant theories on citizenship derived from sociology and political science. These theories are not limited to the topic of European citizenship, but also go into the general discussion of what citizenship is and are connected to debates on nationalism and identity.

Since this thesis only approaches European citizenship from a very specific angle - namely that of asylum policy - it does not claim to be able to offer an all-encompassing explanation of the term European citizenship. Considering the current historiography, a full explanation of this notion is still to be searched for. The notion is currently greatly undefined, and moreover, contested within different academic circles. The academic relevance of this paper therefore lies in its attempt to add a new perspective to this debate and thus to contribute to the current historiography on the topic.

Furthermore, this thesis' questions answer to a societal relevance also. Because of the current criticism on the European Union and everything related to it, it is ever so relevant to understand what European citizenship entails and what the notion means for insiders of the European Union, as well as for outsiders. Therefore the influence of asylum policy – specifically of the Dublin II Regulation - on this notion is analyzed in this thesis. Discussing this matter as a question of exclusion versus inclusion can possibly add a new dimension to the discussion on European citizenship, which is nowadays, in the light of the Euro crisis, mostly seen as a matter of economic relations between European Member States.[12]

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[12] J. I. Torreblanca, 'Debate: Europe has lost its citizens', *El Pais and www.PressEurope.eu,* 11 March 2013, http://www.presseurop.eu/en/content/article/3522081-europe-has-lost-its-citizens (14 June 2013).

2. DISCUSSIONS ON EUROPEAN CITIZENSHIP

What exactly is European Citizenship? Afraid so, there is no straightforward answer to this question. The historiography on what the general term citizenship can entail is enormous and reaches back into antiquity.[13] Most theories on citizenship are built on the idea that this notion is connected to the nation state as the core political entity.[14] In contrast to this, the establishment of European Citizenship has, for the first time since the Peace of Westphalia of 1648, created a transnational sense of citizenship.[15] It is thus not very surprising that European citizens, politicians and academics alike have a hard time defining what this term should mean. There is no consensus on what citizenship in a general sense entails exactly, let alone does anyone have a definition of European citizenship. The latter is a relatively new phenomenon and moreover part of another widely contested matter: European integration.

To approach the citizenship debate from another angle, this thesis considers European citizenship as a matter of inclusion versus exclusion. A logical question to ask would be in what way citizenship is a matter of inclusion versus exclusion; regardless of which definition of citizenship is used, the term always incorporates some sort of shared identity. A citizen cannot enjoy citizenship status by himself but is always part of a community - the citizenry - that is connected to a political entity. Although I just admitted that there is no consensus on the definition of citizenship, I propose to take this definition by sociologist T. H. Marshall as a neutral and inclusive starting point: 'a status bestowed on those who are full members of a community'.[16]

Furthermore, I also use political scientist Antje Wiener's idea that 'rights, access and belonging are the three historical elements of citizenship' as a foundation for this thesis's discussion on citizenship.[17] The social identity of people in a community is shaped by their connectedness to a political entity, which grants the individuals *access* to certain *rights* and obligations. It moreover provides them with a sense of *belonging*, which plays a big part in the interpretation of their individual identities.[18] Who specifically is entitled to enjoy access to rights and feel a sense of belonging and is thus a full member of a community depends on where the boundaries of this group of people are drawn. The boundaries are the fine line between inclusion and exclusion, or between insider and outsider. This analysis will therefore focus on *boundaries* between the included and the excluded.

This thesis's discussion of what European citizenship entails or could entail is founded upon a demarcated theoretical inventory. Due to reasons of time and space, this thesis can and will not go into the entire reservoir of different theories on (European) citizenship. Instead, a selection has been made of theories about citizenship, identity or European citizenship that are perceived to be relevant for this specific research. I am aware that most of the theories mentioned are not very recent. Yet, this does not mean that they are

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[13] For example Aristotle, *Politics* (Politika), as mentioned in J. Waanders, Gebrekkig Burgerschap. De Europese creatie van 's werelds eerste transnationale burger (Thesis International Relations January 2012) 12.

[14] E. Guild, *The Legal Elements of European Identity* (The Hague 2004), 8.

[15] Dora Kostakopoulou, 'European Union citizenship: Writing the Future', *European Law Journal* Vol. 13 No. 5 (2007) 624.

[16] T. H. Marshall, Citizenship and Social Class' (Cambridge 1950) in: T. H. Marshall and T. Bottomore, *Citizenship and Social Class* (London 1992) 18, as quoted in Jozef Waanders, Gebrekkig Burgerschap, 15.

[17] A. Wiener, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', *European Integration online papers* Vol. 1 No. 17 (1997) 4.

[18] Ibidem, 4.

outdated, for the theories mentioned below still prove their relevance in shaping the current discussions on European citizenship. Before the overview of these theories is presented, first a historical overview of the institutionalization of European Citizenship will be put forth.

2.1 HISTORY OF EUROPEAN CITIZENSHIP

To understand the foundations on which European citizenship was built, we should take a leap back in time, to the 1970s. According to Wiener, during this period of economic and political crises in the European Union, European politicians figured that the only way towards more unity and a stronger role of Europe in the world was to increase people's affinity with the European Union.[19] They believed that one of the root causes of the European crises was the lack of connectedness between politics and citizenry. The statement by Belgian EU commissioner Etienne Davignon that 'Europe should be personalized' exemplifies this idea.[20] This initial identity project was not so much about the institutional or legal aspects of citizenship, but rather meant to connect the people of Europe to each other and to the relatively new European political project: the European Economic Community. The foundations of this European connectedness would be certain shared democratic values.[21]

And indeed, as a result of the 1973 Copenhagen summit, the Declaration on European Identity was drawn up. This Declaration laid down the skeleton for what European citizenship should entail. It, however, was more of a conceptual interpretation of what citizenship could be, than a strictly legal document.[22] European identity as described in the document is based on the idea that the then nine countries of the European Community shared a common history and civilization, defined by common values, such as representative democracy, the rule of law and social justice and a common heritage.[23]

This common heritage would be the basis for the future significant role of the European Community in the world. To achieve this ambition, Member States – and their people – would have to work closely together. The role that Europe should play globally is in fact the main focus of the 1973 Declaration. Regardless of Europe's perceived homogeneity, the Declaration does embrace the diversity between the then nine different EU Member States. More importantly, although it defines Europe by its core European commonalities, Title I of the Declaration states that other countries can become part of the EU, as long as they 'share the same ideals and objectives'.[24] Outsiders are welcome to the EU, but only if they adhere to the common values that form the core of what it means to be European. In the 1970's, European shared values thus shaped the boundaries of what it meant to be European.

Although this first framework for European Citizenship was already established in the 1970s, it took a small twenty years until European Citizenship was added to the *acquis communautaire* and became an institutionalized legal element of the European Union. The

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[19] Ibidem, 7.
[20] AE, No. 1449, 2 February 1974, 7 as quoted in , 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective' 7.
[21] Wiener, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', 7.
[22] European Community, Declaration on European Identity (Copenhagen, 14 December 1973), obtained at: www.cvce.eu (14 June 2013).
[23] Ibidem.
[24] Ibid., Title I article 4.

term European Citizenship was first institutionalized in the Treaty of Maastricht in 1992.[25] Article 8.1 states: 'Citizenship of the Union is hereby established'.[26] This small sentence instantly started a revolution in European identity thinking: the transnational citizen was created. The content of this newly institutionalized notion however did not mention the historical, moral and communal foundations that the Declaration on European Identity focused on. Instead, the practical and legal rights that European citizens enjoy became the core of European citizenship in 1992.

In Amsterdam, the EU stepped away from seeing citizenship as establishing a European interpretation of identity based on values and heritage and instead turned it into a strictly legal term.[27] The main asset installed in Amsterdam, was that European citizens now officially enjoyed several political and civil rights: for example the right of free movement, the right to vote and the right to petition. The interpretation of European citizenship was thus moved away from the being based on a European *ethnos,* an ethnic or cultural community, towards being founded on a European *demos,* a political community.[28]

The 1992 Treaty of Maastricht was the result of its preceding Intergovernmental Conference negotiations between the at that time twelve Members of the European Union. 'The Twelve' all needed to ratify this Treaty before it would come into effect. Denmark proved to be a spoilsport when its citizens objected to the European citizenship article in a referendum; they wanted to prevent European citizenship from taking over their sovereign national citizenship.[29] To find rapprochement with the Danes, a supplementary paragraph was then included in the Maastricht Treaty, stating that European Citizenship was in not equal to national Danish citizenship. This nationalist line of thought was taken over by the other Member States. In the Treaty of Amsterdam of 1997 they decided that 'Citizenship of the Union shall complement and not replace national citizenship'.[30] The people of Europe are thus national citizens first, and only transnational citizens of the European Union secondly.

Since Amsterdam, the basic idea that European citizenship is mainly based on shared European rights, and is moreover complementary to national citizenship, has not changed much. However, defining the notion remains a 'work in process' for the European Union[31]. In the Charter of Fundamental Rights of the European Union of 2000, the rights of citizens are once more mentioned as the integral aspect of what it means to be European[32]. This document moreover emphasizes the equality of all European citizens. In 2004, the so-called Citizen Directive further emphasized the rights of the citizen to free movement and residence, which thus further increases the significance of the legalistic understanding of

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[25] European Union, Treaty on European Union, signed in Maastricht (7 February 1992) obtained at: www.eur-lex.europa.eu (14 June 2013).
[26] Ibidem, Title II Article 8.
[27] Wiener, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', 7.
[28] Compare Wiener, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', 1., Waanders, Gebrekkig burgerschap. De Europese creatie van 's werelds eerste transnationale burger. and R. Bellamy, 'The inevitability of a democratic deficit' in: *Key Controversies In European Integration* (Houndmills 2012) 64-71.
[29] Guild, *The Legal Elements of European Identity,* 36.
[30] European Union, 'Samenvattingen van de EU-wetgeving. Het burgerschap van de Europese Unie' (version without year), http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a12000_nl.htm (14 June 2013).
[31] European Commission, 'EU Citizens Report 2013', obtained at: www.ec.europa.eu (14 June 2013).
[32] European Union, Charter of Fundamental Rights of the European Union (18 December 2000) obtained at: www.europarl.europa.eu (14 June 2013).

citizenship[33]. In the Lisbon Treaty of 2007 it was defined that citizenship was no longer complementary, but instead it 'additional to' national citizenship.[34] We will not further discuss this difference, since it seems negligible; however, some scholars disagree.[35]

In 2010, the EU's Stockholm Programme was set up. It sets future ambitions up to 2014 for the European Union in the fields of justice and internal security and aims to create 'an open and secure Europe serving and protecting citizens'.[36] This shows that in the future, perhaps the official interpretation of European citizenship shifts from merely providing citizens with certain rights, towards an understanding that incorporates the EU as the 'protector' of the European citizen. As mentioned, 2013 is the year of the European Citizen. The goal of this project is more citizen participation in EU related matters.[37] These redefinitions and projects aiming at the interpretation of citizenship illustrate that European citizenship is a concept that is still in motion; a widely accepted definition is yet to be found, both by the EU institutions and by the citizens themselves.

2.2 THEORIES ON EUROPEAN CITIZENSHIP

Welcome back to the present. As we have seen, European citizenship started off as a project based on European's common heritage. The 1973 Declaration seems to constitute European identity on Jurgen Habermas's conception of what nationalism entails, namely that it is a collective consciousness based on shared traditions and history.[38] European citizenship would in this view be a transnational version of sentiments that have often been connected to nation states, founded upon people's sense of a shared heritage based on culture and traditions rooted in history. This fixation however became less prevalent in the more recent documents. The step away from the focus of common values seems to make sense when considering Europe's evolution. Whereas Europe initially was a project for sector integration conjured by six - relatively similar - Western European countries, today the European Union enfolds twenty-seven states.

European historical homogeneity can no longer be projected on the European Union.[39] Europe today is too diverse to contain a citizenship that is based on a common history or heritage. Moreover, in the 1973 Declaration on European Identity, 'the Nine' emphasized their common history but also stated to welcome outsiders from all kinds of different backgrounds.[40] They were thus willing to accept other backgrounds and traditions next to their own core heritage, since they must've known that newcomers would introduce their

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[33] European Parliament and Council of the European Union, Citizenship Directive (30 April 2004) (Dir 2004/38) obtained at: www.eur-lex.europa.eu (14 June 2013).

[34] European Union, Treaty of Lisbon (17 December 2007) Title II Article 8 obtained at: www.eur-lex.europa.eu (14 June 2013).

[35] H. de Waele, 'EU Citizenship: revisiting its meaning, place and potential', *European Journal of Migration and Law* Vol. 12 No. 3 (2010) 321-323.

[36] European Council, 'The Stockholm Programme – An open and secure Europe serving and protecting citizens' (4 May 2010) (Official Journal C 115) obtained at www.eur-lex.europa.eu (14 June 2013).

[37] European Union, 'European Year of Citizens 2013', (version 8 May 2013) http://europa.eu/citizens-2013/ (14 June 2013).

[38] J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in: R. Beiner, *Theorising Citizenship* (New York 1995) 255-281 as discussed in E. Guild, *The Legal Elements of European Identity,* 69-70.

[39] Ibidem.

[40] European Community, Declaration on European Identity (Copenhagen, 14 December 1973), obtained at: www.cvce.eu (14 June 2013).

own histories to the EU. Nonetheless, 'the Nine' at the same time indeed tried to preserve their perceived common values; this is apparent from the remark in the Declaration stating that outsiders are welcome, as long as they adhere to the European values[41].

So possibly not a common history, but shared values offered the true foundation for what it means to be European. Still, this opinion prevails under academics and Europeans alike. In this view, shared and moreover civilized values, rooted in humanism, Christianity and the Enlightenment, shape the true core of European identity.[42] Europe is seen by some as a project promoting democracy and enlightened values to its new members.[43] In fact, the European Constitution of 2004 indeed mentioned common humanist values as underlying the essence of the European Union.[44] Nonetheless, the Constitution has been rejected by national referenda in some EU Member States. Does this rejection show that the citizens of Europe no longer share these common values, if they have ever done so in the first place?

Opponents of the idea that Europe is built on common values say that these are long to be sought for in the current Europe of twenty-seven Member States. Precisely its diversity in backgrounds, thoughts, traditions, cultures and values is what makes Europe what it is now.[45] This diversity further multiplies every time a new country accedes. Moreover, they underline that even within European nations multiple values can be found, which further complicates the idea of a homogenous value system internalized in the entirety of Europe.

Sociologist Anthony D. Smith emphasizes that the cultural diversity between different European nations is the main reason why fruitful European citizenship is very unlikely.[46] His stance resembles Habermas's abovementioned view on nationalism; that it is rooted in a collective consciousness. Smith is a culturalist, who believes that 'shared experiences, cultural unity and a degree of commonality among its citizens' offer the foundations for a monoculture, on which the nation is built.[47] The nation is a cultural entity that unites people based on their belief in a common ethnicity, tradition, myths and values, which have become rooted in time. Smith does accept that within the nation, multiple and overlapping individual identities can exist, for people enjoy multiple social identities.[48] Thus, he acknowledges that citizens could simultaneously feel a sense of regional, national and even transnational sense of identity such as European citizenship. However, according to Smith, the most significant and hegemonic entity that defines collective identity is still the nation state.

European citizenship exists as an officially institutionalized notion. Regardless, Smith contends that it is a hollow term, void of cultural or historical roots.[49] Europe as a whole does not share a common culture, let alone common values. To Smith, European identity is nothing more than the sum of its parts, namely the accumulation of national identities.[50] Although he accepts that people could institutionalize or even feel a sense of belonging

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[41] Ibidem.
[42] S. Ponzanesi, '"In the Name of Europe" Introduction to special issue on Postcolonial Europe. In: Social Identities. Journal for the Study of Race, Nation and Culture. Vol. 17 No. 1 (2011) 1.
[43] D. Jacobs and R. Maier, 'European Identity: construct, fact and fiction' in: M. Gastelaars and A. de Ruijter (eds.) *A United Europe. The Quest for a Multifaceted Identity* (Maastricht 1998) 6.
[44] E. Guild, *The Legal Elements of European Identity,* 2.
[45] European Identity, Checkel and Katzenstein p. 3
[46] A. D. Smith, 'National Identity and the Idea of European Unity', *International Affairs* Vol. 68 No. 1 (1992) 55-76.
[47] A. D. Smith, 'The Resurgence of Nationalism? Myth and Memory in the Renewal of Nations', *The British Journal of Sociology*, Vol. 47 No.4 (1996) 581.
[48] A. D. Smith, 'National Identity and the Idea of European Unity', 67.
[49] Ibidem, 74.
[50] Ibid., 68.

towards Europe, his argument is that the national sense of belonging, based on common values and monoculture, is and will always be more prevalent in defining identity. This approach seems to draw close to the way European citizenship has been institutionalized in the EU treaties, namely only as a supplement to national citizenship. The friction between understanding citizenship as a national concern or as a transnational interpretation of identity proves to be integral to any discussion about European citizenship. Should we thus take Smith's word and accept the hegemony of national identity in Europe?

Social and political theorist Isaiah Berlin would not. He declared oneself against the, in his view disastrous, consequences of the belief in irreconcilable national communities founded upon distinct monocultures and historical values.[51] He proposes to step away from a narrow and nation-specific interpretation of values, to embrace pluralism instead. Pluralism is a manner to accept contesting identities, values and traditions within a certain community. Berlin emphasizes that pluralism is not equal to relativism.[52] In pluralism, one can perceive his own values as being better than others while still accepting that these others are entitled to having different values. Relativism, for its part, does not offer the opportunity to make moral statements about values, since, in this view, what is good or bad cannot objectively be pinned down. This has the effect that 'anything goes'.[53] Berlin claims that pluralism, since it allows enacting one's own values while also accepting other's beliefs, can serve as a basis for tolerant and liberal nations or communities.

Perhaps Berlin's pluralistic approach to values could be applied to the European Union, if we accept that there is no such thing as a set of fixed core values that form the foundations of the EU. Or, if we at least acknowledge that these values have lost significance over time during the European expansion process, then there will be room for all the different values that the heterogeneous inhabitants of the EU bring together into one political entity. Since Berlin's approach is not a relativistic one, certain values can still be regarded as better than others; this gives Europe the opportunity to continue to present itself as a beacon of democracy and Enlightenment while also accepting other values.

Berlin's view offers an alternative, founding the essence of what it means to be European on its non-definition: Europeanness would be based on its diverse nature. However, taking pluralism as the essence of citizenship poses a difficult task at hand, both cognitively and practically. Where does the inclusion of diversity end? Citizenship is, as we have seen in Marshall's definition, connected to a specific, delineated community. This means that there must be a line drawn between inside and outside. After all, to be able to feel part of an insider group, there must always be a defined outsider.[54] The question that remains, even now, is what the boundaries of European citizenship are.

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[51] I. Berlin, Section from 'Isaiah Berlin on pluralism' in *New York Review of Books*, Vol. XLV No. 8 (1998) obtained at: http://www.cs.utexas.edu/users/vl/notes/berlin.html (14 June 2013).
[52] Ibidem.
[53] Ibid.
[54] This argument is partly built on the Jacques Derrida's theory on binary oppositions which, in short, entails that meaning in thought and language is established through the hierarchical opposition between two contrasting notions: for example the self and the other, the good and the bad. Edward Said's theory of Orientalism is also relevant for the conceptual foundations of this thesis, for it establishes the opposition between the West and the outsider. According to Said, the (Oriental) outsider is always seen as inferior and backwards. This thesis however does not wish to go into the discussion whether Orientalism can be applied to the way Europe deals with its asylum seekers.

Political scientist and historian Benedict Anderson's thoughts spice up the discussion on the boundaries of (national) communities.[55] He poses that these boundaries are man-made. This might seem like stating the obvious, since borders and walls are all constructed by men, but what he means is that boundaries between communities are based on the imagination of the community's members. That these boundaries are imagined does not mean that they do not exist, nor that they do not have consequences for people's daily lives[56]. It merely means that they are not primordial facts of nature. [57]

In his book *Imagined Communities* Anderson has described how nationalism is a process, instead of a fixed entity based on monoculture.[58] Feelings of national identity are imagined and shaped by the people themselves, for they offer them a sense of continuity and destiny: a sense of belonging.[59] This sense of belonging is in fact imagined because although the members of the community will never meet in person, they do feel connected to each other.[60] This perceived connectedness does not have to be based on an objective common denominator that is shared by all; as long as people feel they have something in common, they do. Communities are thus social constructs, and the essence of what it means to belong to a community depends on the citizens themselves.

If the sense of belonging connected to the nation state is based on 'imagination', then why wouldn't this also be the case for European Citizenship? Anderson offers a more constructivist way of understanding European citizenship, which would be based on the shaping power of ideas. If the inhabitants of the European Union only imagine themselves to be citizens, they will be. This does not have to be based on a real communal asset that all Europeans share but can solely be based on their perception of togetherness. This view creates possibilities for synthesizing Europe's current hybrid nature with the limited notion of citizenship, which after all exists by grace of the insider-outsider opposition. This way European citizenship can be based on feelings of being European, without defining what this means. Nonetheless, the Eurobarometer shows that many Europeans in fact do not feel European and Anderson's theory thus does not seem applicable to Europe.[61]

Wiener also thinks that the term European Citizenship does not have to be defined to the letter, since citizenship in her view is shaped by people's actions within a European framework. Wiener proposes the 'constructive potential of Union citizenship', which means that participation of people within a European framework is what creates citizenship.[62] When people are traveling as Europeans, studying abroad as European, voting for European elections; that is what makes them European. These actions moreover shape people's sense of belonging towards Europe.

Wiener explains that the EU installed a highly legal interpretation of citizenship in the Maastricht treaty of 1992. This legal framework creates citizenship based on '*legal* ties of

[55] B. Anderson, *Imagined Communities*, (London 1991).

[56] D. Jacobs and R. Maier, 'European Identity: construct, fact and fiction', 5.

[57] Primordialism is the stance that national or ethnic identity is fixed in people's 'blood' and roots (Blud und Boden). In this view, national identity is a static notion, based on historical traditions, ethnic bloodlines and common culture. It is thus the opposite approach to the social constructivist stance on nationality and ethnic identity, which states that these are malleable. In academic circles that conduct research on nationalism, primordialism is considered to be mostly outdated.

[58] Anderson, *Imagined Communities,* 11.

[59] Ibidem.

[60] Ibidem.

[61] European Commission, 'Flash Eurobarometer 365: European Union Citizenship', (February 2013), obtained at: http://ec.europa.eu/public_opinion/index_en.htm (14 June 2013).

[62] Wiener, 'Assessing the Constructive Potential of Union Citizenship – A Socio-Historical Perspective'.

belonging' instead of a '*feeling* of belonging' that is based on homogenous cultural or historical identity.[63] Due to their shared rules, Europeans share legal actions, which constitute the practice of their citizenship. Wiener states that within this legal way of seeing European citizenship multiple cultural or national identities can still exist.[64] The people of Europe can thus still embrace their own cultural and national identities, while simultaneously belong to Europe, because they practice European citizenship in their daily lives. In this view, citizenship is not based on a homogeneous shared identity, but simply on the shared rules and rights that people enact.

Indeed the one thing that all European citizens have in common is their shared set of rights. From the installment of the 1992 Maastricht Treaty onwards, the European Institutions have promoted common European rights as the thing that connects the citizens of Europe. The idea that shared rights form the essence of citizenship is put forth by Habermas in his theory of constitutional patriotism.[65] This theory sees citizenship as a highly political and legal matter: instead of being rooted in ethnic or cultural aspects, citizenship is based on the rights that citizens enjoy within their political entity. The acquisition of rights – political, social, civic and economic - is indeed often considered as the essence of citizenship.[66] According to Habermas, the people of Europe are able to adopt a sense of European patriotism based on these 'European Civil Rights'.[67] The term patriotism sparks the attention since it conveys a much stronger affinity with Europe than merely the term citizenship implies.

The EU treaties' fixation on shared rights seems to show that these rights are the key to what it means to be European. But do Europeans feel more connected now that they enjoy the same rights? Do they even know? In effect, the European Union is not the only entity that is responsible for people's rights and duties. The treaties only mention a limited set of political and civil rights, for example the right to vote, to petition, to diplomatic protection and to move and reside freely.[68] Many other rights are still dependent on the national whims of Member States, which is illustrated by the interplay between national law and European law. In many policy areas, laws – and thus rights and obligations of citizens – can still be interpreted solely by the Member States. The citizen of Europe is not only accountable to the European Union as his granter of rights, but also to the nation state that he is a part of.

Apart from national and European rights there are universal rights also, as for example installed in the Universal Declaration of Human Rights of 1948. Sociologist Yasemin Soysal embraces the universality of human rights and even uses it as an argument to claim that national ways of attributing rights are outdated.[69] Citizenship in her view has become a post-national issue: rights are no longer based on a national or cultural identity, but they

[63] Ibid., 17, emphasis in original text.

[64] Ibidem, 18.

[65] J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in: R. Beiner, *Theorising Citizenship* (New York 1995) 255-281 as discussed in E. Guild, *The Legal Elements of European Identity,* 69-70.

[66] S. Hix, *The political system of the European Union* (New York 2005) 344, as cited in J. Waanders, Gebrekkig Burgerschap, 14.

[67] J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in: R. Beiner, *Theorising Citizenship* (New York 1995) 255-281 as discussed in E. Guild, *The Legal Elements of European Identity,* 69-70.

[68] European Union, Treaty on European Union, signed in Maastricht (7 February 1992) obtained at: www.eur-lex.europa.eu (14 June 2013).

[69] Y. Soysal, Yasemin, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (Cambridge 1994) as discussed in D. Jacobs and R. Maier, 'European Identity: construct, fact and fiction', 6.

are simply based on being human. She thinks the European Union, as a relatively new transnational political entity, can open the door for the global proliferation of 'rights, participation and representation in a polity'.[70] However, Soysal's all-embracing understanding of citizenship, as universal rights for all human beings, seems to actually skip the European Union as an identity project. Her idea that national identities are becoming less relevant offers a defense for the fertility of the European citizenship. Nonetheless, she envisions a sort of 'global citizenship' and thus surpasses the question of how to define of EU citizenship.

This theoretical inventory shows that the boundaries of the European citizen are not clear, but highly contested indeed. There is no definition of what it is to be European. As a starting point to understand citizenship, this thesis posed that it is a relationship between the individual and a political community, which grants this individual certain rights, access and belonging. Different views on how European *rights* and a European sense of *belonging* succeed or rather fail to shape European citizenship have passed in review. Perhaps a dive into the third, so far neglected aspect of citizenship; *access,* will offer a more comprehensive view of European citizenship. How are the boundaries towards outsiders defined and what does this mean for the interpretation of citizenship? It is time to leave the insider's perspective and instead take the outsider's point of view. For this, European asylum policy will be discussed in depth.

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[70] Ibidem, 10.

3.CITIZENSHIP AS A MATTER OF INCLUSION VERSUS EXCLUSION: WHY ASYLUM POLICY?

The fact that this notion of European citizenship still finds itself to be undefined and highly contested, provides us with the challenge to find a new understanding of this term. As said, this thesis considers citizenship as a matter of inclusion versus exclusion, for the definition of the insider's realm is greatly dependent on the boundaries that are drawn towards outsiders. This thesis will take a new angle in scrutinizing citizenship by researching the antagonist of European citizenship: European asylum policy.

At first sight it might seem that European asylum policy has nothing to do with European Citizenship. Think again. Asylum policy deals with those people who are *not* part of the European Union: outsiders. Outsiders of the European Union can be understood as the antagonist of European citizens. In EU legislation asylum seekers and refugees from outside the Union are gathered together under the term 'third-country nationals', a term which is clarified to mean anyone who is not a citizen of the Union.[71] Asylum seekers are thus officially defined as outsiders – as opposed to EU citizens who 'belong' in the European Union.

This insider-outsider nexus is the base of European asylum and immigration policy, but it is also paramount for the interpretation of the notion of European citizenship. This thesis looks at asylum policy from a European Union institutional level, to find out whether asylum policy - as well as citizenship - is decided on by the European Union, or by individual Member States. This exploration thus gives us information on whether the boundaries between insiders and outsiders are drawn on a European level or on a national level instead, which will contribute to a better understanding of the discrepancies between supranational and intergovernmental interpretations of what it means to be European.

European citizenship was officialized as a highly national concern in the Amsterdam Treaty of 1997; this document laid down that European citizenship could only be complementary to national citizenship of a Member State of the EU. Paradoxically, in the same Amsterdam Treaty, asylum and immigration matters became less of a national concern, but were turned into a supranational issue instead. Then, European legislation on asylum and immigration, the antithesis of citizenship, was transferred from the third to the first pillar of EU decision-making.[72] This pillar shift meant that decision-making on asylum and immigration policy was henceforth decided upon by means of the Community Method[73]. Decisions taken through the Community Method are mostly based on Qualified Majority Voting, which gives the European institutions the power to decide on the discussed issues in a supranational way. Supranational majority decisions disable Member States to impose a veto when they do not agree with a certain provision. From now on, in matters of asylum and immigration policy, Member States thus ran the risk to be bound by European supranational decision-making against their will.

Apparently from 1997 onwards, the way the European Union deals with outsiders – people applying for asylum - was considered to be a communal matter, subject to supranational decision-making. Contrary to this, the Amsterdam Treaty defined European citizenship as a matter of national belonging. The heart of the matter in this paradox and hence also in

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[71] European Migration Network, 'Glossary: Third Country National' (version without year)
http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=T&id=305 (15 June 2013).
[72] European Union, 'Samenvattingen van de EU-wetgeving. Geleidelijke creatie van een ruimte van vrijheid, veiligheid en rechtvaardigheid' (version without year)
http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a11000_nl.htm (15 June 2013).
[73] Today, these pillars no longer exist because they were merged in the Lisbon Treaty of 2007.

this thesis, is that there are two diverging tendencies in how to deal with all things European. On the one hand there is the national or intergovernmental approach and on the other hand the supranational or communal approach. This opposition manifests itself in different ways, for example in decision-making by means of intergovernmental Member State voting versus the supranational Community Method. It also comes back in the understanding of the self: is the definition of the relation insider/outsider a national concern, or a European communal issue?

This thesis asks whether the supranational interpretation of European asylum policy influences the intergovernmental understanding of European citizenship. It will zoom in on the Dublin II Regulation of 2003. I have chosen this specific Regulation firstly because it has been adopted as a communal EU Regulation, part of European asylum policy which was supranationalized in the Amsterdam Treaty of 1997. Secondly, Dublin II is very relevant because it has been – and still is – a widely contested Regulation throughout the entire European Union. Dublin II is the last piece of the puzzle in this thesis's main question: *what are the effects on European Citizenship, understood as a proxy of European identity, of the decisions taken within the framework of the Community Method concerning European asylum policy, when focusing on the Dublin II Regulation of 2003?*

4. EUROPEAN ASYLUM POLICY

The following two parts will analyze the founding documents of communalized European asylum policy. Asylum policy was first supranationalized in the Amsterdam Treaty of 1997 and further steps towards communalization were taken by the Tampere Conference of 1999. At this conference, the Dublin II Regulation in 2003 was set up as the most important piece of legislation within the future Common European Asylum System, the establishment of which is supposed to equalize asylum matters all across the European Union. Nonetheless, as we will find out in the upcoming two sections, in practice these documents are interpreted differently than they were supposed to in theory.

4.1 ASYLUM AND AMSTERDAM 1997

Before being able to discuss the effects of Dublin II on European *citizenship*, we have to take a step back and first consider how Dublin II has shaped European *asylum policy*. For this analysis, it is important to know the foundations on which Dublin II was constructed: the Amsterdam Treaty of 1997. In this Treaty, decision-making on asylum and immigration policy for the first time became subject to supranational EU decision-making.

Amsterdam implemented a whole set of common asylum policy rules for the EU.[74] This was due to the shift of migration and asylum policy from the intergovernmental third pillar to the supranational first pillar of EU-decision-making.[75] What exactly is this supranational framework for European asylum policy that the Amsterdam Treaty has established? First, article B of the Amsterdam Treaty touches upon the topic of asylum policy briefly. Asylum policy is considered as a matter within the framework of the area of free movement:

> 'The Union shall set itself the following objectives (...) to maintain and
> develop the Union as an area of freedom, security and justice, in which the
> free movement of persons is assured in conjunction with appropriate
> measures with respect to external border controls, asylum, immigration
> and the prevention and combating of crime.'[76]

Asylum policy here is discussed mainly as an issue of security and border control. The objective seems to keep the borders of the European Union safe so that the Member States' insider's area of freedom, security and justice can be kept in check. This is to be done while respecting measures on asylum policy and other legislation. However, what these measures entail for the asylum seeker is not specified, yet. Notwithstanding that they are still unclear, it is stated that these new rules should be implemented within a time period of five years after the Amsterdam Treaty went into force.[77] The ratification of this Treaty took place in 1999 so these measures had to be implemented at latest by 2004.

After article 73i and 73j specify on common judicial procedures, criminal strategies and border controls – all aiming at the protection of the European insider - article 73k provides

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[74] European Union, Amsterdam Treaty (10 November 1997) obtained at: www.eur-lex.europa.eu (14 June 2013).

[75] European Union, 'Samenvattingen van de EU-wetgeving. Geleidelijke creatie van een ruimte van vrijheid, veiligheid en rechtvaardigheid' (version without year)
http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a11000_nl.htm (15 June 2013).

[76] European Union, Amsterdam Treaty (10 November 1997) obtained at: www.eur-lex.europa.eu (14 June 2013) Article B, 5.

[77] Ibidem, Title IIIa Article 73i, 26.

more details on Europe's conduct regarding asylum seekers. It states that minimum standards should be established for how European Member States deal with asylum seekers.[78] First it is said that these standards should be in accordance with the Geneva Convention of 1951 and the [New York, ed.] Protocol of 1967 – these are the two documents that set the standards for refugee rights in international law. This mention is the first time that the rights of Europe's outsider are considered in this document, which implies that Amsterdam first concentrated on what European asylum policy entails for Member States and only afterwards on what it means for asylum seekers.

The attention for asylum seekers' rights is continued in paragraph 1b, 1c, 1d and 2a of article 73k, which speak of setting up minimum standards in asylum and immigration procedures throughout the EU.[79] Member States should comply with the same minimum rules for the reception of asylum seekers, the qualification of refugees and the temporary relief of people in need of protection. These paragraphs mean to create a shared bottom line for EU Member States to which they should minimally adhere. In European legislation, such an effort of creating identical rules in policy is called harmonization.

Apart from this focus on minimum standards, article 73k also zooms in on the determination of 'which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States'.[80] This shows that, although the Amsterdam Treaty has turned asylum and immigration policy into a supranational area of policy, still each Member State is *nationally responsible* for its own conduct. Moreover, communal measures concerning (illegal) immigration, entry and residence should in no way prevent national Member States from implementing their own national legislation on these issues, albeit in accordance with this Treaty and international law[81]. Further down, article 73l claims that this new legislation should in no way obstruct Member States' ability to confirm internal security and law and order.[82] Article 73p describes the role of the European Court of Justice (ECJ), which is only to remain marginal and secondary to national court's decisions on asylum policy.[83] Member States thus keep considerable individual freedom of action in these matters.

The Amsterdam Treaty proves to be indecisive about choosing 'the every Member State for itself' or instead proposing a truly communal set of rules for European asylum policy. In paragraph 2b of article 73k, it is said that there should be a 'balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'.[84] This clause illustrates the discrepancy between the emphasis of *individual* Member State responsibility for asylum policy within a *communalized* framework which should lead to balance and cooperation. Member States of the EU are urged to work together to find *balanced* solutions for asylum and immigration matters, although the responsibility for this is purely individual. Balanced solutions, mind you, are not the same as *joint* solutions.[85]

All in all, the Amsterdam Treaty has shifted power to the European institutions by making asylum policy subject to supranational decision-making, by means of Qualified Majority Voting and the co-decision procedure; the supranational shared decision-making method

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[78] Ibidem, Title IIIa Article 73k, 27.

[79] Ibidem.

[80] Ibidem.

[81] Ibidem.

[82] Ibidem, Title IIIa Article 73l, 28.

[83] Ibidem, Title IIIa Article 73p, 30.

[84] Ibidem.

[85] Ibidem, Title IIIa Article 73n, 29.

enacted by the European Parliament and the Council of the European Union.[86] In practice however, the document still gives Member States a lot of discretionary power in the interpretation of the Treaty's provisions. The Treaty installs minimum standards for asylum seekers' rights, but does not specify what these rights or these minimum standards entail precisely. The Member States are furthermore supposed to balance their efforts in asylum policy, but this responsibility is defined as a purely national concern instead of a communal European issue. Amsterdam aims at dividing responsibility instead of sharing it. In the end, Member States can still go their own way within the framework of communal asylum policy. In this we find an example of the friction between intergovernmental versus supranational ways of exerting agency within the European arena.

4.2 COMMON EUROPEAN ASYLUM SYSTEM 1999 AND THE DUBLIN II REGULATION OF 2003

As seen in the previous section, the Amsterdam Treaty of 1997 did not create straightforward common rules for European asylum policy, but merely rendered a vague and multi-interpretative basic framework for 'minimum standards' and 'a balance of effort'.[87] It is not made clear what these minimum standards entail exactly, or what a 'balance of effort' signifies for the Member States of the European Union as well as for the asylum seeker. The further crystallization of these basic guidelines was to be done by future legislation.

A few months after the ratification of the Amsterdam Treaty on May 1st, 1999, the Tampere European Council took place on October 15th and 16th, 1999. During this conference, the Member States agreed on establishing the Common European Asylum System (CEAS).[88] This System can be seen as the practical result of the theoretical guidelines that Amsterdam put forward. The CEAS was supposed to become the basis for common legislation on European asylum matters. The System was to go through several phases, of which the final one should be concluded in 2012. By then, Europe was supposed to share a common asylum procedure and a uniform status for asylum seekers, valid in every Member State of the European Union.[89] This however has not been achieved in time, since the European Union is still working on CEAS's conclusion at this moment of writing[90].

The Tampere Conference resulted in the Tampere Programme of 1999–2005, which adopted a wide set of European asylum laws. These included four main acts: the Directive on reception conditions for asylum-seekers, the Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status, the Directive on asylum procedures and finally the Dublin II Regulation.[91] While the first three rules are Directives, the Dublin Regulation is distinct since it is, as its name makes clear, a Regulation. What is the difference? Under European law, Member States are obliged to make sure that the

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[86] Ibidem, Title IIIa Article 73o, 29.

[87] Ibidem, Title IIIa Article 73k, 27.

[88] European Council, 'Tampere European Council 15 16 October 1999 Presidency Conclusions' (15 and 16 October 1999) obtained at: http://www.europarl.europa.eu/summits/tam_en.htm#a (16 June 2013).

[89] European Council on Refugees and Exiles, 'History of CEAS' (version without year) obtained at: http://www.ecre.org/topics/areas-of-work/introduction/194.html (16 June 2013).

[90] European Union, 'Press Release. Commissioner Malmström welcomes the European Parliament's vote on the Common European Asylum System' (12 June 2013) (MEMO/13/534) obtained at: www.europa.eu (17 June 2013).

[91] European Commission, 'Home Affairs. Common European Asylum Policy' (version 12 June 2013) obtained at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm (16 June 2013).

objectives of a Directive are met by a certain deadline. Regulations, however, are directly applicable, as well as binding, in all European Member States.[92] Directly from Dublin II's adoption onwards, decisions based on this Regulation thus weigh heavier than national legislation on asylum. Whereas the Amsterdam Treaty still left Member States with great discretion in interpreting their conduct on asylum policy, the establishment of the CEAS in 1999 was supposed to be a further stride towards the supranationalization of European asylum matters.

The binding factor of the Dublin II Regulation already implies that within the CEAS, Dublin II is the most important rule. It was based on the earlier, intergovernmentally adopted, Dublin Convention of 1990. This Convention also determined Member State responsibility in asylum applications, but after Amsterdam it needed to be revised to fit into the communal framework of the CEAS.[93] Dublin II's implementation was meant to further communalize European asylum policy and lead to a common procedure and a uniform status for asylum seekers throughout the entire EU. The number of signatory countries to Dublin II implies that it has been successful in its goals to harmonize asylum policy: the Regulation has been signed by all Member States, including the UK and Ireland although these two countries have opted out of the Schengen Agreement.[94] Non-Member States Liechtenstein, Switzerland, Iceland and Norway have adopted Dublin as well. Denmark also adheres to Dublin II since it has established a special agreement with the European Union in 2006.[95]

Officially, Dublin II is called the 'Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national'.[96] This name shows that notwithstanding its communal goals, Dublin II still sees asylum responsibility as a strictly national concern. The Dublin II Regulation establishes the principle that only one Member State is responsible for examining an asylum application. This unambiguous responsibility will prevent abuse of Member States' hospitality: it prevents asylum seekers from submitting several applications in different countries - so-called 'asylum shopping'.[97] On the other hand, Dublin II is meant to grant asylum seekers more clarity about their

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[92] European Commission, 'Immigration Portal. Explaining the Rules' (version 16 August 2011) obtained at: http://ec.europa.eu/immigration/tab1.do?subSec=36&language=7$en (16 June 2013).
[93] European Commission, 'Commission Staff Working Paper. Revisiting the Dublin Convention' (21 March 2000) (SEC (2000) 522) obtained at: www.statewatch.org (16 June 2013).
[94]European Union, 'Summaries of Legislation. Dublin II Regulation' (version 18 November 2011) obtained at:
http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asyl um_immigration/l33153_en.htm (16 June 2013).
[95] European Union, 'Summaries of Legislation. Participation of third Countries in Dublin and Eurodac' (version 8 April 2008) obtained at:
http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asyl um_immigration/l14515_en.htm (16 June 2013).
[96] European Council, 'Dublin II Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).
[97] European Union, 'Summaries of Legislation. Dublin II Regulation' (version 18 November 2011) obtained at:
http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asyl um_immigration/l33153_en.htm (16 June 2013).

application, by avoiding the risk that they are sent from one country to another.[98] Member States responsibility under Dublin is based on a list of criteria in hierarchical order:[99]

> Summary of the Dublin II criteria in order of relevance:
> - Family unity
> - Issuance of residence permits or visas
> - Illegal entry or stay in a Member State
> - Legal entry in a Member State
> - Application in international transit area of an airport
> - In case this criteria are not applicable the first Member State of entry is responsible
> - For humanitarian reasons other states may use discretionary power to 'interfere' with these criteria

The objective of this Regulation is to clarify responsibility of Member States based on fair and objective criteria so that asylum applications would be dealt with easily and efficiently.[100] The Regulation effectuates that when an asylum seeker illegitimately – according to above-mentioned criteria - applies for asylum in a certain country, he will be transferred back to the country that is responsible for him, again according to these criteria. These movements are the so-called Dublin transfers. How do these transfers work exactly? The Member State in which an asylum seeker is illegitimately present at that time should request the responsible country to *take charge* of the asylum seeker. Most requests however are based on the 'first entry principle' which comes into effect when none of the other criteria are applicable.[101] In this case the country in which the asylum seeker first entered the EU is responsible. A request towards this country to take responsibility of the asylum seeker is called a *take back* request.[102] When for example a person applies for asylum in Belgium but has entered the EU in Greece and is subject to the 'first entry criterion', Belgium should transfer him back to Greece.

Although the transfers implemented by Dublin II indeed seem to indicate that Dublin has sufficiently resulted in a 'balance of effort' between European Member States when taking care of asylum seekers, in fact the transfers enhance the intergovernmental idea that Member States are separately responsible for their own conduct. Dublin II seems to further turn asylum policy into a matter of every country for itself since asylum seekers can only apply to separate Member States and not to the EU as a whole. Moreover, there is no mention that the amount of asylum seekers in each country should be balanced fairly in accordance with the number of residents and size of the country. Dublin II is set up as a part of the CEAS and should be adhered to by all its signatory countries. This implies that the Regulation is very supranational, but in fact it still treats the acceptance of an asylum seeker as a national issue. This discrepancy has been the reason for strong criticism on Dublin II.

Apart from being one of the most important pillars of the CEAS and although it has been adopted by all Member States, the Dublin II Regulation is without any chance the most contested aspect of the CEAS. For years, Dublin II has been an internal subject of discussion in the European Union, as well as an external point of debate considered by

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[98] Ibidem.

[99] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

[100] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

[101] Ibidem.

[102] Ibid.

outside institutions. The European Parliament has exerted criticism and the European Court of Human Rights has played an even bigger part in establishing jurisprudence to change the interpretation of the Regulation.[103] On top of this, international non-governmental organizations (NGO's) specialized on the topic of asylum and refugee matters such as the United Nations High Commissioner for Refugees (UNHCR), Statewatch or European Council on Refugees and Exiles (ECRE) have criticized Dublin II's effects.[104]

As a result of the criticism, Dublin II has been under construction the past years. In 2008 the European Commission proposed a recast of Dublin II. As we speak, in June 2013, after years of discussion and stalemate, the European Union is on the verge of implementing the revised Dublin III Regulation.[105] This revision is the result of interaction between the European Union institutions, Member States and NGO's. The criticism on Dublin II, as well as the revisions proposed in 2008, will be discussed in the following section.

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[103] Library of the European Parliament, 'Library Briefing. Transfers of asylum seekers and fundamental rights (30 November 2011) obtained at: www.europarl.europa.eu (17 June 2013).
[104] Ibidem.
[105] European Commission, 'Home affairs. Countries responsible for asylum application (Dublin)' (version 12 June 2013) obtained at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm (17 June 2013).

5. DUBLIN II REGULATION IN MOTION

The upcoming parts will discuss Dublin's evolution throughout the years as well as its effects on communal European asylum policy. Dublin II is part of the CEAS and it was thus set up to further communalize asylum policy in Europe. However, in the following section we will see that there is a discrepancy between the communal ideas behind Dublin II and its national execution by Member States. Specific attention herein lies with the two main subjects of criticism on Dublin II, namely its insufficient adherence to asylum seekers' human rights and the lack of Member State solidarity in asylum policy matters. These two topics will illustrate how Dublin II has given supranationally installed EU common asylum policy an intergovernmental twist.

5.1 DUBLIN II AND HUMAN RIGHTS

The decision to discuss human rights as a separate topic is not only chosen because Dublin II has been heavily criticized regarding its human rights provisions. Another reason is that an analysis of the rights granted to the asylum seeker by the EU can contribute to understanding the division between citizen and outsider of the EU. As we have seen, the European Union itself interprets European shared rights as the core of European citizenship. Questioning what kind of rights the asylum seeker enjoys, and whether these are similar or instead very different than those of the citizen, thus contributes to the analysis of the insider-outsider divide within the European Union.

Dublin II states to comply with certain human rights provisions. The Amsterdam Treaty poses that European asylum policy should be congruous to the provisions set up in the Geneva Convention of 1951, also called the Refugee Convention,[106] and the New York Protocol of 1967.[107] The Dublin II Regulation claims to also adhere to the Charter of Fundamental Rights of the European Union.[108] This Charter mainly reaffirms the legitimacy of the two other international law documents within a European framework.[109] The 1951 Refugee Convention defines a refugee as 'someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion'.[110] It lays down certain minimum standards for the reception of refugees such as 'access to the courts, to primary education, to work, and the provision for documentation.'[111] The New York Protocol has expanded the Convention to be applicable universally, to all refugees in any country in the world.[112]

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[106]There are several Geneva Conventions. In this thesis specifically the United Nations Convention Relating to the Status of Refugees (CRSR) Geneva Convention of 1951 is discussed.

[107] European Union, Amsterdam Treaty (10 November 1997) obtained at: www.eur-lex.europa.eu (14 June 2013).

[108] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

[109] European Union, Charter of Fundamental Rights of the European Union (18 December 2000) obtained at: www.europarl.europa.eu (14 June 2013) article 18.

[110] United Nations, Convention Relating to the Status of Refugees (CRSR) Geneva Convention (28 July 1951) and United Nations, New York Protocol (31 January 1967) both obtained at: www.unhcr.org (17 June 2013).

[111] United Nations, Convention Relating to the Status of Refugees (CRSR) Geneva Convention (28 July 1951) obtained at: www.unhcr.org (17 June 2013).

[112] United Nations, New York Protocol (31 January 1967) obtained at: www.unhcr.org (17 June 2013).

There is only a fine line between the definition of refugee and the definition asylum seeker. In general, a refugee becomes an asylum seeker at the moment that he applies for asylum, after he is already present in the country that he seeks refuge in.[113] The criteria on which a person can base a legitimate asylum application differ per national constitution.[114] The CEAS of 1999 aims to communalize reception criteria for asylum seekers in the European Union, taking the Geneva Convention and New York Protocol as a foundation.[115] In these documents, great importance is attributed to the term *non-refoulement,* which entails that refugees or asylum seekers will not be sent back to an unsafe state. This key notion in international law cannot be overruled by any entity.[116] It is important to note that the Dublin II Regulation is founded on the premise that all European Member States are considered as safe states, so the transfer of refugees across the EU would, in this view, never violate the non-refoulement principle.[117] We will return to this premise further in this thesis.

Regardless of Dublin's proclamation to adhere to international human rights standards, it seems that its main priority is not the protection of the asylum seeker. The articles of the original Dublin II Regulation put greater importance on the clarification of Member State responsibility.[118] The greater part of the document informs Member States about when they are responsible to take up an asylum seeker. Before, we already saw that the Amsterdam Treaty also emphasized the national responsibility of the Member State regarding asylum policy.[119] Why is this relevant? When the main goal of European asylum policy is to enhance clarity for Member States, its priority is not how it influences the rights of the asylum seeker but more so how it affects the security of the people within the European area of free movement. In other words, asylum policy becomes a means to improve the rights of the European 'insider', instead of seeing it as a goal in itself.

An illustration of this priority goal of enhancing clarity for Member States' instead of improving the wellbeing of the asylum seeker is the statement that one of the main reasons for the establishment of Dublin II was the prevention of 'asylum shopping'.[120] This seems to illustrate that Dublin II tries to serve Member States interests by fighting malpractices by asylum seekers. The use of the EURODAC system is meant to contribute to the prevention of 'asylum shopping' by identifying third country nationals coming into the EU through registration of their fingerprints. EURODAC was created in 2000, under the

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[113] United Nations Education Social and Cultural Organisation, 'Social and Human Sciences. Asylum Seeker' (version without year) obtained at: http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/asylum-seeker/ (17 June 2013).
[114] Ibidem.
[115] European Commission, 'Home Affairs. Common European Asylum Policy' (version 12 June 2013) obtained at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm (16 June 2013).
[116] United Nations, Convention Relating to the Status of Refugees (CRSR) Geneva Convention (28 July 1951) and United Nations, New York Protocol (31 January 1967) both obtained at: www.unhcr.org (17 June 2013).
[117] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).
[118] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).
[119] European Union, Amsterdam Treaty (10 November 1997) obtained at: www.eur-lex.europa.eu (14 June 2013).
[120] European Union, 'Summaries of Legislation. Dublin II Regulation' (version 18 November 2011) obtained at: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33153_en.htm (16 June 2013).

Dublin Convention, and is seen as integral to Dublin's well-functioning.[121] It provides the European Union Member States with a database of identity information of outsiders trying to enter the EU and thus contributes to close regulation of their influx.[122] Although it could be argued that the regulation of asylum seekers in fact serves their well-being, the EURODAC system mainly makes the implementation of policy easier for Member States. Hence Dublin II seems to have taken the responsibility of the Member State as its starting point, instead of the rights of the asylum seeker.

The EURODAC system moreover shows the discrepancy between the idea that Dublin is a communal European regulation, adopted by supranational decision-making through the Community Method, and its intergovernmental execution. When a Member States wants to figure out whether it is *individually* responsible for taking up an asylum seeker, it will resort to EURODAC data.[123] Thus, if EURODAC works properly, it will contribute to increased division of responsibility between countries. However, for EURODAC and the Dublin II Regulation to function properly, good cooperation and communication between Member States is needed. It is after all a shared database which only works if all Member States *communally* join in the maintenance of this system.[124] EURODAC shows the paradox that Dublin is a communal system, based on close cooperation between Member States, but divides responsibility in an intergovernmental way, among individual Member States.

5.1.1 CRITICISM

This priority focus on Member State responsibility has been subject to criticism.[125] To be sure, the original Dublin II Regulation does not neglect to mention human rights of third country nationals completely. Dublin II indeed incorporates clauses that concentrate on the wellbeing of the asylum seeker. Another objective of the Regulation, for example, is to increase clarity of the European asylum application procedure for asylum seekers to this way enhance their rights.[126] The hierarchical responsibility criteria are, apart from fighting 'asylum shopping', meant to prevent the possibility that asylum seekers will be sent from state to state without being accepted anywhere. According to the Dublin II document, these criteria offer the asylum seeker 'fair and objective rules' when applying for asylum.[127] However, it must be mentioned that the interpretation of this fairness and objectivity is entirely up to the European Union and the Member States, without granting much say to the asylum seeker.

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[121] European Council, 'Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention' (11 December 2000) (EC No 2725/2000) obtained at: www.eur-lex.europa.eu (17 June 2013).

[122] Ibidem.

[123] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

[124] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 12.

[125] European Council for Refugees and Exiles, 'Report on the Application of the Dublin II Regulation in Europe' (March 2006) obtained at: http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (17 June 2013).

[126] European Union, 'Summaries of Legislation. Dublin II Regulation' (version 18 November 2011) obtained at: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asyl um_immigration/l33153_en.htm (16 June 2013).

[127] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) Article 4, obtained at www.eur-lex.europa.eu (17 June 2013).

Although the Dublin was thus partly established to make life easier for asylum seekers, this set of rules has received fierce criticism for doing the opposite. In 2006, an extensive report on the Dublin II Regulation was published by ECRE, followed shortly by one by the UNHCR.[128] Their most pressing criticism is that the Dublin II system is intrinsically at fault, since the Dublin transfers that supposedly improve asylum seekers' chances to find a place of refuge in reality only make the procedure more difficult[129]. The critics state that the transfer system forces asylum seekers to move around Member States for too long stretches of time, which leads to the rupture of families and to insufficient provisions for children or ill people.[130] It moreover causes psychological problems.[131] Supposedly, bad cooperation between Member States and big differences in the way Member States conduct the Dublin provisions further aggravate these issues.[132] Member States have so much freedom in the application of Dublin II that the execution of the system varies greatly per country. This shows that nation states enjoy great individual power in implementing the Dublin II Regulation and hence also in communal European asylum policy.

Another criticism on Dublin is that is has caused for a surge in the detention of asylum seekers.[133] Member States indicate that asylum seekers who will be transferred often disappear and as a measure to keep them in place these countries increasingly use detention.[134] In an evaluation of Dublin II in 2007, the Commission has admitted that detention of asylum seekers should only be used as a last resort.[135] However, the interpretation of when detention is needed is up to the discretion of the Member States and the Dublin II Document does not state strict common rules for them.[136]

The same goes for the provision of information towards asylum seekers. Asylum seekers often are not aware of the Dublin Regulation or do not know about their legal rights to object to it. According to the Commission, the way information is granted to asylum seekers varies greatly per Member State.[137] Dublin II has set up minimum standards, but

[128] European Centre for Refugees and Exiles, 'Report on the Application of the Dublin II Regulation in Europe' (March 2006) obtained at:
http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (17 June 2013) and United Nations High Commissioner for Refugees, 'The Dublin II Regulation. A UNHCR discussion paper' (April 2006) obtained at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4445fe344 (17 June 2013).
[129] European Council for Refugees and Exiles, 'Report on the Application of the Dublin II Regulation in Europe' (March 2006) obtained at:
http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (17 June 2013), 5.
[130] United Nations High Commissioner for Refugees, 'The Dublin II Regulation. A UNHCR discussion paper' (April 2006) obtained at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4445fe344 (17 June 2013), 21-30.
[131] European Council for Refugees and Exiles, 'Report on the Application of the Dublin II Regulation in Europe' (March 2006) obtained at:
http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (17 June 2013), 162.
[132] Ibid., 24.
[133] Ibid., 162-163.
[134] European Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' (6 June 2007) (COM(2007) 299 final) obtained at: www.eur-lex.europa.eu (17 June 2013), 8.
[135] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 30.
[136] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).
[137] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 36.

leaves Member States with great discretionary power in implementing these. Simply put, the lack of communal rules seekers grants Member States the possibility to do what they wish. In fact, all these different points of criticism show that the great discretionary power of Member States in the execution of Dublin II is a paramount reason for why there are such big – unacceptable – variations in the way asylum seekers are treated throughout the EU.

In stark contrast to this criticism, the 2007 Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system presented a positive judgment on Dublin II.[138] This Report is the execution of a clause in the Dublin II Regulation that obliges the European Commission to evaluate the effects of the Regulation at latest three years after its ratification.[139] For this assessment, it has taken into account the UNHCR and ECRE reports, together with assessments by Dublin II's Member States.[140] These intergovernmental evaluations take place every six months behind closed doors, therefore is not clear what the Member States' precise stance in these discussions has been.[141]

In this 2007 evaluation Report, the Commission claims that Dublin II's goals, on the whole, have been achieved.[142] It does not specifically mention the insufficient safeguarding of asylum seekers' rights, stressed so vehemently by the NGO's, but it does admit that concerns remain regarding the practical application and the effectiveness of the system. The report claims that increased efficiency of transfers would greatly improve Dublin.[143] Even the inefficiency of transfers can be blamed on the freedom of action of Member States. There are, for example, no sanctions for countries that fail to comply with Dublin II. The Commission wants to tighten up the system to solve this problem. This way it will further strengthen separate responsibility of Member States, albeit with stronger rules. The critics take an opposite position: they prefer to revise the underlying principles of Dublin II, or rather to discard it in its entirety.[144]

5.1.2 HUMANITARIAN CLAUSE AND SOVEREIGNTY CLAUSE

Member States' discretionary power in applying Dublin II is enhanced even more by its two 'discretionary clauses'. These give the Member States the possibility to go against the grain of the regular criteria procedure and instead enact their own preferences. The Humanitarian clause was implemented to allow the Member States discretionary power to reunite family members in the case that they would be separated by the normal

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[138] European Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' (6 June 2007) (COM(2007) 299 final) obtained at: www.eur-lex.europa.eu (17 June 2013).

[139] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

[140] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 6.

[141] Because of the scope of this thesis, it was not possible to scrutinize the national position per country on this topic.

[142] European Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' (6 June 2007) (COM(2007) 299 final) obtained at: www.eur-lex.europa.eu (17 June 2013), 13.

[143] Ibidem, 13.

[144] European Council for Refugees and Exiles, 'Report on the Application of the Dublin II Regulation in Europe' (March 2006) obtained at: http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (17 June 2013), 25.

application of the Dublin II criteria.[145] The Sovereignty clause further increases Member States' national power in European asylum policy, for it gives Member States the discretionary power to take charge of a certain asylum application even when it is not supposed to do so according to the Dublin II criteria.[146]

The Humanitarian clause could be used as a humanitarian tool to improve family rights and the rights of the child.[147] However, in practice it turns out that Member States often do not apply the same criteria for considering who exactly is a family member. This causes for discrepancy in agreeing on who is actually a family member of whom; and as a result family members are not reunited. The UNHCR states that the interpretation of when to apply the humanitarian clause should be broader, and equalized in all Member States.[148] To reach this goal, Member States should improve their communication and consensus-seeking processes. This matter shows that the interpretation of this clause is entirely up to Member States' national preferences, which enhances the already intergovernmental nature of Dublin's nationally divided responsibility to take up asylum seekers.

The Sovereignty clause is meant to simplify the Dublin Regulation in case Member States cannot figure out which country is responsible for a specific asylum seeker.[149] A Member State can then individually decide to take up an asylum seeker. The Sovereignty clause could theoretically also be used as a humanitarian tool: Member States could use it to take up an asylum seeker in the case that he would be worse off elsewhere. However, it should be noted that the consent of the asylum seeker is not needed for the effectuation of the Sovereignty clause.[150] Member States can move people around according to their own preferences. This again demonstrates that Dublin in essence focuses more on the wants of Member States, than on the needs of the asylum seeker. It moreover shows how Member States are capable of following their own interpretation in the implementation of Dublin II.

5.1.3 EUROPEAN COURT OF HUMAN RIGHTS

The free reign of Member States, in combination with the insufficient attention for the rights of the asylum seekers, has in fact resulted in a number of landmark court cases by the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ). As said before, the European Court of Justice has only been granted very limited power regarding European asylum policy. National courts mostly have the final say in these matters.[151] However, the ECHR has had a big hand in shaping future jurisprudence that has great consequences concerning the execution of Dublin II. The ECJ has also been involved,

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[145] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) article 15, obtained at: at www.eur-lex.europa.eu (17 June 2013).

[146] Ibidem, article 3(2).

[147] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 24.

[148] United Nations High Commissioner for Refugees, 'The Dublin II Regulation. A UNHCR discussion paper' (April 2006) obtained at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4445fe344 (17 June 2013), 35.

[149] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) article 3(2), obtained at www.eur-lex.europa.eu (17 June 2013).

[150] European Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' (6 June 2007) (COM(2007) 299 final) obtained at: www.eur-lex.europa.eu (17 June 2013), 13.

[151] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

but to a lesser extent. Criticism on Dublin II also included the idea that the asylum seeker did not obtain sufficient information about his legal rights to object to the Dublin conduct.[152] This right to appeal is, in legal jargon, called the effective right to remedy. These court cases however show that the asylum seeker does have a chance to – successfully – object to a Dublin II transfer.

In the 2011 M.S.S. v. Belgium and Greece case, an asylum seeker (M.S.S.) appealed to Belgium's decision to transfer him to Greece, based on the Dublin II criteria.[153] The EHCR decided that the living circumstances for asylum seekers were so poor in Greece that this transfer breached the Charter of Fundamental Rights of the European Union. Strikingly, not only Greece was at fault due to its inhumane asylum conditions; also Belgium was reprimanded for having sent the asylum seeker there.[154] This case and similar ones have resulted in new jurisprudence concerning the application of Dublin II, namely that Member States are not allowed to transfer asylum seekers to other Member States in which they would risk to meet insufficient human rights conditions.[155] Member states are bound by these decisions. They can thus be seen as supranational European impositions, taking a step towards the limitation of the great discretionary power that European Member States enjoy in asylum policy matters.

These cases give us the opportunity to reintroduce the term non-refoulement. As seen previously, Dublin II was founded on the premise that all signatory countries of the Dublin II Regulation are safe states under refugee law. However, the two above-mentioned landmark case shows that in fact, not all countries within the EU are truly that enjoyable for asylum seekers. The human rights situation for outsiders varies greatly across internal European borders' since Member States have the national freedom to deal with asylum policy in their own way.

The premise moreover seems to indicate that the Regulation was built on the idea that all EU countries are capable of treating asylum seekers similarly. This idea could explain why so much attention is given to individual Member State responsibility: if all countries treat asylum seekers the same, then it does not matter where in the EU the asylum seeker finds refuge. Nonetheless, the opposite is true. Member States' application of asylum policy differs greatly per country and so the rights of the asylum seeker do too. These differences are only enhanced by the countries' great discretionary power in this matter, which thus does not benefit the human rights of the asylum seeker. Should Dublin II application be equalized to a greater extent? This question will be discussed in the following section.

5.2 DUBLIN II AND MEMBER STATE SOLIDARITY

This section will go into Member State solidarity in applying the Dublin II Regulation. Again, this topic is chosen not only because it has been subject to much debate, but also because citizenship in this thesis is considered as a sense of shared belonging between individuals within a political community. Solidarity between Member States could be the basis for a community feeling in the European Union and thus for citizenship. The topic of

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[152] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 33.

[153] European Court of Human Rights, 'Case of M.S.S. v. Belgium and Greece' (21 January 2011) (Application no. 30696/09) obtained at: www.ec.europa.eu (17 June 2013).

[154] Ibidem.

[155] Court of Justice of the European Union, 'Press Release No 96/11' (22 September 2011) obtained at: www.ec.europa.eu (17 June 2013).

Member State solidarity questions whether the lines of inclusion and exclusion in the EU are drawn along European or national boundaries.

The original Dublin II document states that the lack of internal borders within the free movement area of the EU makes it necessary 'to strike a balance between responsibility criteria in a spirit of solidarity'.[156] However, the practical execution of this intergovernmental tool does not spark a spirit of solidarity between Member States since they are still only individually responsible for offering asylum seekers a safe haven. The fact that communal networks have been set up to establish communication between Member States and European Institutions regarding Dublin II, namely DubliNet and Circa, can be used as a counterargument to this observation.[157] Consultations between the Commission and Member States take place twice a year, so that they can exchange ideas about the future of Dublin. However, during these discussions no binding decisions are taken.[158]

Simply said, European Member States can decide what they do with asylum seekers entirely by themselves. This is further exemplified by the observation that some Member States perform under par when it comes to human rights standards, such as Greece. Dublin II has not installed a truly communal and equal asylum system for Europe, but merely proposes minimum standards that should be complied with. As long as these standards are adhered to, Member States can do whatever they want. These minimum standards thus cause for great differences between Member States in applying Dublin II and they could even lead to a 'race to the bottom' in which the lowest official standards become acceptable for all countries.[159]

This inequality between Member States' standards can be explained by the fact that Dublin II is not based on a concept of *fair burden-sharing*. The number of asylum seekers that each country has to take in, according to Dublin's rules, differs greatly. The Dublin II criteria only decide who is responsible, but the Regulation provides no alleviating conditions for countries that are not capable of taking up their designated asylum seekers. Whether the number of incoming people is too high for the population size or economic capacity of Member States is irrelevant to the narrowly divided responsibility rules of Dublin II. In the 2007 Working Staff Document, the Commission actually emphasized that Dublin was never meant to balance the amount of asylum seekers in each country.[160] This seems to be a contradiction to the idea that Dublin was established to create a 'balance of effort' in the first place.

The lack of balance is precisely what also is considered to be Dublin's inherent ailment: since it divides responsibility according to certain 'objective' criteria, some Member States

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[156] European Council, 'Dublin II Regulation' (18 February 2003) (EC No 343/2003) obtained at www.eur-lex.europa.eu (17 June 2013).

[157] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 33-34.

[158] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 33.

[159] European Parliament, 'Resolution on asylum: practical cooperation, quality of decision-making in the common European asylum system' (21 June 2007) (OJ C 146 E) obtained at: www.europarl.europa.eu (17 June 2013).

[160] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 51.

will continuously be disadvantaged.[161] For example, when applying the 'first entry' criterion, border countries of the European Union are always obliged to accept more asylum seekers than centrally located countries. This is due simply to the fact that asylum seekers more often enter the outskirts of the Union first, before being able to go to the center. Southern countries like Greece thus face a much greater number of asylum seekers and carry a heavier burden.[162] This results in inhumane treatment of asylum seekers and should be changed, the critics say. The Commission has however stated that this is a misconception. It used statistics from 2005 that show that there are in effect more transfers towards centrally located countries than the border countries of the EU.[163]

In 2007, the European Commission also published its Green Paper on the Future Common European Asylum System, which made recommendations not only on the future of the Dublin II Regulation, but on the CEAS in general. This document stated that asylum policy should be improved to include true common provisions in the protection of asylum seekers, as well as enhanced solidarity between Member States.[164] It suggests installing '"corrective" burden-sharing mechanisms', not to replace Dublin II, but to complement it.[165] It accepts that although the statistics show that the objective number of transfers towards the border countries of the EU is not bigger than the number of transfers to central countries, *de facto* border regions could still face a heavier burden, simply because a higher number of people enter their territory in the first place, due to their geographical location.[166] It is very remarkable that the Commission published this Paper, when keeping in mind that the same institution, in the same year moreover, published a Report that stated that Dublin functions well on the whole and that border countries are not facing a higher burden.

Up to now, we get the impression that solely the Commission, the Member States and NGO's have a say in the future of Dublin. The European Parliament, however, also stepped into the Dublin II discussions. In two resolutions, on the future of the European asylum system and on the future of Dublin II, respectively from 2007 and 2008, it goes even further than the Commission's Green Paper. It states that binding rules and sanctions should be implemented for Member States that do not respect the rules.[167] As seen previously, Dublin II did not yet include sanctions for negligent countries.

Apart from sanctions, the Parliament also wants to install a fair burden-sharing mechanism for Member States. It proposes to reinvent asylum policy by trying out joint mechanisms for taking care of asylum seekers within a European framework.[168] The

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[161] European Council for Refugees and Exiles, 'Report on the Application of the Dublin II Regulation in Europe' (March 2006) obtained at:
http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (17 June 2013), 8-9.
[162] Ministers of Home Affairs and Internal Security from Cyprus, Greece, Italy, Malta, and Spain, 'Joint Communiqué Regarding North African Migration' (19 April 2011) obtained at: www.gov.mt (17 June 2013).
[163] European Commission, 'Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System' (6 June 2007) (SEC(2007) 742) obtained at: www.eur-lex.europa.eu (17 June 2013), 51.
[164] European Commission, 'Green Paper on the future Common European Asylum System' (6 June 2007) (COM(2007) 301 final) obtained at: www.eur-lex.europa.eu (17 June 2013) 3.
[165] Ibidem., 11.
[166] Ibid., 10.
[167] European Parliament, 'Resolution on the evaluation of the Dublin system' (2 September 2008) (2007/2262(INI)) obtained at: www.europarl.europa.eu (17 June 2013).
[168] European Parliament, 'Resolution on asylum: practical cooperation, quality of decision-making in the common European asylum system' (21 June 2007) (OJ C 146 E) obtained at: www.europarl.europa.eu (17 June 2013).

Parliament, among other ideas, proposes the resettlement of asylum seekers from overburdened Member States towards less burdened countries. It this way it tries to step away from the nationally divided responsibility and the great discretionary power for Member States that Dublin II imposes. The Parliament thus goes against the institutionalized grain completely by truly aiming at the convergence of asylum policy through the installment of supranational regulations in contrast to the inherently intergovernmental Dublin II rules.

This criticism on Dublin II attacks its core principles: whereas Dublin II divides responsibility in an intergovernmental way, the Parliament and NGO's contend that responsibility for asylum seekers should be fairly shared by the Member States. They strive to further communalize and supranationalize policy. This is in line with the goals of the Amsterdam Treaty, which made asylum policy a Community Method matter and thus subject to supranational EU decision-making. This view also complies with the Tampere Conference of 1999 and the ambitions for a CEAS. The European Commission in this matter shows two faces: in its Dublin II evaluation Report it states that Dublin II is successful as it is, but in its Green Paper on asylum policy it aims to alter Dublin II towards more supranationalism.

Regardless of this discussion, the EU had in fact already taken steps towards further communalization of asylum policy in the Lisbon Treaty of December 13, 2007.[169] It institutionalized the ambition to create a truly common asylum policy. Of course, this was already agreed on in Tampere, but Lisbon officially laid it down in the institutional foundations of the EU. The Treaty has set the way for more convergence in policy, to function as fertile ground for the completion of the CEAS by 2012. However, it has turned out that the completion of a truly Communal European Asylum System is obstructed by one of its constituents: the Dublin II Regulation.[170] Hence, the only way to effectuate common asylum policy seems by revising Dublin II.

5.3 DUBLIN II RECAST 2008

As we speak, Dublin II is in fact being reorganized.[171] This is the result of a 2008 proposal by the European Commission for a Recast of the Dublin II Regulation.[172] The Commissions alterations on Dublin are based on recommendations by the EU institutions, by Member States and by NGO's. In fact, the 2008 Recast takes a big stride in trying to improve human rights provisions for asylum seekers. It moves away from the original Dublin II Regulation, which regarded asylum policy mostly as a matter of Member State responsibility. In contrast to this, the Recast wants to enhance European asylum system as a framework for international protection.[173] It, however, remains true to Dublin II's intergovernmental interpretation of separate responsibility for Member States.

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[169] European Union, Treaty of Lisbon (17 December 2007) Title II Article 8 obtained at: www.eur-lex.europa.eu (14 June 2013).
[170] European Parliament, 'Fact Sheets on the European Union. Asylum Policy' (November 2012) obtained at: ww.europarl.europa.eu (17 June 2013), 4.
[171] European Union, 'Press Release. Commissioner Malmström welcomes the European Parliament's vote on the Common European Asylum System' (12 June 2013) (MEMO/13/534) obtained at: www.europa.eu (17 June 2013).
[172] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible
for examining an application for international protection lodged in one of the Member
States by a third-country national or a stateless person (Recast)' (3 December 2012) (COM(2008) 820 final) obtained at: www.eur-lex.europa.eu (17 June 2013).
[173] Ibidem.

The Recast focuses specifically on the right to family unity and the rights of unaccompanied minors, improved provision of information and improved legal rights, such as the right to effective remedy.[174] Also, the Sovereignty and Humanitarian clauses are altered to be used mainly as humanitarian tools. The family member criteria for applying the Humanitarian are broadened to include a wider scope of people. The sovereignty clause is amended to include the consent of the asylum seeker. These adaptations try to further converge human rights regulations within Dublin and thus indeed aim to limit Member States' discretionary room in this topic.

The Recast of 2008 furthermore addresses the lack of solidarity between Member States and the unequal burdens they face when taking up asylum seekers. It proposes to install a procedure that will enhance burden-sharing between Member States.[175] The idea is to grant the Commission the power to temporarily suspend transfers to specific countries, which cannot comply with international human rights standards or which are overburdened due to their geographical location.[176] This suspension is supposed to alleviate the burden of countries in trouble and so to increase solidarity. The suspension can be requested by the Member State in question itself, by another Member State, or the Commission can solely decide if a suspension is necessary.[177] The Council of the European Union has the power to object to the suspension, but its objection has to be accepted through Qualified Majority Voting (QMV) and is thus subject to supranational decision-making.[178] If this proposal were to pass, the European Union would thus obtain more supranational power over the Member States in matters of asylum policy.

Even if the Commissions has taken strides towards more supranationalism in the 2008 Recast, this institution does not has the final say in its adoption. Since Dublin II falls under the *acquis communautaire,* decision-making on this Recast happens in a supranational way. In this case the Parliament and the Council of the European Union (from now on mentioned as Council) have to adopt the Recast through the co-decision procedure before it will be ratified.[179] While the Recast was proposed in 2008, the discussions were only concluded very recently. At the end of 2012, the institutions have finally been able to find consensus on this topic.[180] The implementation of the Recast, probably in mid 2013, thus means a big breakthrough for the European Union and its communal asylum policy.

Why was this decision-making process so difficult? The stalemate is due to discord between the European Parliament and the Council of the European Union (further mentioned as Council). As we have seen, the European Parliament proposed to revise Dublin in a supranational way, by installing sanctions for negligent Member States as well as a joint mechanism that will increase fair burden-sharing between Member States. It thus proposes the further communalization of the asylum system, taken care of on a supranational European level. This view is adhered to in the Commission's 2008 Recast. Up to now, the Council has hardly been discussed and thus seems irrelevant in this issue. On the contrary; in fact it has played a very important role in the discussions on the Recast by presenting itself as a big game changer.

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[174] Ibid., 7-13.
[175] Ibid., 10.
[176] Ibid., article 21, 19.
[177] Ibid., article 31, 52-53.
[178] Ibid.
[179] European Commission, Legislation history of Dublin II Recast (COM (2008) 820) obtained at: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197712 (17 June 2013).
[180] Ibidem.

The Council has blocked and reshaped the Recast throughout the years of the co-decision process with the European Parliament. A document published by the Council in July 2012 shows how the Parliament and the Council both altered the original 2008 Recast.[181] It exemplifies that whereas the Parliament concentrates on installing supranational and communal tools to create fair burden-sharing, the Council is set to tone down these supranational ambitions. The Council tries to let the Member States keep their discretionary power in implementing Dublin II. This makes sense because, simply put, the Council of the European Union is first and foremost an intergovernmental institution, through which Member States can convey their national interests on a European level and negotiate with other national representatives. If Member States consider that great discretionary power in the field of asylum policy is in their best interest, the way to make this clear on a European level would be through the Council of the European Union.

The stalemate has recently come to an end, since the EU is on the verge of implementing the renewed Dublin III Regulation.[182] However, not all parties are satisfied with this development. NGO's such as ECRE, as well as Statewatch, continue to criticize the Recast. They state that it still does not oblige Member States to provide sufficient human rights provisions for asylum seekers, for example considering family unity or children's rights.[183] Moreover, they pose that the intrinsic faults of the transfer system are not sufficiently revised.[184] In their view, the Recast thus does not amend Dublin II sufficiently and more rigorous steps should be taken. Statewatch argues that this is due to the intergovernmental influence of the Council of the European Union throughout the years of negotiation.[185]

Apart from toning down human rights obligations for Member States, the Council has also made its mark regarding Member State solidarity tools as suggested by the Recast. In the final version, not much remains of the transfer suspension tool that the Commission and Parliament wanted to install.[186] Instead of the suspension mechanism, the revised Dublin III Regulation will include an early warning system.[187] This early warning mechanism entails that whenever a Member State feels it cannot cope with the influx of asylum seekers, it can ask for support from the European institutions. Member States can also express their worries about other Member States but the final decision lies with the Member State itself.[188] Whereas the suspension mechanism would be implemented in a very supranational way, this early warning system keeps the Member States in full power

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[181] Council of the European Union, Note on First Reading Recast Dublin II Regulation (13 July 2012) (2008/0243 (COD)) obtained at: www.eur-lex.europa.eu (17 June 2013).
[182] European Commission, Legislation history of Dublin II Recast (COM (2008) 820) obtained at: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197712 (17 June 2013).
[183] Steve Peers, 'Statewatch Analysis. The revised 'Dublin' rules on responsibility for asylum seekers: The Council's failure to fix a broken system' (April 2012) obtained at: www.statewatch.org (17 June 2013).
[184] European Council on Refugees and Exiles, 'Dublin II Regulation: Lives on Hold. European Comparative Report' (February 2013) obtained at: http://www.ecre.org/component/content/article/56-ecre-actions/317-dublin-ii-regulation-lives-on-hold.html (17 June 2013).
[185] Steve Peers, 'Statewatch Analysis. The revised 'Dublin' rules on responsibility for asylum seekers: The Council's failure to fix a broken system' (April 2012) obtained at: www.statewatch.org (17 June 2013).
[186] Council of the European Union, Note on First Reading Recast Dublin II Regulation (13 July 2012) (2008/0243 (COD)) obtained at: www.eur-lex.europa.eu (17 June 2013).
[187] Ibidem.
[188] Council of the European Union, 'Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows Conclusions on solidarity' (9 March 2012) (7485/12) obtained at: www.register.consilium.europa.eu (17 June 2013) 4.

about whether they need support or not. Although this system is supposed to enhance Member State solidarity, it in reality keeps Member State individual discretionary power in check. It can thus be seen as a further intergovernmental addition to Dublin II.

Regardless of the Council's success in maintaining Dublin II's intergovernmental approach, the European Commission did get its further supranationalization partly. Already in 2010, a new European office was brought into existence, with the goal of alleviating unequal burden-sharing in European asylum matters.[189] The so-called European Asylum Support Office (EASO) has been set up on Malta, since this is one of the European countries that face a great influx of asylum seekers. The EASO is supposed to advice Member States that deal with problems, for example in the application of the early warning system.[190] It is supposed to enhance Member State solidarity. Although the communal approach to increase Member State solidarity by means of a supranational suspension tool has been replaced by an intergovernmental early warning tool by the Council, still a supranational office, the EASO, has been set up to offer Member States communal European advice.

All in all, the 2008 Recast strongly attempts to improve the human rights of the asylum seeker by adaptation of contested clauses. This results in the move away from regarding European asylum policy firstly as an issue that is important for European Member States, towards greater emphasis on the human rights of the asylum seeker. The Recast also focuses on installing mechanisms for fair burden-sharing in European asylum policy which should contribute to stronger solidarity and an enhanced 'balance of effort' between Member States. Whereas the original Dublin II Regulation was an inherently intergovernmental tool – which moreover is said to be the cause of its defects - the revised version takes small steps in giving the European Union more power over asylum policy.

These supranational ambitions, however, conjured by the Commission and supported by the Parliament, have been toned down by the Council of the European Union. This intergovernmental institution has made the intergovernmental wishes of its members clear. The result is that the revised Dublin III Regulation will still grant Member States a lot of freedom of action in how to deal with asylum seekers. Moreover, they are not obliged to concede to supranationally imposed burden-sharing mechanisms, which thus leaves Member State solidarity as it has been before; barely apparent. Dublin III will remain highly intergovernmental in granting individual responsibility to Member States.

The discussions on Dublin II indicate that the great discretionary power for Member States that is the essence of Dublin II, is in fact the cause of its ails[191]. Dublin is based on a framework of common minimum standards and shared rules for asylum policy. The responsibility that Dublin talks about however, is not a European responsibility, but a national one. Dublin II, ironically part of the Common European Asylum System, is an inherently intergovernmental piece of policy and is in fact the thing that hinders the complementation of a truly communal and supranational European asylum policy. Even

[189] European Asylum Support Office, 'What is EASO?' (version 2013) obtained at:
http://easo.europa.eu/about-us/what-is-easo/ (17 June 2013).
[190] Council of the European Union, 'Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows Conclusions on solidarity' (9 March 2012) (7485/12) obtained at:
www.register.consilium.europa.eu (17 June 2013) 5.
[191] Although NGO's have exerted the idea that Dublin's intergovernmental approach to asylum policy is the cause of bad circumstances for asylum seekers in the EU, of course it is not sure whether a completely communal asylum policy on a European level would truly improve life conditions for asylum seekers. This thesis does not try to take a stance on this for it merely aims to show the discrepancy between the intergovernmental nature of Dublin II within its supranational framework of common European asylum policy.

though it has been revised to further enhance the CEAS, the renewed Dublin II Regulation remains an intergovernmental tool, albeit hidden beneath a veneer of supranationalism. Hence it shows that the boundaries presented to the outsider of Europe are decided on by nation states, not by the European Union. The matter of European inclusion and exclusion is greatly defined by the individual nation states and less so by the EU as a whole.

6. EUROPEAN CITIZENSHIP RECONSIDERED

After having analyzed the Dublin II Regulation and its influence on European asylum policy, what can be said about its effects on European Citizenship? As seen in the preceding empirical chapters, Dublin II offers the outsider of the EU an intergovernmental framework for entering the European Union. In other words, an asylum seeker cannot apply for asylum to the European Union as a whole, but instead has to be accepted by one of the Member States first. Dublin II shows that the boundaries presented to outsiders of the European Union are not drawn on a European level, but instead on a national level. It seems that the European Union wants to further communalize the definition of inclusion and exclusion in the EU, but momentarily this is defined by the Member States. This is due to their great discretionary power in implementing asylum policy, which is built upon the nationally separated responsibility that Dublin II has installed.

This intergovernmental manner of dealing with the outsider is congruent to the highly intergovernmental interpretation of European Citizenship. Remember that the European term of citizenship is only complementary to national citizenship but has no significance by itself? Similar to the fact that the asylum seeker can only apply to separate Member States and not to the EU as a whole, the people of Europe have to be national citizens before they can consider themselves to be citizens of Europe as a whole. In both matters of, supposedly communal, EU policy the Member States truly call the shots. Dublin II and its intergovernmental approach to asylum policy only further reinforce the intergovernmental understanding of European citizenship. After all, if the nation state is the most important player in deciding on how to deal with the outsider, the insider will also identify itself according to these national boundaries between inclusion and exclusion.

What are the consequences of this observation for the theoretical discussion on (European) citizenship posed in section two? First, the potential of European citizenship as founded on a shared history or shared values was discussed. This idea might still be prevalent with many Europhiles, but it however does not manifest itself at all in the scrutinized empirical documents considering European asylum policy. It might be a bit far-fetched to expect that asylum policy will go into the common heritage of the European Union. However, if a common culture would indeed be the essence of what it is to be European, it could be expected that this would have consequences for asylum seekers trying to become part of the EU. For example, the European Union could set certain standards for asylum seekers to comply with Europe's values, traditions and history. Yet this is currently not the case: asylum seekers do not officially have to accept certain European morals before they can apply for asylum.

This is not to say that there are no cultural requirements for newcomers to the EU, but again these are up to the individual Member States. Some Member States have installed entry requirements for outsiders wanting to become part of their national entity. For example, a country that attaches strong importance to its 'native' values and traditions is the Netherlands: it asks people who want to become part of their citizenry to participate in a so-called naturalizing course. The lack of European cultural requirements for outsiders reconfirms the idea that European citizenship is not based on the Habermasian understanding of cultural monism, as discussed in section two. Instead, national cultural monism seems to be more important.

Does this mean that Berlin's pluralism is not present in the European Union? The empirical findings of this thesis seem to indicate that Berlin's pluralist values are embraced by Europe because the Union does not impose a singular set of values on its citizens, nor on newcomers. However, the observation that feelings of national identity are more pervasive

among the people of Europe than a sense of European – pluralist – belonging, again contradicts this observation. Moreover, this research also shows that Member States hold fast to their national freedom of action in both the interpretation of European asylum policy and of citizenship. Whether Member States' national approach in European matters is based on a narrow belief in national homogeneity – which would thus oppose pluralism - or is based on other reasoning, is not questioned in this research. This question could be explored in further research.

Another option is that Europeans are bound together by the common rights they share. Since the institutionalization of citizenship in Maastricht in 1992, these rights are practically the most important asset of what it means to be a European Citizen. How does Dublin II deal with these European rights? Surely, the European Union grants its subjects different rights than asylum seekers. One example of this is that whereas European citizens can move and reside freely within the EU, asylum seekers are, under Dublin II, confined to follow wherever the Regulation tells them to go. This difference in insider and outsider rights thus serves as a boundary between asylum seekers and Europeans. Following Wiener's argument on how shared legal practices constitute a sense of citizenship, indeed European citizens could base a feeling of togetherness on their common rights. Nonetheless, Europeans do not only enjoy rights within the European arena. Wiener's legal belonging could also be applied to a universal scale, when based on universal human rights, or to a national scale, when based on national rights.

In the Recast of Dublin II, the neglected human rights of the asylum seeker were a point of much attention. The Regulation needed to be improved to better adhere to universal human rights standards, as defined in the Geneva Convention and the New York Protocol. This proves Soysal's idea that post-national rights for human beings are growing in importance. However, even if Dublin II's human rights provisions will be improved, the execution of these rights remains a national concern. After all, this responsibility lies with individual Member States, and with Member States alone. Dublin II strongly emphasizes this. Surely, these Member States can be called to account by the European Courts – for example in the case of M.S.S v. Belgium and Greece. In this sense, the European Union does have post-national power in awarding rights, but only as a last resort. Both for asylum seekers and citizens, the national attribution of rights is often more prevalent, as well as more apparent, than European rights and regulations. European rights float somewhere in between the national and the universal attribution of rights.

The analysis of Dublin II and asylum policy shows that Smith might be right in arguing that nation states remain the hegemonic political entities upon which identity is based in Europe. Nation states – only confined to minimal European rules - self-handedly decide on how to deal with asylum seekers. Even if we discard Smith's argument that the tenacity of national identities is based on their rooted monocultures and historical traditions, the rest of his position is relevant. Dublin's intergovernmental nature shows that the boundaries between inclusion and exclusion are drawn along national lines. This national understanding of identity reinforces the already national approach of European citizenship that is laid down in the European Union treaties. Both the insider and the outsider base their sense of belonging on the rules of the nation state. Smith thus has a valid point in stating that identity in Europe is – and will continue to be - defined by the Member States.

Dublin II moreover illustrates the lack of a sense of solidarity between European Member States. Although the European Commission and the European Parliament would further communalize asylum policy, the Council of the European Union's conduct in this matter shows that Member States do not wish to let go of their discretionary power in this matter. This lack of solidarity between Member States in asylum policy can translate into a lack of solidarity between the people of Europe and hinder a sense of belonging that connects

them as European citizenry. Why would we take care of Greece's asylum seekers if we have nothing to do with this country in the first place? Dublin II seems to reinforce the validity of nationalist navel-gazing since it draws the boundaries of identity in an intergovernmental way.

Hence, when seeing European citizenship as a matter of exclusion versus inclusion, we have to conclude that, since the boundaries between the two are defined along national lines, there might not even be such a thing as European citizenship. Then why is this term institutionalized in the EU treaties? The 1973 Declaration on European Identity shows that the original ambition of the conjurers of European Identity was to create a European identity as founded on a common heritage and enlightened values to this way ensure a glorious future role for Europe in global affairs. This approach changed in 1992, when the writers of the Maastricht Treaty installed the official term citizenship with Habermas's constitutional patriotism in mind: fruitful citizenship based on shared political and legal rights.[192] However, it turns out that both approaches - citizenship based on values and citizenship based on rights - do not catch on with European Member States, nor with the European people. A true definition of what it means to be a European citizen still has to be found.

Is it time for the EU to discard its ambitions to install a European citizenry? In reality it seems that the European Union institutions, by imposing the term European Citizenship on reluctant Member States and their people, undermine their own wishes for the viability of a transnational sense of identity. The obscurity of the term European citizenship leaves Member States with a free reign to designate the sense of belonging for Europe's people. Member States enjoy so much discretionary power, for example concerning asylum policy, that the boundaries of identity in Europe are mostly defined by them. The question of European Citizenship poses a great example of the fight between intergovernmental and supranational interpretations of what it means to be European. And in this case intergovernmentalists seem to be winning. By implementing a supranational term that does not rest on solid ground, the European Union defeats its own purposes: instead of creating European Citizenship as a valid conception of identity, it ends up reinforcing national identities.

On the other hand, the fact that the European institutions have created this transnational term of European citizenship means that it exists. It has been institutionalized and this way the people of Europe have become European citizens, whether they want to or not. The interaction between Europe's many countervailing forces in influencing the interpretation of European citizenship has created a notion that is obscure, but therefore also moderate and applicable to everybody. Perhaps exactly the squabbling between EU institutions has constituted a hazy European reality, on which the interpretation of identity can be based. When seeing citizenship and identity this way – as a process of institutionalization – a core essence of Europeanness is not needed. Only the fact that all Europeans are in some way, through their transnational status, directly related to the unwieldy European institutions could grant them a sense of togetherness.

This institutionalized perception of citizenship seems to be congruous with the previously made observation that the officially documented essence of European citizenship is their shared rights, since the installment of the Maastricht Treaty of 1992. This bureaucratic

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[192] I am aware that Habermas's article that proposed this theory, namely 'Citizenship and National Identity: Some Reflections on the Future of Europe' was published in 1992, the same year that the Maastricht treaty was signed. Therefore, it is not very realistic that the treaty's drafters truly had this particular piece of Habermas in mind when writing this treaty. For the sake of rhetoric, however, I have phrased it this way.

perception of identity thus embraces all Europeans since specific cultural traits or a defined historical background are not needed to fit in. Moreover, although European citizenship is a contested notion, Europe's people abide by it nonetheless. National identities remain more prevalent, but the majority of Europeans has not vehemently protested against their supplemental citizenship status. Fierce objections against transnational citizenship remain in the margins of nationalist political parties. The term 'permissive consensus' that has often been used to describe Member States' conduct in the EU arena, seems to be applicable to Europe's people as well.

The term European Citizenship exists and is permissively accepted, yet it remains greatly unspecified with the exception of a shared set of European rights, which do not seem to particularly trigger people's imagination. We could argue that exactly this obscurity grants the citizens of Europe ample opportunity to self-handedly draw the boundaries of what it means to be European. This view is built on Anderson's argument that people's sense of belonging is a social construction, based on people's own perceptions of commonality. However, the Eurobarometer shows that currently there is no true feeling of European connectedness. Yet, if we lastly take into account Wiener's 'constructive potential of citizenship participation', we could argue that European people are already connected: they move, vote, live, study, marry and consume in a European context. Europe is apparent in all aspects of daily life. These practices could serve as firm foundations on which to build the imagined community of Europe.

7. CONCLUSIONS

Although the term European Citizenship proposes to entail some sort of transnational essence, in fact a core aspect of what it means to be European is long to be sought for. In this thesis, I have scrutinized European asylum policy to take a new angle in the analysis of what it means to be European. This approach shows that Member States' great national discretionary power in EU asylum matters further reinforces the national interpretation of citizenship. The boundaries of inclusion and exclusion of the European Union are drawn along national lines. This shows that, when citizenship is considered as a proxy of identity, European transnational citizenship can be considered as an institutionalized illusion because Member States remain hegemonic in defining identity in Europe.

Several theorists have exposed different explanations for the *general* notion of citizenship. In this thesis I have used a very basic definition of citizenship, namely 'a relationship between individual and political entity based on rights, belonging and access'. The *European* version of citizenship is even harder to define. This is due to its revolutionary quality: it is the first institutionalized transnational status of citizenship in history since the hegemony of the nation state came about under the Westphalian order. In its transnational character also lies its contestability: academics, politicians as well as 'the real people' of Europe question whether citizens of European Member States truly share commonalities on which they can base a transnational interpretation of identity. It is often said that feelings of national identity are dominant in Europe and hence the institutionalized term European citizenship would be an air castle, not based on real transnational sentiments.

The European Union's stance on what European Citizenship officially entails has shifted throughout the years. It started off as an interpretation of European identity founded on common history, culture and values (the European *ethnos*) in the Declaration of European Identity of 1973. However, the Maastricht Treaty of 1992 imposed a more legalistic meaning upon the notion. From Maastricht onwards, European citizenship was institutionally defined in the *acquis communautaire* as the common rights that Europeans share. This way the European Union thus took a step away from seeing the European citizenry as bound together by cultural identity and instead started to regard it more as a legal and political community: a *demos.* This lesser focus on common history and traditions seems like a logical result of the tremendous expansion of the European Union since 1973, for the newly acceded European countries introduced their own national histories and traditions in the European Union.

These different European national identities seem to be irreconcilable however, which is exemplified by the Amsterdam Treaty of 1997 that has institutionalized European citizenship only as complementary to national citizenship of Member States. Europeans cannot belong to the EU as a separate entity; they need to be part of a national political community first. National identity this way overrules European identity within the European arena, which is emphasized by citizens claiming to barely feel connected to Europe. Is there no essence of what it means to be European? By considering citizenship as a matter of inclusion versus exclusion, I have tried to take a new perspective on citizenship. An analysis of the way the European Union decides on 'outsider matters' can give further insight into how the EU understands 'insider things'. Based on this reasoning, I have decided to analyze European asylum policy, since asylum seekers are both conceptually as well as practically located on the boundaries between inside and outside of the EU.

Since the Amsterdam Treaty of 1997, steps have been taken to communalize European asylum policy. By shifting asylum policy within the cadres of the *acquis communautaire,* the

EU institutions made asylum policy subject to supranational decision-making by means of QMV and the co-decision procedure. This change seemed to imply that asylum policy would become more supranationalized and this way Member States would enjoy lesser national influence in the execution of asylum policy. However, the reality has proven differently. In fact, European asylum policy is greatly decided on by national Member States, due to the fact that the communal policies leave Member States with much discretionary power in implementing the supranational frameworks in their own way.

The Dublin II Regulation of 2003 illustrates the discrepancy between the European Union's supranational ambitions concerning asylum policy and the intergovernmental reality. Ironically, this Regulation is part of the Common European Asylum System, which was set up during the Tampere Conference of 1999. The goal of the CEAS is to communalize asylum policy in Europe. Nonetheless, the completion of this ambition is obstructed by one of the CEAS's own parts: indeed, the Dublin II Regulation. This Regulation divides responsibility for asylum seekers separately per Member State. Dublin II is this way inherently intergovernmental in giving Member States individual responsibility and power over asylum seekers. This causes for great variations in Member States' provisions for asylum seekers' human rights. The Regulation moreover does not include the principle of *fair burden-sharing*, which, many think, would be essential to create a truly communal European asylum system.

Much criticism on the Dublin II Regulation has been expressed throughout the years. Not only by international NGO's, but by the European Parliament and, more cautiously, the Commission as well. As an answer to this criticism, the European Commision proposed a Recast of Dublin II in 2008. Its first goal was to improve and communalize human rights of the asylum seekers in all signatory countries to Dublin; the twenty-seven EU Member States and four other countries. Its second goal was to create a mechanism that would increase a 'balance of effort' between Member States and thus enhance Member State solidarity. However, throughout the years of co-decision discussions between European Parliament and the Council of the European Union, the latter has gotten its intergovernmental way. Parliament's supranational ambitions have been toned down and the soon to be implemented Dublin III Regulation remains a highly intergovernmental tool.

This intergovernmental approach to asylum policy reinforces the intergovernmental understanding of transnational European citizenship installed in Amsterdam in 1997. Dublin II shows that the boundaries presented to the outsider – the asylum seeker – are defined by Member States. When understanding the outsider as the antithesis of the insider, it logically follows that when the outsider is nationally defined, what it means to be an insider will also be based on national boundaries. Both asylum policy and citizenship are firstly seen as national concerns and only secondly as communal or supranational matters. Although a transnational term of citizenship has been institutionalized, and regardless of the establishment of a supranational framework for a Common European Asylum System, in reality the Member States intergovernmentally rule the show in both matters of policy. The boundaries between inclusion and exclusion are thus drawn along national lines.

This national definition of insider-outsider boundaries answers to the idea that European citizenship is a void term. The hegemony of the nation state remains so influential that all attempts to impose Europeanness on Europe's peoples fail. It seems that Member States have a free reign in defining identity in Europe. However, since its institutionalization in the Maastricht Treaty of 1992, this transnational interpretation of identity does exist. Perhaps precisely the obscurity of the term European citizenship is what gives room for different identities within its transnational cadres and thus creates a moderate and debatable interpretation of Europeanness. Moreover, Europe's people have permissively

accepted their Europeanness. Although the Eurobarometer shows that people do not really feel a transnational sense of belonging, they do not object to it either. The institutionalization of European citizenship has called this sense of belonging into life and so people come into contact with it, whether they feel passionate about it or not.

Even Anthony D. Smith, who emphasized the hegemony of national identity in Europe, has claimed that a sense of European identity can exist next to national identity and that - albeit the latter remains more prevalent – they are not mutually exclusive. This could be exactly what the European Union meant when it installed European citizenship as complementary to national citizenship: people can enjoy multiple identities and do not have to discard their nationality to become European. This view makes way for accepting the great diversity that Europe already entails. The transnational character of European citizenship is unprecedented in history, so why not embrace its uniqueness: both its transnational as well as its national aspects? In fact, next to having a national identity, the citizens of Europe are practically already Europeans also. Europeans travel, live, move, eat and communicate within European boundaries, as undefined as these might be. For European citizenship to become a viable notion, the people of Europe only have to recognize themselves as Europeans.

EPILOGUE

If I may be so bold to insert some personal remarks in the epilogue of this thesis, I'd like to explain why European citizenship is a notion that I think is worth imagining. If we take Berlin's conception of pluralism and apply it to Europe, then European citizenship can shape a framework in which all the multiple and overlapping identities that are present in Europe could belong. Cultural, national or historical identity does not have to be deleted for this. Surely, inclusion and exclusion will remain, for otherwise there can be no sense of difference. And people do differ. Berlin already said it best: '(...) all human beings must have some common values or they cease to be human, and also some different values else they cease to differ, as in fact they do.'[193]

Applying Berlin's ideas to European citizenship would create soft boundaries between inclusion and exclusion and it would create citizens who hold fast to their own values while accepting others. This is not to propose a Europe without boundaries, for I believe that is a postcolonial illusion since Europe will always have borders. Where these borders are, or will be, located is a topic for further debate. However, as Berlin claims, a pluralist conception of citizenship would increase tolerance towards difference. In my view, there needs to be no narrow definition of what it is European, for in fact what is unique about Europe is that so many diverse national identities share a sense of transnational citizenship. However, some strides could be made in enhancing tolerance between these diverse people, which would result in a highly inclusive Europe. Wasn't the credo of the European Union 'united in diversity' to begin with?[194]

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[193] I. Berlin, Section from 'Isaiah Berlin on pluralism' in *New York Review of Books*, Vol. XLV No. 8 (1998) obtained at: http://www.cs.utexas.edu/users/vl/notes/berlin.html (14 June 2013).
[194] European Union, 'The EU Motto' (version without year) obtained at: http://europa.eu/about-eu/basic-information/symbols/motto/ (14 June 2013).

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