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Governmentality and the formation of public reason in the European Union

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Fulfilling the Duty of Civility in a Post-Truth Era

PREFACE

It was the 6th of September, 2019, when the question was asked "What is freedom?", the professor looked around the class, asked a couple of students if they could provide an answer to this question, to which the professor replied; "No", he shook his head, and his eyes rested at the front row, where I was sitting; "could you tell me what freedom is?"- I hesitated and said; well, it depends on how you define freedom – the professor nodded – I continued; you see, it depends on the context, situation and who you would ask this question, because each person has their own understanding of what freedom entails;

That was exactly the answer he was looking for.

The answer I kept to myself was;

For me, freedom is a feeling,

For me, freedom is feeling the wind through my hair, the sun on my face, the smell of the sea, the friendliness of passers-by ([1]Agoeie!), while I steadily navigate my motorboat through the calm waters of Friesland.

[1] Pronounced as: Àg(r)oehyeah – Hello in Frisian (Second official language after Dutch in the Netherlands).

ABSTRACT

The 21st Century, otherwise known as the Post-Truth Era, requires more and more justification. Simultaneously, a shift has been taking place, in which there is moved from a time in which arguments and justifications were based on pure knowledge, episteme, to a time in which the same processes of argumentation and justification, striving for legitimation, have been based on the appeal to values and beliefs. In a Post-Truth Era, not only (political) institutions, demos, and societal processes have been undergoing change, but the way in which realities are being constructed as well. This results in the need to offer a [fresh] perspective when it comes to theoretical realities and applications, and their translations into practice. In this dissertation, the phenomena of European governmentality and public reason are studied by looking at the role of fundamental rights in the formation of public reason in the European Union. To do so, through the methodological study of governmentality and the theoretical study of public reason in the EU, methods and tools of analysis were determined, encompassing primary and secondary information, making use of historical analysis, platform analysis, framing and narrative construction analysis, comparative analysis and case study analysis. The result show that, in a post-truth era, shared sets of reasoning, justification, self-/group-identification of a demos in a structure beyond the nation-state, enabled through European governmentality, can be established in the absence of a ratified constitution by using law as a strategic framework and creating normative standards of behaviour through strategies and action plans.

Key words: European Union, governmentality, public reason, fundamental rights, democracy, institutions, political processes, values and identity, post-national citizenship, post-truth.

Аннотации

выпускной квалификационной работы по теме:

«Управленческая ментальность и формирование публичного разума в Европейском Союзе»

Автор выпускной квалификационной работы: Кинга Феенстра.

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Тема ВКР актуальна в нескольких смыслах и определяется выходом властных структур за пределы национального государства и их способностью формировать и регулировать поведение, институционализацией ценностей и основных прав, изучением международных организаций и наднациональных властных структур, проблемой основных прав в политической и моральной философии. Европейский Союз представляет собой уникальный пример управления, существующего за пределами государства, где, в свою очередь, могут возникнуть вопросы о его легитимности. В то же время в этих реалиях возникают новые процессы формирования публичного разума, которые захватывают проблему фундаментальных прав, доминирующей в менталитете современной политической философии. В работе рассматривается влияние европейской управленческой ментальности на формирование публичного разума в Европейском Союзе.

Целью работы является исследование проблемы формирования публичного разума вне национальной (государственной) идентичности.

Практическое значение этого исследования состоит в использовании его результатов для дальнейших исследований.

Содержание и объем работ. Выпускная квалификационная работа написана в европейском стиле; она состоит из введения, обзора литературы, методологической части, результатов исследования, дискуссии, заключения и списка использованной литературы.

Основная часть работы занимает 78 страниц, в ней 8 таблиц, 23 рисунка, 97 источников.

Ключевые слова: Европейский Союз, управленческая ментальность, публичный разум, основные права, демократия, институты, политические процессы, ценности и идентичность, постнациональное гражданство, постправда.

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Annotation

to the master's thesis on the topic:

«Governmentality and the formation of public reason in the European Union»

The author of the master's thesis: Kinga Feenstra

Scientific advisor: Leonid Vladimirovich Smorgunov

The relevance of the topic is reflected in different aspects; the shift of power structures beyond the nation state, and their capabilities to shape and regulate behaviour; the institutionalisation of values and fundamental rights; the study of international organisations or supranational power structures; the issue of fundamental rights in political and moral philosophy. The European Union offers a unique example of a government existing outside a state, in turn, questions could be raised about the legitimacy of this organisation. At the same time, the question of fundamental right is yet one dominating the mentalities in political philosophy, as well as the realities in which new processes of the formation of public reason take place. Therefore, there will be looked at European governmentality and the formation of public reason in the European Union.

The purpose of this work is to study the issue of the formation of public reason outside national (state) identity.

The practical significance of this study would be the utilisation of the results to offer recommendations for further research.

Structure and scope of work. This final qualification work is written in a European style; introduction, literature review, methodology, results, discussion, conclusion, and a list of references.

Thesis: Body 78 pages, 8 Tables, 23 Figures, 97 sources.

Key words: European Union, governmentality, public reason, fundamental rights, democracy, institutions, political processes, values and identity, post-national citizenship, post-truth.

Table of contents

Abbreviations

AFSJ	=	Area of freedom, security and justice
CFSP	=	Common foreign and security policy
CFR	=	Charter of Fundamental Rights of the European Union
CSO(s)	=	Civil society organisation(s)
EC	=	European Commission
ECB	=	European Central Bank
ECSC	=	European Coal and Steel Community
EIB	=	European Investment Bank
EU	=	European Union
EP	=	European Parliament
FR	=	Fundamental rights
FRA	=	EU agency for Fundamental Rights
FREMP	=	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
IG	=	Intergovernmental
IGO	=	Intergovernmental organisation
MEP	=	Member of European Parliament
NGO	=	Nongovernmental organisation
SEA	=	Single European Act
TEU	=	Treaty on the European Union
TFEU	=	Treaty on the Functioning of the European Union

INTRODUCTION

Through the (de)(re)construction of the conduct of conduct, we as political scientists are searching for the formula to create the perfect system and the perfect citizen. However, as political systems are changing, our job, as the mechanics of the system, is changing as well. The technical and geographical borders of the nation state are eroding; the number of actors able to participate in the construction of the conduct of conduct, consciously or unconsciously, has been growing.

The problematics of the 21st century, issues of humanity, political systems and structures of governance; the emergence of power structures beyond the state result in the need to update theory, to ensure that it could be translated into practice; changes occur while humans are still catching up with the last changes; from digital and technological solutions to an online civilization, from traditional media to new media, social media and social networks. The digitalised world led to the rise of new alterations regarding news, information and (democratic) participation; people want information fast, accurate, at the right place and the right time, and have become even more vulnerable to manipulation. At the same time, there has been a shift from a time in which argumentation was based on facts, to a time in which argumentation is based on the anticipation of emotions and beliefs; the border between objectivity and subjectivity is eroding, interpreted based on intersubjectivity; our truth. Have we entered an era in which Doxa and Gnosis replace Episteme, or is a post-truth our new Endoxa?

I argue that, this very issue, is being anticipated on, there is a shift in the political, following this general trend, the one that could be described as despicable, (political) actors are left no other choice but to walk the path of the post-truth era, entering a forest, of which the landscape has not been visualised yet, but could be manipulated at, the moment in which you think you figured out the rules of the game. The question who determines the rules of the game in a post-truth era is a rhetorical one; it is identity

politics, offering another one, explanation, creation, interpretation, and categorisation: *us vs. them*. The point is that, an increasing number of actors have been enabled to enter the stage, from which the reality of an average citizen is being presented. Shaping the reality of citizens and creating the ideal citizen is a core function carried out by a national government, each having their own culture and perception of what is right and wrong, and deciding what mechanisms, tools and technologies are employed in doing so. Considering our (online) civilisation, citizen and watch-dog organisations, customer-driven government-citizens relations, the nature of politics itself is changing, or are we on our way back to Ancient Greece, where "everyone", those who were considered to be part of the in-group allowed to participate, should *directly* participate in the public political forum? Throughout time, different systems developed, collapsed, changed, or have even been combined. Taking into consideration that in political science, there is still being looked for all-encompassing approaches towards the state, power, legitimacy, the political, the aim of this study is to contribute to the discussion of these concepts, in an implicit way, by focusing on governmentality and public reason in the European Union, a structure about which there is much to say; from the Coal and Steel Industry into a Value Enforcing Machinery.

The European Union. A union, consisting out of 27 Member States, 24 official languages, twenty-seven histories, cultural traditions, political landscapes. The co-existence of these differences has been referred to by Rawls (1997) as comprehensive doctrines, or reasonable pluralism. Public unrest, deeply rooted in the divergent histories, triggered by the four freedoms, the Euro-crisis, Brexit. The European Union in all of its shapes goes against the traditional conception of the nation state, referring to the Westphalian System (1648) (McCormick, 2015). Democratic standards and values are at the core of mutual agreement on the common understanding of all Member States about how the EU should function, and which criteria a prospective Member State should meet. As the EU moved far beyond the purpose of an international organisation and cannot be categorised as a sovereign state, questions have been raised about its legitimacy, democracy, transparency and accountability. The European Union started as an economic and peace project, of which the ultimate dream

was to create the Federation of the European Union, or the United States of Europe. However, with the replacement of the federal goal by *an ever-closer Union*, it became even less clear what the end state of this project was ought to be. Some argue that the EU only works in practice, from (quasi-)federalism, confederalism, (neo)functionalism, (liberal) intergovernmentalism, many more, still, no one has succeeded to make the EU work in theory, as it works in practice. The European Union started as a Coal and Steel Community (1952), and grew into what some call, an unidentifiable political object (UPO), or a system in its own right, or what I call, a value enforcing machinery. Throughout the years, the EU went through different stages of regional and economic integration, revolving all around the Single Market: from Rome, to the Single European Act, to Maastricht, to Amsterdam, Nice, and finally, to Lisbon (2007). The Single European Act (1986), set the goal for the completion of the internal market by 1993, paving the way for political integration and the economic and monetary Union. In these transformations, with an eye on expansion, the Copenhagen Criteria (1993) were adopted, to ensure the compliance of new Member States with political, economic and institutional standards. The EU that is known today was established in the same year, with the Maastricht Treaty; replacing the federal goal by *an ever-closer Union*, establishing the concept of European identity and Union citizenship. The EU is all about promoting peace, its values, and the well-being of its people. The principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law form the foundation in constructing (the future of) Europe.

European integration: refers to the process of the further development of the European Union since the establishment of the European Coal and Steel Community (ECSC) (1952). There are different approaches towards the study of the EU, the most popular approaches include: federalism, (neo)functionalism, (liberal) intergovernmentalism, multi-level governance.

Governmentality

"Basically, if I had wanted to give the lectures I am giving this year a more exact title, I certainly would not have chosen "security, territory, population." What I would really like to

undertake is something that I would call a history of "governmentality"" (Foucault 1978, 2007, p. 144).

In the 1970s, the concept of governmentality was born during a series of lectures by Michel Foucault; Security, territory, population: lectures at the Collège de France. In accordance with Foucault, "governmentality" has three meanings:

(1) A complex ensemble of structures. Governmentality is understood as an ensemble, encompassing institutions, procedures, analyses and reflections, calculations, and tactics, that enable the exercise of a specific but complex power, of which the demos is the target group, of which political economy serves as the foundation of knowledge, for which apparatuses of security would be its essential element (Foucault, 1978, 2007).

(2) A tendency, a type of power. In this aspect, Foucault (1978, 2007) defines governmentality as a tendency that has led towards the supremacy of the type of power that is called "government" over all other forms of power, leading to the development of specific governmental apparatuses, as well as a series of knowledges.

(3) A result of a process. According to Foucault (1978, 2007), efforts should be taken to build an understanding of the process, or rather, the result of the process "by which the state of justice of the Middle Ages became the administrative state…and was gradually 'governmentalized'" (p. 144).

The State. According to Foucault (1978), the survival and limits of the state could be understood through the general tactics of governmentality. Next, there has been proposed to reconstruct the major forms, the major economies of power by looking at the state of justice, the administrative state (regulations and disciplines), a state of government that is not defined by its territory but by the mass of population. During his lecture, Foucault posed the following question, "Is it possible to place the modern state in a general technology of power that assured its mutations development, and functioning?" (2007, pp. 165-166).

Research objective (1). In the literature review, 1.1 Methodological study of governmentality, studies of different scholars will be discussed to *determine* different

approaches in the application of Foucault's concept of governmentality in the context of the European Union (Glenn, 2019; Walters & Haahr, 2005; Merlingen, 2003; Toplišek, 2019; Derous & de Roeck, 2019; Zimmerman & Favell, 2011; Muehlenhoff, 2019; Shore, 2011; İşleyen, 2015).

Public reason. The idea of public reason, in accordance with Rawls, is concerned with the fundamental political relation between the government and that of free and equal citizens. The purpose is to determine under what circumstances, in the situation in which constitutional essentials and matters of basic justice are at stake, citizens are bound to honour the structure of their constitutional democratic regime (Rawls, 1997). At the same time, the interpretation and value added to the decision made on political questions would be determined by what citizens regard as the best reasons to justify a decision, based on their own idea of the whole truth (Habermas, 1995). In the discussion of public reason, there is looked at democratic structures, in the work of Rawls (1997), public reason is applied to the situation of a constitutional democracy. In turn, a constitutional democracy has been interpreted as a deliberative democracy. In order to ensure the existence of a deliberative democracy, there is a need for widespread education, in which citizens are informed about the basic aspects of the constitutional democracy in which they are situated. The absence of widespread education on these matters, a public uninformed about pressing problems, would result in the inability to take crucial political and social decisions. Therefore, there is a need to identify principles and guidelines informing the framework of public reason that would be appealed to in the public political forum (Habermas, 1995). The identification of the aforementioned aspects has been framed as the *original position* in Rawls' work on political liberalism. Public reason is formed in different environments, relating to the discussion of a fundamental political question, which ideally leads to the outcome that the political decision or moral idea could be reasonably accepted and justified by all those concerned. The question whether the design of the original position by Rawls was a wise one, will be further outlined based on critique provided for by Habermas (1995) in the literature review.

Norms. The input for decisions concerning what one is ought to do is provided for by norms; equal and exceptionless obligations on all governed by a structure of norms are imposed by those norms that are recognized; informing the normative standard of generalized behavioural expectations. Moreover, Habermas (1995) stated that norms have an obligatory nature, an absolute meaning; an unconditional and universal duty.

Values. The input for decisions concerning what conduct would be the most desirable is provided for by values. Apart from that, values serve to express the ranking order of goods based on preferability. Values or goods, could only be realised or acquired through purposive action, establishing a fixed relation of preference on the ranking order of certain goods; why some would be considered more attractive than others (Habermas, 1995).

Reflective equilibrium. Furthermore, Habermas aimed to examine whether overlapping consensus plays a cognitive or an instrumental role. In determining underlying normative ideas, a method of reflective equilibrium was used by Rawls, that is via a reconstruction of proven intuitions. Those intuitions would be found in the traditions and practices of a democratic society. A reflective equilibrium is reached when a philosopher succeeds to attain the word that these intuitions can no longer be rejected with good reasons by those involved.

Research objective (2)

2.1 In the literature review (1.2 Theoretical study on public reason in the European Union), the concept of public reason will be explained with the use of Rawls (1997), Habermas (1995);

2.2 supplemented with studies on public reason in a supranational context (Sadurski, 2015; Petersmann, 2008; Douglass-Scott, 2015), multi-level governance structure (Crum, 2017; Kjaer, 2017).

2.3 Simultaneously, public reason will be placed in the context of the European Union, by *directly elaborating on key concepts* outlined by the aforementioned authors, complemented with a broad range of authors, from political science (e.g., Maurer, 2020; Crespy & Parks, 2019; McCormick, 2015; Bee, 2008; Jacobs & Maier, 1998),

legal studies, constitutional law (Sadurski, 2015; Murray, 2016), European law (Timmermans, 2016; Murray, 2016; Raulus, 2016), European political science (Högenauer et al., 2016; Oxelheim et al., 2020), international law, educational philosophy and theory (Fejes, 2008), ethics and law (Hermerén, 2008).

Post-truth. The concept of post-truth is a relatively young one, but that does not mean that the sphere in which it exists, the situations in which it could be determined, the strategies used by a variety of actors reflecting the existence of a post-truth conception or understanding, is a new one. In fact, each individual, collective, community, group, collaboration, structure, political party, media outlet, social media bubble, family, religion, and so on, has their own perception of the truth, situated in a network in which an increasing number of actors are competing for the attention of the one under construction, consciously or unconsciously. Post-truth is implicit in its existence, if existent, in my opinion, it exists in different areas of life. With the intention of integrating it in the discussion of the political, widening the scope of imagination, not only in the visualisation of its application, but in the attempts of hypothesising and theorising the functioning of different aspects of the political, I introduce another reality into this dissertation: the post-truth.

The motto of the post-truth era is: it does not have to be entirely true what you are saying, as long as you believe it, and can convince others. Not a new motto, but one that has come to dominate our mentalities, with consequent implications on our realities. Therefore, I propose three categories of a post-truth conception in one of the perceptions I have of what one of its aspects would entail:

- The post-truth of information
- The post-truth of communication
- The post-truth of argumentation

In rational choice theory, actors make choices in a structured manner, capable of ordering information and evaluating it based on its utilisation, cost-benefits and different types of mathematical equations. But who provides the information that is subject to rationalisation?

In a post-truth era, we select, present and discuss information, not for the purpose of rationalisation, but that of reputation. In a post-truth era, we witness the mediatization and sensationalisation of the political through the (social) media. In this aspect, I suggest three elements to consider: people, money, technology.

People and information. The psychological structures of human beings, the reception of information takes place through categorisations, putting it into boxes to store information in our mental capacity of being.

Money and mediatization. The shift to the digital: people want information fast, accurate, at the right place and the right time. Information is narrowed down into sensation: big headlines and click-baits: sensationalisation, leading to its further and simplified compartmentalisation.

Technology and technological equations. Algorithms design our bubbles, with the intention to show us news and information that we are interested in, based on our online self-presentation, cookie-accepting and clicking confirmations. We exist in bubbles, we click on sensation, each located behind their own veil of ignorance. A pillarized society, not based on religious pillars, but digital pillars, not a set of pillars, but individual bubbles.

A new stage is set based on the change of the psychological structures of people. Now, having briefly discussed a simplified reality of a post-truth era, I argue that the anticipation on the post-truth of information leads to a change in communication and argumentation. Bringing the reality of post-truth closer to political realities; the implications of the aforementioned representations, could be observed in the behaviour of political actors competing for the attention of a citizen, (informing) strategic choices in decision-making, as well as governmental self-representation and visualisation.

Competing for attention. In competing for attention, political actors anticipate on the emotions and beliefs of those they are trying to reach, while keeping in mind the structure of mental (and/or digital) bubbles, and the tools available in penetrating those bubbles. In turn, this anticipation does not only influence the selection of information in its presentation, its implications could be reflected during decision-making. Now

you may raise the question, but how is this related to the formation of public reason or governmentality?

In this dissertation, no value will be added to the concept of post-truth, i.e., it is not right or wrong, instead, it will be used to broaden the scope of imagination in studying power structures beyond domestic political systems, starting with the utilisation of *governmentality* to let go of the government in the context of a traditional nation state.

Governmentality offers the necessary tools to adapt to a post-truth era, enabling the analysis of power structures, what enables power, and what implicit and explicit tools are employed in this process. At this stage, a post-truth era does not change the previously outlined ideas of governmentality, as the abstract understanding of governmentality offers enough scope for the imagination, a conception of post-truth is to be kept in mind when interpreting the to be presented information.

The design of the original position in public reason (Rawls) has been contested by Habermas (1995), who advocated for a procedural conception of practical reasoning free of substantive connotations by developing it in a procedural manner. In the idea of public reason, basic democratic values as laid down in a constitutional democracy inform the existence of public reason and its formation. The original conception offered by Rawls could be interpreted in a way that it would suggest us to identify basic democratic values, rights, opportunities, guidelines for inquiry. As briefly mentioned, problematics exists around the operationalisation of the first-person perspective, the original position. While this critique (Habermas, 1995) will be further discussed in the next chapter, I would like to add a new perspective to the game, that is, not a first-person position, but a third-person perspective.

A third-person perspective. In accordance with my conception of the post-truth, there should be let go of the first-person position, the original position of public reason. I argue that this could be done by making use of Habermas' ideal role taking, and benchmarking strategies in redesigning the political game in which the formation of public reason would take place.

Research objective (3). In order to translate the concepts discussed above, Governmentality, Public Reason, Post-Truth, into a reality, the issue of the formation of public reason outside national (state) identity will be studied.

The purpose of this dissertation is to study the issue of the formation of public reason outside national (state) identity. Therefore, the object of this study is European governmentality and public reason, and the subject is concerned with the role of fundamental rights in the formation of public reason in the European Union.

The research methodology of this study is built upon the three meanings of governmentality as introduced by Foucault (1978): A result of a process (European integration); A tendency, a type of power (Fundamental rights); A complex ensemble of structures (Application and visualisation). In this study, there is made use of primary and secondary information, qualitative analysis, making use of historical analysis, platform analysis, framing/narrative construction, comparative analysis. A further elaboration and explanation can be found in 2. Methodology.

Structure. This dissertation is written in a European style, starting with the (1) Literature review, consisting out of two sub-chapters: 1.1 Methodological study of governmentality; 1.2 Theoretical study of public reason in the European Union, followed by the (2) Methodology of the research. Next, in the (3) Results, the identified aspects in the first chapter will be researched in the reality of the European Union, consisting out of four parts: (3.1) European integration; (3.2) Basic democratic values and principles; (3.3) The Charter of Fundamental Rights; (3.4) Upholding EU values. Subsequently, in the (4) Discussion, an analysis of the results of the empirical part and the literature review will be conducted, followed by the (5) Conclusion.

Limitations

In the preliminary stages, there was an interest to study the formation of public reason in the discussion of migration and asylum policy of the European Union. Looking at the fact that the EU has been in a political deadlock since 2015 in this area, the area of freedom, security and justice is one of the latest policy areas, and a policy area that would naturally go against the instinct of a (nation) state, as territorial integrity is considered one of the main characteristics of a national government. Even though

the data on the proposals for regulation with the search filter on migration through the EUR-Lex database, supplemented with detailed information retrieved from the Legislative Observatory tool offered by the European Parliament was gathered and prepared for analysis, there appeared to be a need to take a step back and consider the Charter of Fundamental Rights of the European Union. The need to look at the CFR was motivated by the fact that the legal basis of the AFSJ has been built on the Charter as well. Therefore, during this stage, there was referred back to the Charter, resulting in the identification of the Strategies on its implementation. Consequently, it appeared that there were only two strategies published on its implementation since it acquired a legally binding status in 2009. Thus, the decision was made to compare these two strategies to unravel the recontextualization and reinterpretation of the goals that were formulated for the implementation of the Charter in and by the European Union. Consequently, the initial intention to analyse the aforementioned data on proposals for regulation, that had already been gathered and processed, was abandoned. As a result, through a snow-ball effect, the decision was made to determine the actual use of existing EU mechanisms for the enforcement of fundamental rights. At first, there was an interest in the identification of narrative creation through the voice of the people: the European Parliament. The decision was made to analyse the newsroom on the EP website, however, the website appeared to be not fit for analysis; limited search options, inability to download results list or to see the total amount of search results. Efforts were taken to find a different database of news articles and press releases. Next, the common database of the EU appeared to only offer in-depth search options for the last 30 days; all items older than 30 days would be available at the database of the individual institution. However, the link offered referred to the newsroom of the EP, the one that led to the need to find another database due to the lack of search options and transparent gathering of data, in the first place. The attempts taken to gain access to the news items and press releases in a transparent way turned out unsuccessfully. Nevertheless, the option was given to request specific information, by sending an email to the European Parliament. Consequently, the decision was consciously taken to not request the information from the EP for two primary reasons: it would not be

conforming transparency and accessibility standards; the data that could be obtained, would be selected for the applicant, and not by the applicant. This would mean that, there would not be a way in which the objectivity of the selection of the items that would be delivered, could be guaranteed. On that account, the decision was made to further examine other mechanisms that could be utilised to uphold EU values, i.e., the compliance with EU law, in the same areas that were previously identified. Finally, the need for the integration of a third-person was expected to be determined in the analysis of discussions related to the proposals for regulation with regards to migration policy.

1. LITERATURE REVIEW

In this dissertation, there is looked at European governmentality and the formation of public reason. Governmentality offers us a broader and more abstract understanding of government, enabling the visualisation of implicit mechanisms used in establishing, developing and/or maintaining normative standards of behaviour. Governmentality is not a concept with a fixed definition, its tools are expected to differ in each situation. The core values, on which argumentation would be based remain the same, but the interpretation of those values would be different, as everyone interpreting values, does so from their own frame of reference. Therefore, there will be looked at different manners to utilise the concept of governmentality in the context of the European Union. Governmentality as a form of rule is not limited to the conception of the state and government, instead, attention is paid to the ways in which rule is made possible. In the second sub-chapter of this part, a theoretical study of public reason will be conducted.

1.1 Methodological study of governmentality

One of the key elements of governmentality is concerned with ‘conduct’;

“Conduct is the activity of conducting (conduire), of conduction (la conduction) if you like, but it is equally the way in which one conducts oneself (se conduit), lets oneself be conducted (se laisse conduire), and finally, in which one behaves (se comporter) under the influence of a conduct as the action of conducting or of conduction (conduction)”

(Foucault (1978), 2007, pp. 257-258).

The concept of governmentality as introduced by Foucault in the 70s, combines two terms: government and mentality. As discussed in the introduction, in accordance with Foucault his conception (1978, 2007), governmentality has three meanings: A complex ensemble of structures; A tendency, A type of power; A result of a process.

Building further on studies that aimed to utilise Foucault his conception of governmentality, governmentality could be understood in a way that it expands the narrow scope of a definition of *government*; a concept of power and way of governing that is determined by the rationalities/mentalities behind the structures of power in place. The normative construction of governance would lead to the development of a frame of reference for the conduct of conduct, cultivated with the use of framing and narrative construction. In turn, behaviour of individuals is regulated through the creation of general norms and corresponding concepts, justified through argumentation and appealing to values. The tools used in the regulation of behaviour are also referred to as micro-practices and technologies. In this understanding, governing concerns “the conduct of conduct”, in which the normative standard would be reflected in specific governmental apparatuses and knowledges; encompassing all mechanisms that aim to “shape, guide, manage or regulate the conduct of persons- in light of certain principles or goals” (Rose, 1996, p. 41 in Glenn, 2019, p. 26).

The study of governmentality can be applied in a wide range of areas, from sociology, criminology, economic and social geography, urban studies, cultural studies and financial management (Walters & Haahr, 2005). Governmentality is believed to offer powerful analytical tools for the study of politics. According to Walters & Haahr, it would be unwise, and even inappropriate, to over-rationalise 'governmentality' by turning it into a theory of power. Instead, the authors suggest considering the analytical dimensions offered by governmentality. On that note, in accordance with the categories offered by Walters & Haahr (2005), there are at least three ways in which governmentality could be understood:

1. **The conduct of conduct** (Walters & Haahr, 2005). In this understanding, the activity of governing is concerned with shaping, guiding, regulating the conduct of a person. Governing takes place through the regulated freedoms of individuals and collectives (Walters & Haahr, 2005). The term governmentality enables the understanding of government in a more abstract way; a broad range of practices visible in different aspects of life, often contradictory and only partly coordinated. Therefore, a government would not be defined as an institution or a structure, rather as a set of activities, shaping the conduct of conduct. According to Tully (1999), the work of Foucault on governmentality finds common ground with Nietzsche, Wittgenstein, Arendt and Skinner, on at least one aspect; focusing on the activity or the game of politics itself (In Walters & Haahr, 2005).
2. **A form of political analysis** (Walters & Haahr, 2005). In this aspect, the focus would be laid on "mentality", stimulating a critical and reflexive form of political analysis; unravelling the forms of political reason and ethical assumptions behind the political thought that informs the conduct of conduct. There is a shift in the territory of governance, what is called by Rose; governing through community (1996, 1999 in Walters & Haahr, 2005). Constructivists tends to focus on causal explanations, emphasizing the need to study ideas, constructions, norms; elements that are often overlooked in institutional or rational approaches. Governmentality does not aim to offer causal explanations, instead; "If it exhibits an interest in discourse, this is less for the reason of factoring it in as one more explanatory

variable but instead denaturalising many of the terms that we might otherwise take for granted. Making these terms stand out, making them less familiar, is a necessary precondition for thinking and acting otherwise" (Walters & Haahr, 2005, p. 291). Finally, the utilisation of governmentality enables the theorization of changing the typology of politics.

3. **A historically specific form of power** (Walters & Haahr, 2005). Thirdly, there could be looked at characterisations of changes in and/or transformations of the nature, logic, means and ends of political rule (Walters & Haahr, 2005, p. 291). Next, governmentality, as a mode of power, could be understood, in a similar fashion as modes of production, such as communism, feudalism, capitalism. In addition, the nature of governmentality, as an art of governance, would offer the possibility to perceive a system in the same manner as capitalism as a system; the dominant mode of production (power).

Different aspects of governance are covered by the concept of governmentality; vocabulary of the state, forms of subjectivity, and forms of socialisation (mechanisms). Vocabulary of the state is concerned with the genealogy of political thought and rationalities: vocabulary, conceptualisation and articulation of rule. In the process of governing, specific techniques are employed to present problems as understandable and amenable. In addition, discourse could be utilised as an intellectual machinery establishing the main frame in situation x, making it amenable to political deliberations (Glenn, 2019, p. 26). The second aspect is concerned with the forms of subjectivity flowing out of the first aspect, as well as forms of socialisation employed in shaping and regulating the conduct of the individual. Forms of subjectivity are not determined by the regime, but are implicitly formed by setting standards, promoting certain normative standards of beliefs, values, norms and forms of behaviour (Glenn, 2019). Moreover, Merlingen (2003) stated that, intergovernmental organisations (IGOs) function as a legitimate representative of the dominant collective. Normative power of IGOs is believed to be derived from self-identification of group members with the collective (Merlingen, 2003).

Furthermore, Toplišek (2019) employed multiple approaches in researching liberal democracies in crisis through the lens of governmentality. Crisis has been used as an analytical framework, with a focus on how the conditions of crisis change through discursive discourse. Next, political economy served as the basis of the general approach, with the aim to identify structural and historical conditions for the depoliticization of contemporary democratic politics. In a macro-level analysis, signifiers or interpretive categories constituting judgements made in times of crisis should be identified. Apart from that, during crises, critical reasoning- so-called *discourse of truth* is required to renew old ways of reasoning (Toplišek, 2019, p. 77). Framing an event as a crisis takes place through the construction of narratives. As stated by Toplišek, narratives are politically conditioned, and are constructed with a predetermined function, serving interests of specific structures. In addition, psycho-analytics could be employed to research micro-level impacts of crisis or trauma on the subjective and objective realities of individuals (Toplišek, 2019).

According to Derous & de Roeck (2019), the interrelation of different forms of power in the sui generis of international organizations could be researched with the use of governmentality. The utility of governmentality has been researched in the study of EU external relations. In doing so, the concept could be divided into three parts: (1) Definition of government; (2) Overarching discursive constructions or mentalities; (3) Translation of mentalities into micro-practices/technologies of governing (Derous et al., 2019, p. 247). Government is understood as an umbrella of discursive constructions/mentalities, translated to reality through technologies or mechanisms employed by the government, shaping the conduct of conduct. Governmentality is in constant interplay of construction and techniques, reflecting the dominant political mentalities and governance techniques. Moreover, Derous & de Roeck (2019), created four analytical dimensions to inspire future research concerned with governmentality analysis (Appendix 1, Figure 1). If governmentality would be analysed in a micro-setting, attention could be paid to the interdependence of power, freedom and resistance. Finally, in the work of Derous & de Roeck, the recommendation has been made to incorporate the following methods in analysis; historical analysis, power

effects in discursive and technical aspects of governance, framing and discourse analysis, the role of counter-conduct as part of governance. At the methodological level, the focus is often laid on discourse analysis of policy papers, official publications, legal texts, speeches, to unveil the discursive construction of problems, corresponding arguments, justifications and strategies. In addition, there could be made use of charts, tables and graphs to demonstrate how a specific issue is visualised as governable and manageable (Zimmerman & Favell, 2011).

Apart from that, there could be looked at the process of depoliticization of concepts related to the issue that is being studied. Muehlenhoff (2019), questioned the claim that depoliticization is undesirable and broadened the scope of the political in governmentality literature by building on insights derived from feminist and queer international relations theory. Presenting an issue as technical and manageable could result in its depoliticization. The feminist approach enables the expansion of the narrow scope of interpretation of governmentality by recognizing the overlapping and interacting nature of the private and public sphere, and enables the study of civil society organizations and empowerment (Muehlenhoff, 2019).

However, the statement made by Muehlenhoff about the narrow interpretation of governmentality, and the utility of incorporating perspectives offered by feminist and queer international relations theory, allowing for the study of civil society organisations and empowerment, would not change the interpretation of governmentality. This can be observed in the fact that Foucault (1978), extensively discussed the role of the population in guiding the state, where Foucault recognized the role of civil society as a natural process that should not be strictly governed by the state. Nevertheless, as the intentions of Muehlenhoff are good, the argument made about widening the narrow scope of governmentality is out of place; April 5 1978, Foucault posed the question; “What is civil society if not, precisely, something that cannot be thought of as simply the product and result of the state? But neither is it something like man’s natural existence. Civil society is what governmental thought, the new form of governmentality born in the eighteenth century, reveals as the necessary correlate of the state” (Foucault 1978, 2007, p. 449). In turn, Foucault raised

the following questions, “With what must the state concern itself? For what must the state be responsible? What must it know? What must the state, if not control, at least regulate, or what kind of thing is it whose natural regulations it must respect?” (Foucault 1978, 2007, p. 449).

Furthermore, Shore (2011), analysed the genealogy of European governance and concluded that the model employed by the European Commission represents a form of neoliberal governmentality. In his research, three political and sociological questions were posed: differences between European governance and government; the new semantic (political) terrain created by the discourse related to the EC’s interpretation of EU governance; policy shifts, and reconceptualization of the EU by European policy elites related to the appropriation of the concept of governance. The results have shown that a normative definition of governance, promoting an EU-centric view, an open and pluralistic political arrangement, including multi-level organisations, has been constructed by the European Commission. According to Shore (2011), modern statecraft is focused on “steering”, rather than commanding and controlling. This type of governance could be perceived as inclusive and representative of all EU stakeholders, fostering democracy and accountability. At the same time, the craft of steering could be considered less democratic due to the lack of inclusiveness and participation in the nature of the term. An organic democracy is based on informal instruments of regulation and self-regulation, informed by the rule of experts and new public management techniques (Shore, 2011, p. 301). Lastly, Shore (2011) found EU governmentality to be depoliticizing, acting as an “anti-politics machine” (p. 303).

Moreover, İşleyen (2015), researched the EU Twinning programs through the lens of governmentality. The results have shown that the effects of the Twinning programs go beyond the original agenda and intentions. İşleyen (2015), employed Dean’s analytics of government to examine how EU-instruments function. Deans’ analytics of government consists out of three fields: (1) visualization of government; (2) technical aspect of government; (3) “the formation of subjects, selves, persons, actors and agents” (Dean (2008) p. 32 in İşleyen, 2015, p. 677). The aforementioned methodology provides the opportunity to apply Foucault’s core ideas in analysing case

studies under scrutiny. The first field frames the problem sphere, in connection with economic and social growth. Furthermore, the employment of benchmarking strategies demonstrates that there has been a shift from the act of governing towards the conduct of business. In the work of İşleyen, there has been made use of primary and secondary sources; primary resources such as country strategy papers, manuals, annual reports, news, evaluation reports and EC documents; secondary sources have been consulted to establish a contextual basis of EU engagement in the region.

The study on governmentality offers insights into how the ideas behind power structures in place could be constructed, and its implications on the self-governance of others, as well as in what way power structures beyond the nation state could be analysed. The next topic to be looked at is the formation of public reason in and beyond the nation state, based on the works of Rawls (1997), Habermas (1995), Sadurski (2015), Petersmann (2008), Douglass-Scott (2011), Kjaer (2017), Crum (2017), supplemented with books and studies on, e.g., the European Union, European citizenship, European civil society, European values, justice and human rights, democracy, the rule of law.

The aim of the theoretical study of public reason in the European Union is twofold:

1. Determine the basis of public reason in governmentality of and beyond the nation state
2. Unpack the role of democratic principles, values and basic rights in the formation of public reason

1.2 Theoretical study of public reason in the European Union

Dimensions belonging to the accountability of EU governance can only be fully understood by introducing public reason to the research of it, looking at the political values through institutional embodiment (Weale, 2011). In this chapter, a theoretical study of public reason in the European Union will be conducted, starting with a further elaboration on the original idea of public reason as introduced by Rawls, and remarks and suggestions made by Habermas.

The idea of public reason originates from the theory of justice in the work of John Rawls, one of the most known political philosophers in this area. Rawls renewed the approach taken by Kant, concerning the question of morality, by introducing an *intersubjectivist* version of the principle of autonomy; humans act autonomously and obey laws based on the assumption that, through the public use of reason, it would be accepted by all (Habermas, 1995). The underlying foundation of public reason is the theory of justice; "*justice denies that the loss of freedom for some is made right by a greater good shared by others*" (Rawls, 1971, 1999, p. 3). The idea of public reason indicates that citizens would accept decisions when the outcome is perceived as most reasonable for all, free and equal citizens; the outcomes of the deliberation of democratic processes secures the public through reason. In unfolding the idea of public reason, it is necessary to identify the basic moral and political values that constitute the relations between a constitutional democratic government and her citizens (Rawls, 1997). It is important to outline that the idea of public reason[2] can only be applied, but never in the same way, to political discussions of fundamental questions in the public

[2] The idea of public reason has a definite structure consisting out of five key elements: "1. The fundamental political question to which it applies; 2. The persons to whom it applies (government officials and candidates for public office); 3. Its content as given by a family of reasonable political conceptions of justice; 4. The application of these conceptions in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people; 5. Citizens' checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity" (Rawls, 1997, p. 767).

political forum[3] (Rawls, 1997). Persons participating in the public political forum reason from the *original position*, which takes place behind the *veil of ignorance*. And if one or more elements included in the definite structure of the idea of public reason would be ignored, the idea itself would become far-fetched. Justice as fairness serves as the foundation for overlapping consensus, and is expected to succeed under the conditions existing in a pluralistic society (Rawls in Habermas, 1995). Furthermore Rawls (1997) stated that, political principles and guidelines can be identified by demonstrating that those conceptions would be agreed to in the *original position*. Apart from that, Rawls acknowledged that others may think that different ways to identify these principles would be more reasonable. Therefore, the content of public reason is provided for by a family of political conceptions of justice, of which justice as fairness is but one. On that note, Rawls (1997) proposed three main features characterizing these conceptions: first of all, there should be a list of basic rights, liberties and opportunities (e.g., those familiar from constitutional regimes); second, special priority should be given to these rights, liberties and opportunities; third, it should be measurable for citizens to make effective use of their freedoms (p. 774). Nevertheless, the interpretation of these ideas would lead to different formulations of the principles of justice and contents of public reason. Even if the same political conceptions would be specified, there would be a difference in the way in which political principles and values would be balanced. In addition, Rawls (1997), assumed that, what he refers to as, 'these liberalisms' cover more than procedural justice as they contain substantive principles of justice.

As observed by Habermas (1995), the operationalisation of the moral point of view by Rawls leads to several *unfortunate consequences*; "1. Can the parties in the original position comprehend the highest-order interest of their clients solely on the

[3] Public political forum: 1. The discourse of judges in decisions; 2. The discourse of government officials; 3. The discourse of politicians and their campaign managers (p. 767). The culture of civil society, referred to as the background culture, is separate and distinct from the public political forum- the idea of public reason does not apply to the background culture.

basis of rational egoism?; 2. Can basic rights be assimilated to primary goods?; 3. Does the veil of ignorance guarantee the impartiality of judgment?" (1995, p. 112).

According to Habermas (1995), in the original conception (Rawls), the freedom of choice of rational actors has been placed in the frame of the theory of justice, as part of the general theory of choice; assuming that "the range of options open to rationally choosing parties only needed to be limited in an appropriate fashion in order to facilitate the derivation of principles of justice from their *enlightened self-interest*" (Habermas, 1995, p. 111). Habermas continued that, Rawls soon realised that, "the reason of autonomous citizens cannot be reduced to rational choice conditioned by subjective preferences" (Justice as Fairness: Political Not Metaphysical," Philosophy and Public Affairs, xi (Summer 1985): 223-51, p. 237 n. 20, in Habermas, 1995, p. 113).

Citizens. Moral persons possessing a sense of justice, the capacity to have their own conception of the good, and the interest in organising this in a rational manner. Those engaged in reasoning from the original position, do so within the constraints of a rational design, behind the veil of ignorance. This position would ideally guarantee that decisions are taken in an impartial manner. In the understanding of Rawls, characteristics of a moral person are not included in the original position. At the same time, actors reasoning from the original position are expected to understand autonomy as possessed by a citizen, without possessing it themselves (In Habermas, 1995). In addition, concerns have been expressed with regards to the possible influence of the perspective of rational egoists on the meaning of justice. Whatever the case may be, the capacity of actors reasoning from the original position has been described as restricted by the limits of their "rational egoism", therefore, there has been stated that those actors would not be able to adopt the reciprocal perspective- the perspective citizens are expected to adopt in fulfilling their duty of civility- that is deemed necessary to do what is equally good for all. In contrast to Rawls, Habermas (1995) pointed out that, if parties would be expected to understand the meaning of the deontological principles striven for in accounting for their clients' interests in justice, it is necessary to ensure that their cognitive competences "extend further than the

capacities sufficient for rationally choosing actors who are blind to issues of justice" (p. 113). Those reasoning on behalf of citizens have been described as rational decision-makers, who are detached from the moral person. Next, Habermas questioned if the design of the original position was a wise one; rationally choosing actors have been described to be bound to the first-person position; normative issues can only be evaluated in relation with interests or values that are provided for by goods. According to Habermas (1995), the concept of justice adopted by Rawls is more in line with the ethics of approaches instead of a theory of rights. In accordance with Rawls' conception of justice, the autonomy of citizens is derived from their rights, while rights could only be enjoyed by exercising them. However, Habermas argues that, if rights would be assimilated to distributive goods, their deontological meaning would become spoiled; the rational choice model is conceptually constrained. According to Habermas (1995), criticism on Rawls' conception of public reason can be met through the creation of a subsequent qualification of primary goods, establishing a relation to basic liberties as basic rights. However, this would indicate that there would be a deontological distinction between rights and goods, which contradicts the prima facie classification of rights as goods (Habermas, 1995). Moreover, in order to ensure the fair value of equal liberties, the actual availability of opportunities needs to be addressed; only in the case of rights, there could be distinguished between legal competence and the actual opportunity available to choose and act (Habermas, 1995). And this would indicate that the notion of primary goods would be subject to correction in a second step, which is why Habermas (1995) posed the question whether the design of the original position, that resulted in the need to offer additional differentiations in the interpretation of rights as primary goods, was a wise one. Next, Habermas (1995) raised the question why parties would be deprived of practical reason, located behind the veil of ignorance, and argued that the problematics arising with the design of the original position could be overcome by operationalising the moral point of view in a different manner.

The manner in which this moral point of view should be operationalised, is to keep the procedural conception of practical reasoning free of substantive connotations by developing it in a procedural manner (Habermas, 1995). The outcome of a Kantian

universally valid worldview would only take place in case the self-understanding of individuals would reflect an a priori consciousness, leading to an outcome that would be equally good for and in the equal interest of all. Simultaneously, there has been pointed out that this fact can no longer be assumed under the conditions of social and ideological pluralism, but, if the spirit of the Kantian universalisation principle is to be preserved, there could be responded to the aforementioned situation in different ways (Habermas, 1995). On that note, Habermas (1995) proposed to consider *discourse ethics*- the intersubjective practice of argumentation, enabling those involved to broaden the horizon of their interpretive perspectives, is the practice in which the moral point of view would be embodied. Discourse ethics would call for a joint process of ideal role taking (if the application of universalisation is properly understood). In addition, Habermas (1995) referred to the pragmatic theory of argumentation; an inclusive and non-coercive rational discourse among free and equal participants, a process in which everyone is required to adopt the perspective of everyone else, projecting herself into the understanding of the self and world of others. The aforementioned ideal would lead to the interlocking of different perspectives, resulting in the formation of a *we-perspective*. And from this perspective, all can test whether to adopt a controversial norm as the basis of their shared practice. In this process, mutual criticism of the appropriateness of the language used in terms of the situations are defined and needs would be interpreted. Finally, "in the course of *successively* undertaken abstractions, the core of generalizable interests can emerge step by step" (Habermas, 1995, p. 118).

The veil of ignorance. In accordance with the justification of the principles of justice, the veil of ignorance would be lifted gradually in the process of framing a constitution, legislation and the application of law. On that note, Habermas (1995) pointed out that, new information flowing out of the aforementioned aspect must be in line with the basic principles selected under the veil of ignorance, to avoid unpleasant surprises. According to Habermas (1995), to ensure the harmonization of new information flows with previously established concepts, the original position should be constructed with knowledge and foresights of all the normative aspects that could

cultivate a shared self-understanding of free and equal citizens. Therefore, the impartiality of judgment could only be guaranteed if basic normative concepts utilised in its construction, would be resilient to revision "in light of morally significant future experiences and learning processes" (Habermas, 1995, p. 118). Depriving information imposed on those in the original position by the veil of ignorance is a heavy burden of proof to carry. In turn, Habermas (1995), suggest a *convenient response* to decrease this burden, by operationalizing the moral point of view through a more open procedure of argumentative practice under the public use of reason, without categorising the pluralism of perspectives and worldviews beforehand.

In the previous paragraphs, a basic understanding of Rawls' conception of public reason through political liberalism, as well as Habermas' objections and suggestions have been discussed. In the following part, articles on public reason in a multi-level governance and supranational context will be discussed. At the same time, a further elaboration on interpretations of Rawls and Habermas will be outlined. Consequently, key concepts to be determined will be supplemented with studies, books and articles in the context of the European Union.

1.2.1 Multi-level governance and supranationalism

"We assume the capacity of reason to be universal and public reason to thicken with the increase of mutual interaction" (Crum, 2017, p. 53).

In the theory of justice, subjects of public reason are not individuals but collectives, their representatives; people are those who have several elements in common: a political structure, culture and a political conception of justice (Crum, 2017, p. 48). As a result of the increasing interdependence between states, elements of public reason do no longer solely rely on "the negative common good of averting conflict and war"; a shift has been noted towards more positive common goods (Crum, 2017, p. 50). Furthermore, Crum (2017) differentiated between "thin" and "thick" public reason. At the domestic level people have the opportunity to make "thicker" use of public reason and to develop a common conception of justice of what should happen at the international stage. The main difference between the domestic and the

international domain is the political autonomy of citizens. This autonomy is realized at the domestic level under “thick” public reason; therefore, there has been argued that, public reason at the international level is much “thinner”. The first factor determining the foundation and thickness of public reason at the domestic domain consists out of the historical functions of the nation state. In this sense, the nation state has a special position within the multi-layered structure of public reason. The nation state entails five principles: strong external borders; state apparatus; monolingualism; national mass media; national party structure. Levels of political obligations resulting in the exercise of collective political autonomy are determined by the state. The scope of consequences ruled through justice is determined by the extent to which the existing shared framework of political deliberation enables its justification. In addition, the level of involvement and public reason depend on the scope and depth of political obligations. The EU is taken as an example to demonstrate that with internationalisation, public reason flows across national borders; the scope of public reason has been expanding with the conferral of competences to the European level, the degree of EU integration and the spill-over effects of policy area deepen the level of cooperation and add new competences to its foundation. In turn, the scope of public reason is widened, and nation states are enabled to incorporate positions of other nation states at the domestic level of reasoning (Crum, 2017). At the same time, the process of autonomisation of international organisations could result in a legitimacy gap between domestic levels and the supranational level. According to Sadurski (2015), this gap can be largely bridged by appealing to public reason. The level of autonomisation increases with (1) the interpretation of legal sources establishing the authority of an organisation; (2) a wide range of mechanisms that cannot only be used by governments, but by individuals and NGOs as well; (3) the integration of supranational law into domestic law, the expansion of legal precedents by international courts and tribunals; (4) the establishment of key terms by judicial authorities independently of value added to those concepts by local legal systems (Sadurski, 2015). Consequently, the scope of an organisation is no longer determined by member states only, and, in this context, not only the characteristics and scope of an organisation

change, but the level of self-identification of people part of this supranational collective as well. As a result, the scope of public reason beyond the nation state has been steadily expanding; transnational relations allow for public reason to evolve, resulting in a shift in the grounds and scope of political obligations (Crum, 2017). Therefore, sharing a common understanding of beliefs and values becomes increasingly important under a common political structure. Common standards of reasoning are created through mutual engagement in public deliberation about shared norms and values (Crum, 2017).

1.2.2 Basic democratic values and citizenship

In determining the foundation on which the idea of public reason would be based, it is necessary to consider the establishment of basic democratic values in a constitution; basic democratic values, as well as democratic citizenship are considered key elements in unfolding the idea of public reason that determines the relationship between a constitutional democratic government and her citizens (Habermas, 1995). In a deliberative democracy, there should be an idea of public reason, a framework specifying the setting for deliberative legislative bodies through constitutional democratic institutions, and citizens should possess the need and corresponding knowledge to fulfil the duty of civility (Rawls, 1997). Reasonable pluralism is a basic feature of democracy, the natural outcome of a culture with free institutions is the presence of diverse conflicting reasonable comprehensive doctrines (religious, philosophical, moral). The coexistence of comprehensive doctrines aims to demonstrate that each party could endorse a reasonable political conception, and through conjecture, and despite different understandings of groups, would be able to adopt the basis for public reasons (Rawls, 1997, p. 786). Public representatives in liberal democracies “agree” on serving the will of the people, based on two points leading to mutual agreement: everyone enjoys and has access to a system of basic liberties; “social inequalities are acceptable only when they are also to the advantage of the least privileged” (Rawls in Habermas, 1995, p. 110). The aforementioned points, as proposed by Rawls, and discussed by Habermas, indicate that this conception of

justice would be expected to meet in agreement "under those conditions of a pluralistic society which it itself promotes" (Rawls in Habermas, 1995, p. 110). Furthermore, Habermas elaborated that, political liberalism would not claim a position towards truth, as it promotes itself as being neutral towards conflicting worldviews.

Political conceptions of justice as a basis for public reason. Liberal political principles and values are derived from liberal political conceptions of justice. According to Rawls (1997), political conceptions of justice apply to political and social institutions[4]; are the same for all comprehensive doctrines (reasonable overlapping consensus may exist); are implicit fundamental ideas in public political culture (Rawls, 1997, p. 776). Next to that, each political conception should include principles, standards, ideals, guidelines of inquiry. Engaging in public reason can take place when individuals appeal to one of the existing political conceptions, and from this framework, engage in debates about fundamental political questions. Political conceptions relevant for public reason are those conceptions that are reasonable for a constitutional democratic regime. On the other hand, Habermas (1995) pointed out that, by calling a conception of justice political, Rawls' seemed to break down the distinction between its justified acceptability and actual acceptance, Rawls; "the aim of justice as fairness as a political conception is practical, and not metaphysical or epistemological. That is, it presents itself not as a conception of justice that is true, but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons" (Justice as Fairness: Political Not Metaphysical, p. 230 in Habermas, 1995, p. 122). According to Habermas (1995), a clear distinction between acceptability and acceptance should be made; if Rawls excludes a functionalist interpretation of justice as fairness, there should be allowed for some epistemic relation between "the validity of his theory and the prospects of its neutrality toward competing worldviews", that are confirmed in public discourses (p, 122).

[4] Political values are reflected in and realized by political institutions. There should be differentiated between basic values of public reason and other values reflected in political institutions or political parties (Rawls, 1997).

Moreover, Habermas (1995), explained that each concept within the *"*network of concepts in which persons and interpersonal relations, actors and actions, norm conforming and deviant behaviour, responsibility and autonomy, and even intersubjectively structured moral feelings all find their place", deserves a prior analysis (p. 127).

The principles counting for the notion of the public use of reason are valid if met with "uncoerced intersubjective recognition under conditions of rational discourse" (Habermas, 1995, p. 127). This leaves space in empirical questions to determine when and whether "valid principles" could guarantee political stability within a pluralistic society. Habermas (1995) argued that, under the veil of ignorance, an increase in awareness of citizens will lead to the discovering that one has been subject to principles and norms institutionalized beyond their control. In the theory of justice, there has been argued that the establishment of a democratic constitution can only happen once, and that it is not possible to repeat this under the constraints developed by the institutional conditions of a society which had already been constituted.. New developments are ought to be constructed conforming the normative concepts in the existing understanding of the public; basic principles should be harmonized to avoid "unpleasant surprises" (Habermas, 1995, p. 118). The "public[5] use of reason" sets unrealistic demands in discovering the original position; therefore, Habermas (1995) is in favour of employing the open procedure of argumentative practice.

Harmonizing basic principles in the EU

The core political values of the EU have been outlined in Treaties, the Charter of Fundamental Rights of the European Union (CFR), as well as the Copenhagen Criteria. The Copenhagen Criteria[6] (1993) serves to guarantee that new Member States meet a set criteria of democratic principles and economic standards. As pointed out by

[5] Reason is public in three ways: reason of free and equal citizens; the subject of reasoning concerns public goods, looking at fundamental political justice (constitutional essence and matters of basic justice); expressed by "a family of reasonable conceptions of political justice" (Rawls, 1997, p. 767).

[6] "[A] functioning market economy; stable institutions guaranteeing democracy and a market economy, human rights and respect for and the protection of minority rights; and the ability to implement the acquis Communautaire" (European Council, 1993, p. 13 in Teti et al., 2020, p. 43).

Oxelheim et al (2020), the lack of sufficient political support for a number of EU values, as laid down in the Treaties, makes it unattainable to translate the values into legally binding protective mechanisms. At the same time, perceptions of the legitimacy of the EU are linked to its raison d'être as a global actor; the increasing scrutiny on EU internal and external policy results in the need for the EU to pay special attention to its communication and protection of fundamental rights and values. In this aspect, European integration entered the era in which the safeguarding of liberal democracies in Europe obtained a key role in determining the future of Europe (Oxelheim, 2020). One of the few existing mechanisms to enforce the compliance with fundamental values in the EU is offered by Article 7 from the Treaty on the European Union, and could be enforced when there is (risk of) a serious breach, or a repetitive breach, of the values laid down in Art. 2 (TEU). The breach of values referred to in Article 2 would be determined by the European Council, based on unanimity; this is where the enforcement of corresponding "punishments" (suspension of voting rights) is blocked. Considering the approach in monitoring compliance with fundamental values, the role of the European Commission in the new framework demonstrates that there has been a shift from an intergovernmental logic to a supranational one (Moberg, 2020).

In the beginning of the 21st Century, efforts were taken to establish a constitution for Europe. The constitution was never ratified, the Treaty of Lisbon (2007), the Reform Treaty, is considered to entail key elements that were established in the discussions on a constitution. In the process of European integration, the structure of the Union has been adjusted to the increase accountability, legitimacy, transparency, and democracy (Högenauer, Neuhold & Christiansen, 2016).

The role of norms and values

In the work of Hermerén (2008), European values have been researched in the context of a political and ethical construct; discussing 'European values' instead of 'values in Europe' is not necessarily a political rhetoric. Common values could be emphasized to generate political, social and economic gains, and could function as a mechanism to generate a sense of unity between the Member States. Next, there has been argued that norms and values play a crucial role in holding a union of states

together, and that shared values inform the moral identity of a society (Hermerén, 2008). In addition, Hermerén (2008), pointed out that trade-offs between values take place in all societies; the practice of ranking values on importance in case of a value clash, leads to redefinitions, interpretations and clarifications in decision-making. At the same time, Hermerén (2008), stated that, moves made in the aforementioned situation are not considered *ethically neutral*. Therefore, the author argued that there are "several different ranking orders of values depending on context, situation and problem (Hermerén, 2008, p. 379).

Furthermore, Kjaer (2017), noted a reconfiguration between normative and cognitive articulations and expectations; norms play an important role in organising societal processes with strong cognitive components. In the exercise of power of democratic states, the former and the latter are combined, allowing for norms to support adaptivity to change. As soon as normative outlooks become part of legal principles, these norms obtain an indirect strategic role and become tools guiding decision-making processes. Next to that, normative expectations could obtain a constitutional status, e.g., the creation of "an ever-closer Union" (EU). In the process of justification, legitimacy-enhancing measures are employed by structures of public power. In the EU, there are general frameworks of policymaking, consultation, feedback mechanisms. However, Kjaer (2017) argued that, due to the fact that the EC itself selects stakeholders to be consulted in decision-making, these frameworks turn into a stage revolving around the self-representation of the EC. Simultaneously, policymaking frameworks could lead to an increase of the cognitive capacities of the EC, in which societal developments inform policymaking. Nevertheless, Kjaer (2017), argued that, relying on strong abstract normative principles seems far-fetched in the case of the EU, therefore, policymaking frameworks would turn into aesthetic forms, that lack strong substance and significant normative guidance.

Union citizenship

In 1992, the Treaty of Maastricht established the concept of European identity and Union citizenship. The development of European citizenship could be considered

as a driving force in the creation of a political community, in which citizens become part of a new collective, resulting in the creation of a prototype for a post-national citizenship design (Kostakopoulou, 2008, p. 286). Union citizenship is considered to be the only existing example of transnational citizenship, that was created in an attempt to establish a transnational political community and democracy (Siklodi, 2020). According to Murray (2016), with its establishment, a new 'political' element was added to the integration process of the Union.

Related to citizenship, but with a focus on modifying and shaping feelings of belonging, European integration could be considered to entail an *identity building process*. In analysing this process, attention should be paid to the capacity of institutions to modify and shape territorial and emotional feelings of belonging to a specific group, community, peoples (Checkel (1999) in Bee, 2008). The concept of identity is often understood as something "imagined", a dynamic, rather than static, concept, an integrated symbolic structure in the past, present and future. Identity is not entirely imagined in the case of the EU; categorisations constituting identities have been laid out in the Treaties (Jacobs & Maier, 1998). Throughout the years, different mechanisms have been established to further the process of self-identification with the Union. In 2007, the concept of European citizenship was strengthened as a result of the Treaty of Lisbon, with the European Citizens' Initiative. The ECI turned into force in 2012, and has been used as a method to establish direct contact between citizens and the European Parliament (Crespy & Parks, 2019).

Scholars have argued that European citizenship could be understood as a *symbolic institution*, inducing real institutional change. Constructivists placed the issue of European citizenship in a broader context of socio-political transformations, and perceived existing constraints in political and legal structures as *opportunities* for institutional modification in building a political community (Kostakopoulou, 2008). In addition, through the lens of constructivism, identity has been perceived as the outcome of political manipulation, reinvention, and the selection of sets of values (Bee, 2008).

According to Hermerén (2008), a moral identity, based on a minimum set of shared values, is required for the survival of a society. Identity emerges through the

combination of the construction of social values, norms of behaviour and collective symbols. Relevant for this dissertation is the statement made by Balibar (1991), "*the dominant reference points of individual identity change over time [] with the changing institutional environment*" (In Jacobs & Maier, 1998, p. 4). Basic elements such as language, race, history, culture, territory, are essential for the process of self-identification with, and belonging to, an in-group, a community. The analytical framework for the study of contemporary citizenship employed by Siklodi (2020), encompasses three dimensions: identity [a sense of belonging; shared identity; recognition of the 'other'], rights [awareness citizenship rights; access to civil, social and political rights; membership political community], participation [socio-economic background participants; models and reasons; forms of engagement] (p. 50).

Furthermore, there has been argued that, intra-EU mobility leads to the redefinition of national models of citizenship in Europe, challenging the popular belief of citizenship being tied to statehood. Traditional notions of statehood and citizenship are increasingly under public scrutiny, reflected in the news and political headlines in the Member States. According to McMahon (2015), the free movement of CEE citizens has become a politicized topic of discussion (In Siklodi, 2020). Consequently, problematics attached to the politicization of 'free movement' offered ground for the development of populist ideas. As pointed out by Siklodi (2020), intra-EU learning mobility may be the only area that has not been affected by the dynamics of contemporary European politics. In 2008, Fejes, analysed the role of the Bologna Process[7] (education) in the construction of a European identity. The harmonization of education could be understood as a way of governing and regulating behaviour; in this process, individuals and educational institutions are under construction. Fejes (2008), stated that, the EU has taken the role of an "enabling state", whose efforts result in the construction of "an autonomous, self-choosing subject, which can be related to neoliberal governmentality" (p. 524). According to Fejes (2008), the freedoms of

[7] While the aim of the Bologna Process is to stimulate the free movement of Europeans, the treaty is not limited to EU Member States, it includes about 48 countries (Fejes, 2008).

citizens are the starting point in regulating and governing behaviour; governing goes beyond law making. In his analysis, the focus was laid on the identification of rationalities behind specific mechanisms. In the process of construction, a "we-group" is created, which consequently leads to the creation of "the other" group[8].

1.2.3 Democratic legitimacy

Public reason strives for public justification, formulating arguments addressed to others, based on conclusions that oneself and others could reasonably accept this argument. The ideal of public reason is realised when judges, legislators, executives, government officials, candidates for public office act from and follow the idea of public reason; fulfilling their duty of civility (Rawls, 1997, p. 769). Citizens who are not government officials support the idea of public reason and fulfil their duty of civility by carrying out their moral duty, "by doing what they can to hold government officials to it" (Rawls, 1997, p. 769). In addition, principles of justification should be taken as a prerequisite for the functioning of society, that guarantee the fair cooperation of free and equal citizens (Habermas, 1995). Justification strives for legitimation, and the idea of legitimacy is based on reciprocity. According to Rawls (1997), the criterion of reciprocity is "violated whenever basic liberties are denied", simultaneously, the criterion of reciprocity has been described as the limiting feature of different forms of public reason (p. 771). In this aspect, the justification of duties imposed by justice depends on the extent to which a shared set of reasons (possessed by those involved) allows for its justification. Therefore, in imposing duties of justice, the aforementioned aspect should be taken into consideration (Crum, 2017). In addition, there has been suggested that justice is constrained by the depth of public reason, while discursive processes of justification demonstrate that its capacity has no borders.

The emergence of supranational and international organisations beyond the nation state often results in a discussion about the absence of democratic legitimacy at the supranational level. According to Sadurski (2015), the legitimacy of supranational

[8] In sociology, the former and the latter could be described as "in-group" and "out-group".

actors and decisions is derived from, and relies on, their appeal to public reason. Supranationalism facilitates a space between national and international actors with a certain degree of synchronisation, where actors strive to legitimize political authority, based on common standards of justification and the appeal to public reason. Public reason is not the only factor influencing the legitimacy of authorities, other factors depend on the institution under consideration and could include institutional factors and procedural variables (Sadurski, 2015). According to Sadurski (2015), legitimacy is located between legal validity and justice; believed to be stronger than validity because it includes some level of "moral authority" on a norm, simultaneously, it is weaker than justice, because there could be disagreed upon the justness of a norm while acknowledging its legitimacy (Sadurski, 2015). Next to that, in a reason-constraining conception of legitimacy, there should be differentiated between (1) weak and strong legitimacy, (2) legitimacy of authority and that of authoritative decisions (Sadurski, 2015, pp. 404-406). It is important to mention that, in some cases, there is no appeal to public reason in the public justification of a decision. A decision should be permissible in accordance with a forum of principle. In this case, public reason concerns "input" and "output" legitimacy; the former referring to factors resulting in the need for a decision, the latter would be necessary because the input legitimacy and consequent decision, cannot be separated from its substance and results (Sadurski, 2015, p. 408). According to Kjaer (2017), a transnational context is bounded by structural reasons, and only allows for a limited democracy to exist. In order to make up for existing limited democratic practices in a transnational context, there could be made use of "invoking processes of justification" (Kjaer, 2017, p. 10). Subsequently, law could serve as a strategic framework through which justification takes place. The EU is a suitable example of an institution that exercises public functions but cannot be categorised as a state (Kjaer, 2017). In the process of European integration, from the European Coal and Steel Community (ECSC) to the EU, the key accomplishment has been the reshaping of integration into a publicly organised one, in which integration became subject to normative standards of public law.

Moreover, Sadurski (2015) pointed out that, public reason could be treated as a legitimizing device, that appeals to values of universality, reciprocity, openness to cultural contexts. Due to the fact that, political legitimacy is often understood as democratic in nature, difficulties are created in researching political legitimacy in a non-state context. According to Sadurski (2015), the EU cannot be used an exemplar of a supranational democracy, considering the scope of competences, decision-making procedures, legal status of European citizenship, the Euro. Apart from that, there has been argued that, the democratic nature of the EU is only in its beginning stage; "the functioning of the Union shall be founded on representative democracy" (Art. 10 (1) TEU). In questioning the democratic composition of the Union, Sadurski (2005) referred to the principle of separation of powers as well as the European Parliament; the only directly elected EU body, that cannot initiate legislation. Applying the concept of democracy at the international level would require the redefinition of the nature of democracy (Sadurski, 2015).

The EU democratic deficit

According to Oxelheim et al (2020), the empowerment of the European Parliament has been the main strategy to address the so-called "democratic deficit". Deeper European integration is often perceived as the solution to issues faced by the EU. Apart from that, the issue of sovereignty plays and important role in the debate on the future of European integration (Ramiro Troitiño et al., 2020). Furthermore, the Common Assembly of the ECSC was the predecessor of the European Parliament, the common body of the three supranational European communities. The increasing powers of the European Parliament throughout the treaties could be perceived as a key aspect in the process of European integration (Högenauer et al., 2016). The general trend of liberal democracies in Europe revolves around the central role of national parliaments. In an effort to increase the legitimacy of the Union and to bridge the gap caused by the democratic deficit, a closer connection has been established between the work of the European Parliament and the involvement of national parliaments. In general, there could be spoken about an existing need for the further parliamentarization of the Union; some even started to speak about "the emergence of

a multilevel parliamentary system" in the Union (Högenauer et al., 2016, p. 2). Over the years, a rise in Euroscepticism, as well as "public disenchantment" has been noted in the EU.

Justice in the European Union

Moreover, Douglas-Scott (2017) argued that, there exists no overarching theory of justice in the EU (p. 77). The author identified "five failures of justice" in the EU; justice is not a specific value; it is not adequately reflected in the context of freedom, security and justice; it is difficult for social justice to be fulfilled under EU law; recent crises demonstrate a lack of EU solidarity and justice; it is impossible to identify an overarching concept of justice in the EU, due to its unidentifiable nature (Douglas-Scott, 2017, p. 60). On the other hand, Petersmann (2008), pointed out that, the European Court of Justice, the European Court of Human Rights, the European Free Trade Area Court, managed to transform the intergovernmental treaties, as well as the European Convention on Human Rights, into "constitutional orders". There has been demonstrated that the cooperation of European courts reflects overlapping consensus; public reason does no longer solely consists out of the reasoning of the 27 Member States. Petersmann (2008), argued that national and international judges could be perceived as "the most effective guardians of the constitutional principles and overlapping consensus" (p. 774). The establishment of international and European courts expands the constitutional rights of European citizens, the Treaties of the EU do not only prescribe the functioning and procedures of EU institutions and everything Single Market related, but offer legal remedies for European citizens, in turn, those legal remedies enable the watchdog function of EU citizens over the institutions. Petersmann (2008) concluded that judicial remedies are more efficient, effective, and democratically more legitimate than the politicized process of the procedures of settling intergovernmental disputes.

Apart from that, the creation of legal precedents through the Court of Justice of the European Union, such as the Van Gend & Loos case (C-26/62), as well as the Costa/E.N.EL. Supremacy case, contribute to the furthering of European integration. In 1963, Van Gend (NL) challenged the legality of the customs duties at the Dutch

border when importing goods from Germany, claiming that the request to pay custom duties by the Dutch authorities was in contradiction with the Customs Union (Nowadays Art. 30 TFEU). In addition, the Court of Justice of the European Union reasoned that, a 'new legal order' had been constituted by EU law; rights and obligations of private individuals and Member States were now of direct effect without the necessity to translate it (nowadays known as a Regulation) into national law. Three criteria should be met for a provision to be directly applicable: clear and precise; unconditional; not subject to further implementing measures (Van Munster, personal communication, 2018). The Van Gend & Loos case resulted in the enshrinement of two principles: primacy of EU law, its direct effect. The primacy of EU law and the majority voting rule in EU decision-making reflect the supranational character of EU institutions in specific areas (Moberg, 2020).

The theoretical study on public reason results in the identification of a great number of elements to consider in the study of its formation in the European Union.

1. Public deliberation about shared norms and values
    a. Common standards of justification
    b. Common standards of political legitimacy
        i. Does the existing shared framework of political deliberation allow for the justification of the scope of consequences ruled through justice?
    c. Common standards of reasoning
2. Public reason as a legitimizing device
    a. Values, universality, reciprocity, openness to cultural contexts
    b. Redefining democracy in the EU
    c. What is the scope and depth of political obligations?
        i. Is there a shift of political obligations as a result of the recontextualization of basic principles?
3. Discourse
    a. Public reason for justification – discursive resources in political contexts

b. Efforts/mechanisms to harmonize basic principles in the issue of discussion
c. The role of fundamental ideas

2. METHODOLOGY

The aim of this study is to develop knowledge about the formation of public reason in the case of the European Union through the lens of governmentality. The research methodology of this study is based on the concept of governmentality as introduced by Foucault (1978, 2007), consisting out of three meanings: A complex ensemble of structures; A tendency, a type of power; A result of a process.

The methodological study of governmentality resulted in the identification of a broad range of methods and sources for analysis. Primary and secondary information has been retrieved through different sources, as outlined in the table below.

Table 1. *Elaboration of research methodology (Own elaboration)*

	Three ideas of governmentality *(Foucault, 1978, 2007)*	***Sources & databases***	***Steps***
Political Analysis of Governmentality	**A result of a process** *European integration: setting the stage* • A historically specific form of power • Characteristics: nature, logic, means and ends of political rule (Walters & Haahr, 2005) Goal: unravel the development of the mentalities from the founding fathers: *From the Coal and Steel Industry into a Value Enforcing Machinery.*	Sources: Treaties of the EU, official EU websites, information and fact sheets, booklets EU Publication Office, (my own) Gnosis on the EU (based on my teaching practice at St. Petersburg State University & BA in European Studies)	1. Preparation lecture and seminar materials for teaching practice at the course "International Language of Globalisation", "Introduction to the European Union"

	A tendency, a type of power
	(1) Basic democratic values and principles
	(2) Fundamental rights
	• The conduct of conduct
	• (Glenn, 2019) Vocabulary of state (= genealogy of political thought and rationalities)
	  1. Vocabulary
	  2. Conceptualisation
	  3. Articulation of rule
	
	• Forms of subjectivity & forms/mechanisms of socialisation (Glenn, 2019)
		Sources: Eurobarometers; Treaties; EU official websites; CFR; Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM (2010) 573 final); Strategy to strengthen the application of the Charter of Fundamental Rights in the EU (COM (2020) 711 final)	1. Identification of rights, freedoms and principles
			2. Strategies on the Charter of Fundamental Rights of the European Union
			3. Comparison of strategies with the use of mind mapping
			
			- Power effects in discursive and technical aspects
			- Framing and discourse
			- Role of counter-conduct

	○ Discursive construction of problems: arguments, justification, strategies *Goal: defining specific governmental apparatuses*		
	A complex ensemble of structures *Application and visualisation* • Forms of subjectivity & forms/mechanisms of socialisation (Glenn, 2019) ○ Discursive construction of problems: arguments, justification, strategies *What: institutions, procedures, analysis and reflections, calculations, tactics (Foucault 1978, 2007)*	Sources: EU official websites, infringement database EC, e-Curia website, press releases Data processed in Excel	1. Output of comparison CFR (list of seven significant differences in the interpretation of the same values) 2. Investigation of the rule of law framework 3. Analysis of the infringement procedures database European Commission

3. RESULTS

As laid out by Art. 3(1) the aim of the EU is to promote peace, its values, and the well-being of its people. The principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law form the foundation in constructing the future of Europe.

In this chapter, the key concepts of public reason and governmentality will be researched in the context of the European Union. The foundation of public reason is theorized to be based on the basic values as laid down in a constitutional democracy. Basic European values have been laid out in the Treaties, declarations and conventions. In addition, legal rights of Europeans have been expanded by legal precedents, established through European courts (Kostakopoulou, 2008).

Before the EU can be understood in its contemporary shape, it is necessary to look at the mentalities of the founding fathers when the Treaty establishing the European Coal and Steel Community (1952) was signed, and to explore the path of development towards an *ever-closer Union*.

3.1 European integration

Jean Monnet, one of the founding fathers saw federalism as the end state of the European Union, which could only be reached gradually. The creation of the European Coal and Steel Community (ECSC) would be the first step along the way of European integration, gradually spilling over into other policy areas (McCormick, 2015). The idea of cooperating with different states on an international level with the goal to solve common issues, would establish new areas and habits of working together. Robert Schuman, French foreign minister, was the first to formulate the idea to create a common market for coal and steel under the authority of an independent institution. The consequent development of the Schuman Declaration by Jean Monnet formed the basis for the establishment of the European Coal and Steel Community (ECSC). The goal was to make it unthinkable and materially impossible for 'a war like this to happen again', by building an interdependence between Europe's coal and steel industries (Ramiro Troitiño et al., 2020). In 1958, the Treaties of Rome were signed, adding two new communities to the ECSC: the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), with the aim to create a common European market, based on the four freedoms[9]. The creation of the European Economic Community (EEC) was a key stone in the creation of the EU[10] that is known today (Oxelheim et al., 2020). In this short period of time, European integration resulted in the elimination of customs duties, establishment of external Common Customs Tariff (CCT), common policies for agriculture and transport, the creation of the European Social Fund, and the establishment of the European Investment Bank (EIB)[11]. The process of integration slowed down in the 60s: Charles de Gaulle vetoed the application

[9] **Four freedoms:** free movement of persons, capital, services and goods.

[10] In 1965, the existence of shared institutions between the three communities was formalized through the Merger Treaty.

[11] The EIB is one of the world's largest multilateral borrower and lender, working with EU institutions in the implementation of policy.

of the United Kingdom twice (1963, 1967), and because of the *empty chair crisis*[12]. Integration continued in the 70s, with the expansion of membership; Denmark, Ireland and the United Kingdom were the first new members to join. The way to political integration and the economic and monetary Union was paved with the Single European Act (1986)[13]. The Maastricht Treaty (1993) marked a new stage "in the process of creating an ever-closer union among the peoples of Europe", and further developed the democratic nature of decision-making processes; replaced the initial federal goal with *an ever-closer Union*; further expansion of policy areas, e.g., common foreign and security (CFSP), common currency, education and social policy, immigration and asylum, police cooperation. Next, it created a single institutional structure 'European Union', based on three-pillars: (1) European Communities; (2) Common Foreign and Security Policy (CFSP); (3) Cooperation in the areas of Justice and Home Affairs. The second and third pillar made use of intergovernmental methods of decision-making, the first pillar is based on supranational characteristics; with the conferral of levels of sovereignty from the Member States to the EU level, power has been given to a supranational authority of which the legislation would be of direct effect. Furthermore, the definition of the principle of subsidiarity has been established by the Maastricht Treaty; the principle existed in previous documents, but no procedure was attached on how this principle would work in practice. As a result, the Protocol on the application of the principles of subsidiarity and proportionality was established. In 1999, the area of freedom, security and justice (AFSJ) was created to ensure the free movement of persons, while offering a high level of protection to citizens. The creation of the area of freedom, security and justice has been based on the Tampere (1999-04), the Hague

[12] **Empty chair crisis:** Member States proposed increased supranational powers to the EC and EP, through a change of voting style, from unanimity to what is today known as a qualified majority vote (QMV). As a result, France withdrew its representatives from the Council. The empty chair crisis was resolved during the Luxembourg Compromise (1966); QMV would not be applicable to issues of "important interest"

[13] **The Single European Act (1986)** set the goal to complete the internal market by 1993, it revised the previous treaties, expanded policy areas, reformed the institutions, and paved the way to political integration and the economic and monetary Union. Equally important, the qualified majority vote was adopted, and unanimity now only applied to taxation, free movement, rights and interests of employed persons

(2004-9), and Stockholm (2010-14) programmes (EUR-Lex, n.d.). The policies[14] in this area fall under *shared competences*[15] between Member States and the EU.

In Figure 2, a table can be found with main developments from Maastricht until the Treaty of Nice (2001).

Figure 2. *Maastricht-Nice (Own elaboration)*

Treaty of Maastricht (1993)		
An ever-closer Union	Policy expansion	Union citizenship
Single institutional structure	European system of Central Banks	
Committee of Regions	Economic and Social Committee	
Copenhagen Criteria (1993)		
Ensuring political and economic standards of new members		
Treaty of Amsterdam (1997)		
Pillar one methods apply to several pillar three areas	View on enlargement	
IG cooperation in the areas of police and judicial cooperation strengthened		
The Council and European Parliament became co-legislators *(Co-decision- today = ordinary legislative procedure (OLP))*		
Nice (2001)		
Increase parliament legislative powers; broadened scope of co-decision		
Proposal for a treaty establishing a constitution for Europe *Signed but never ratified -* *(Rejected by France and NL in national referenda)*		

In the beginning of the 21st century, efforts were taken to establish a constitution for the European Union through the European Convention. In the Open Letter of the European Convention (27 March 2002) the success story the Union, the one that was facing twin challenges, was highlighted. With an eye on enlargement, there was a need to further democratize the Union, and to establish a closer relationship between the Institutions of the Union and its citizens. In December 2001, the European Council set up a convention to determine the needs of citizens, as well as their perception of the

[14] The Area of Freedom, Security and Justice covers the policy areas of border checks, asylum, immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; police cooperation.

[15] Refer to Appendix 1, Figure 3

European Union (The European Convention, 2002). On that note, a website[16] for readers to follow debates and access documents was established by the Convention. At the same time, a two-way communication stream would take place through a second website: the Forum[17]- enabling representatives of civil society and individuals to participate in the debate on the future of Europe. The archived Futurum[18] website served to provide information on developments of the institutional reform of the European Union, outlining four main stages[19]: the Treaty of Nice, the European Convention, the Intergovernmental Conference, and the European Constitution. The European Convention was signed in 2004, but efforts on the ratification of the European Constitution turned out unsuccessfully; France and the Netherlands rejected it via a national referendum. Consequently, a two-year period of reflection was announced; by the end of 2007, a Reform Treaty was to be drawn up by the Intergovernmental Conference, which ultimately resulted in the Treaty of Lisbon (turned into force two years later) (European Union, n.d.-a).

The focus of the Treaty of Lisbon (2007) was laid on strengthening the democratic character of the Union, based on three fundamental principles: democratic equality, participatory democracy, representative democracy, as well as strengthening the participation of citizens by introducing the European Citizens' Initiative (ECI). Apart from that, the former third pillar structure ceased to exist, and the intergovernmental method was abolished; from that moment on, decision-making processes would be governed via the ordinary legislative procedure; the Community method turned into the standard procedure of decision-making (Bux, 2020b). Decision-making processes were not the only elements undergoing change; the place of human rights at the core of EU external action was confirmed with the turning into force of the Lisbon Treaty (2009) and the legally binding status, on equal footing with the

[16] http://european-convention.europa.eu/EN/bienvenue/bienvenue2352.html?lang=EN
[17] The Forum website could not be accessed because it does no longer exist.
[18] https://ec.europa.eu/archives/institutional_reform/
[19] The Treaty of Nice was signed in 2001, turned into force in 2004; the European Convention finished its work in 2003; the Intergovernmental Conference (IGC) 2003/2004 (October 2003–June 2004); the European Constitution was signed in 2004 but never ratified.

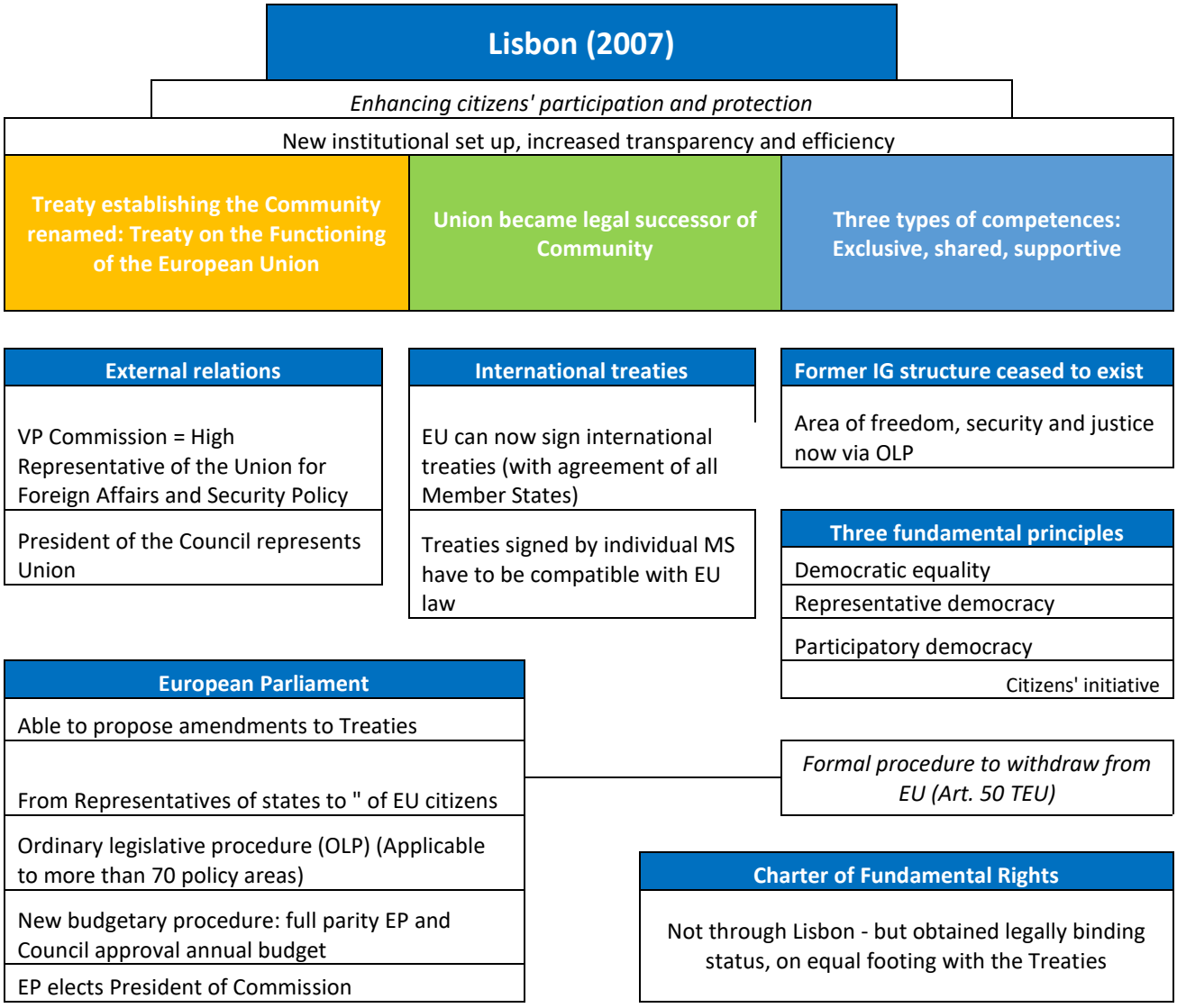
Treaties, of the Charter of Fundamental Rights of the European Union. The changes brought about by the Lisbon Treaty are also reflected in the extension of the co-decision procedure to different policy areas. On top of that, the Court was given general responsibility in the field of freedom, security and justice.

According to Art. 67 (1-2), the AFSJ shall be based on respect for fundamental rights, the different legal systems, and traditions of the Member States. Next, a common policy on asylum, immigration and external border control *shall be framed based on* ***solidarity*** *between Member States*, fair towards third-country nationals. At the same time, a high level of security has been described to be offered through the use of measures *preventing and combat crime, racism and xenophobia*. In building the future area of justice, freedom and security, the promotion of fundamental rights in the Union turned into a priority for the European Parliament and the European Council. Please refer to Table 2 in Appendix 2.1 for an overview of the legal foundation on which the area of freedom, security and justice is based.

Building further on the foundations laid for the principle of subsidiarity (1993), the Lisbon Treaty offered a further elaboration of its regional and local dimension. In Article 5 (3) of the TEU, three preconditions for intervention by EU institutions in accordance with the principle of subsidiarity have been laid down: (1) the area falls outside the exclusive competence of the EU; (2) there exists a necessity, i.e., the objectives of the proposed action cannot be solved more sufficiently at the level of the Member States; (3) based on reason or scope, the added value of the action exists; the EU can implement it more successfully. The protocol on the application of the principles of subsidiarity and proportionality is used by EU institutions and national parliaments. In accordance with Art. 1 of the protocol, each institution ensures consistent respect for the principles of subsidiarity and proportionality. The principle only applies to “shared competence” and applies to all EU institutions. The Treaty of Lisbon increased the power of national parliaments and the Court of Justice in monitoring compliance (European Parliament, 2020; Protocol 2, TFEU). Finally, a differentiation was offered for the first time, between three types of EU competences

(App. 1 Figure 4). In Figure 5, an overview can be found of the main changes brought about by the Treaty of Lisbon.

Figure 5. *Lisbon (Own elaboration).*



3.2 Basic democratic values and principles

The formation of public reason starts at the level of basic democratic values, as laid down in a constitutional democracy. The case of the EU differs slightly; it is an international organisation, the EU does not have a constitution, but has adopted the practices of democratic decision-making processes. In the previous part, the process of European integration has been discussed to determine the nature and character of European governmentality. Next, basic democratic values and principles will be determined with the use of the Treaties.

The functioning of the EU is based on the rule of law, i.e., action can only be taken within the legal scope that all Member States have voluntarily and democratically agreed upon[20]. First of all, the Treaties are negotiated and have to be agreed upon by all Member States, and are ratified by the national parliaments or by referendum. The objectives of the EU, rules for EU institutions, and decision-making processes are laid down by the Treaties. The Charter of Fundamental Rights of the European Union (CFR) has not been incorporated in the Treaty of Lisbon, instead, it acquired the same legally binding character and value as the Treaties (Murray, 2016). It is important to point out that, the CFR could only be interpreted under the legal competences of the EU, and 'shall not extend in any way' EU competences that have been defined by the Treaties (Raulus, 2016; Art. 6 (1) TEU Consolidated Version). Moreover, international agreements are separate from primary and secondary legislation, but can be of 'direct effect'; in the case of direct effect, its legal force becomes superior to secondary legislation. In Title 1 of the Treaty on the European Union (TEU) common provisions that form the foundation of the European Union have been laid out. By the TEU, a European Union has been established among the High Contracting Parties; Member States work together and confer competences to the EU level to pursue common

[20] The sources of EU law and types of EU legislation can be found in Appendix 1 Figure 6 and 7.

objectives. The TEU and TFEU offer the legal basis on which the Union shall be founded, having both the same legal value. The aim of the Union is to promote peace, the well-being of its peoples and its values (Art. 2 TEU); respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The rationale informing the specified values indicates that, those values are "common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (Art. 2, TEU).

Furthermore, key principles of the EU include the principle of conferral; principle of sincere cooperation; principle of subsidiarity and degressive proportionality. First of all, the scope of EU competence is governed by the principle of conferral; there can only be acted if x falls under the competences that have been conferred to the EU level. Secondly, the principle of sincere cooperation ensures that the Union and the Member States respect and assist each other in the execution of tasks derived from the Treaties. In addition, Member States are committed to facilitate the achievement of corresponding tasks and will not initiate measures that could jeopardise the realization of EU objectives in the areas of Union action (Art. 4 (3) TEU). Thirdly, the principle of subsidiarity is concerned with the regulation of the exercise of EU non-exclusive powers; the EU cannot interfere in areas that could be dealt with more efficiently at the level of the Member States, and can only act if Member States are unable to achieve the objectives of a proposed action. Finally, the concept of degressive proportionality indicates that despite the allocation of seats based on the size of the population of a MS, those with a bigger population agree to be under-represented to enable a greater representation of those with a smaller population (Pavy, 2020b).

Moreover, one of the principles accounted for in the Treaties is the principle of solidarity. This principle seems to dominate European discourse and communication strategies, but lacks in substantial content, "DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions" (Preamble TEU). The term has been listed among the values stipulated in Article 2 (TEU). The only content accounting for a principle of solidarity would, at first sight,

appear to be the solidarity clause in the TFEU; Article 222 (1) “The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a **terrorist attack** or the **victim** of a natural or man-made **disaster**. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States” (Consolidated version, 2016). This article is concerned with the use of preventative measures in reaction to a terrorist threat in a Member State; protecting democratic institutions and the *civilian population* from *any* terrorist attack. It is important to point out that, the interpretation of Article 222 is not *intended* to infringe the right of a Member State to determine the appropriate means to meet its own solidarity obligation (Declaration on Article 222 of the Treaty on the Functioning of the European Union).

Furthermore, the value of solidarity has been referred to in the Treaties and the Charter of Fundamental Rights, in terms of *mutual (political) solidarity*. In this context, mutual solidarity refers to external action and security policy, as well as the role of Member States in providing active support “in a spirit of loyalty and mutual solidarity” (Art. 24 (2) TEU). In addition, the area of freedom, security and justice is governed by the principle of solidarity and fair sharing of responsibility as well. Apart from that, Title 4 of the CFR “Solidarity” is concerned with (workers’) right to information, collective bargaining and action, access to placement services, prohibition of child labour, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, and consumer protection.

Finally, the concept of solidarity has been referred to in energy policy, as well as the Declaration of Poland on the protocol on the application of the CFR. In the latter, the commitment of Poland to respecting social and labour rights has been reaffirmed.

"Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship" (Art. 9 TEU).

As discussed in the literature review, normative standards have been created before there can be publicly made use of them. The values of the EU can be found in Title 1 and 2 of the TEU. Simultaneously, the personal values of citizens as well as values best describing the EU have been measured throughout the years; indicating that people are familiar with a set of prescribed values and can rank them based on personal understanding. Until recently, a selection of twelve values was included in public opinion surveys: human rights, respect for human life, peace, democracy, individual freedom, the rule of law, equality, solidarity (support for others), tolerance, self-fulfilment, respect for other cultures, religion. Since 2019, a new value has been included in the list; "respect for the planet".

Table 3. *Values measured in the European Union (Own elaboration[21])*

Which three of the following values best represent the EU?	**2010**	**2012**	**2014**	**2016**	**2018**	**2019**
Democracy	38%	37%	31%	31%	35%	34%
Human rights	38%	35%	36%	34%	34%	32%
Peace	35%	39%	40%	39%	42%	42%
The rule of law	25%	23%	18%	20%	23%	22%
Solidarity, support for others	20%	16%	15%	17%	16%	17%
Respect for other cultures	18%	17%	14%	12%	13%	15%
Respect for human life	14%	15%	17%	15%	15%	14%
Equality	13%	12%	13%	12%	12%	13%
Individual freedom	12%	12%	17%	15%	16%	15%
Tolerance	11%	10%	11%	12%	11%	12%
Self-fulfilment	4%	4%	4%	4%	4%	5%
Religion	3%	3%	3%	3%	3%	4%
Respect for the planet						6%
None	3%	5%	5%	6%	5%	5%
Don't know	9%	8%	6%	7%	6%	6%

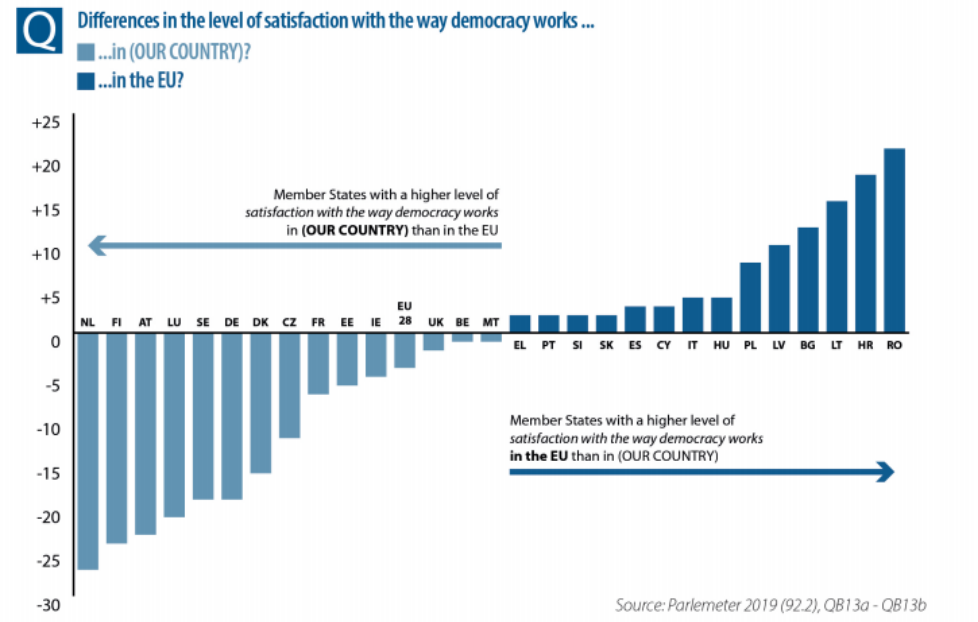
[21] (EB74 Autumn 2010: Public Opinion in the European Union, p. 34; EB82 Autumn 2014: Public Opinion in the European Union, p. 91; EB78 Autumn 2012: Public Opinion in the European Union, p. 45; E86 Autumn 2016: Public Opinion in the European Union, p. 71; EB90 Autumn 2018: European citizenship, p. 61-62; EB91 Spring 2019: European citizenship, p. 72).

In Table 4, an overview is given on the results of Eurobarometer surveys that have been conducted between 2010-2020. Over the period of nine years, the ranking of freedom to travel, study and work anywhere in the EU as a personal value indicator increased by ten percent, to a total of 55%.

Table 4. *What the EU means for respondents personally (Own elaboration[22])*

What does the EU mean for you personally?	2010	2012	2014	2016	2018	2019
Freedom to travel, study and work anywhere in the EU	45%	42%	50%	49%	53%	55%
Euro	40%	35%	39%	35%	37%	37%
Peace	24%	26%	29%	28%	33%	35%
Cultural diversity	23%	19%	28%	26%	30%	31%
Bureaucracy	21%	23%	26%	25%	24%	23%
Waste of money	25%	27%	25%	24%	22%	21%
Not enough control at the external borders	17%	15%	20%	24%	20%	20%
Stronger say in the world	23%	18%	25%	22%	27%	29%
Democracy	23%	19%	22%	21%	26%	27%
More crime	14%	13%	15%	15%	15%	13%
Economic prosperity	13%	12%	15%	13%	18%	20%
Unemployment	14%	18%	17%	13%	10%	11%
Loss of our cultural identity	13%	12%	13%	13%	13%	13%
Social protection	10%	9%	9%	10%	13%	14%
Other	1%	2%	2%	2%	1%	2%
Don't know	4%	4%	3%	3%	2%	3%

Figure 8. *Satisfaction with democracy:* Parlemeter 2019, p. 17.



[22] (EB74 Autumn 2010: Public Opinion in the European Union, p. 33; EB82 Autumn 2014: European Citizenship, p. 60; EB86 Autumn 2016: European Citizenship, pp. 64-65; EB77 Spring 2012: Values of Europeans, p. 12; EB90 Autumn 2018: Public Opinion in the European Union, p. 71; EB91 Spring 2019: Public Opinion in the European Union, p. 80).

In the previous part, information has been provided about the common values and main principles on which the EU is based. This was necessary to understand which values might be appealed to in discourse in the public political forum. It goes without saying that the outlined information is only a fragment of the available resources for the interpretation of common values and principles. However, for the purpose of this dissertation, the previously outlined values and principles will serve as the foundation, which will be complemented by a comparison of strategies on the Charter of Fundamental Rights of the European Union.

3.3 The Charter of Fundamental Rights

Despite the failed ratification of the constitution for Europe, the Charter acquired a legally binding status on equal footing with the Treaties. In order to ensure the effective application of the Charter, the members of the Commission solemnly pledged to uphold the Charter before the Court, a member of the Commission was appointed for the promotion of justice, fundamental rights and citizenship, and a strategy for the effective implementation of the Charter by the EU (2010) was developed. Apart from that, with the changes brought about to the area of freedom, security and justice with the Lisbon Treaty, the *promotion* of fundamental rights in this area turned into a key priority for the European Parliament and the Council.

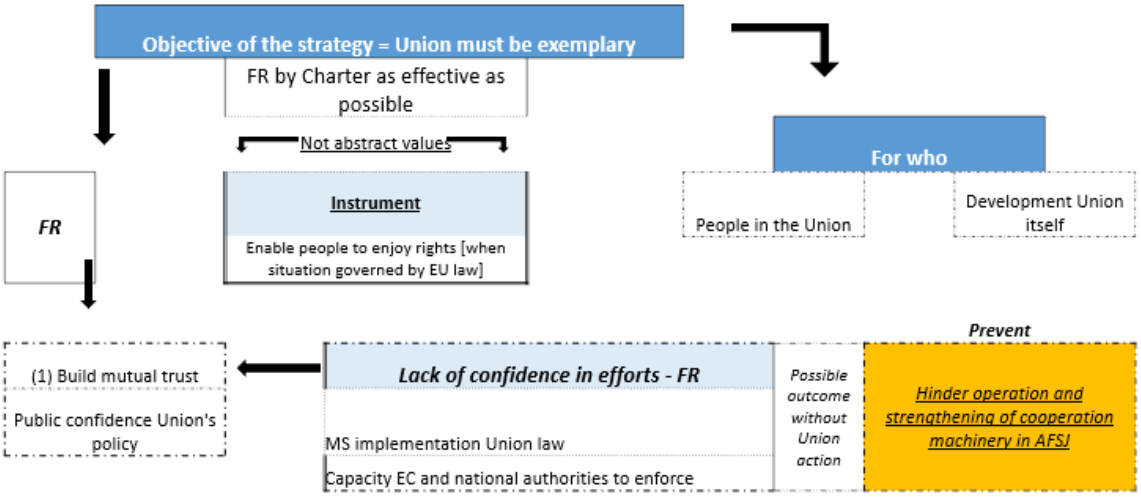
In light of the 10th Anniversary of the Charter (2020), efforts were successfully taken to develop a new strategy on the application of the CFR; the Council of the European Union adopted conclusions, and reaffirmed that common values form the foundation on which the Union is based. The rule of law has been described as a key guarantor for the protection of common values. According to the Council of the European Union (2019), common values underpin "our" democratic and social models, and are the "foundation of European freedom, security and prosperity" (p. 2). The need to strengthen awareness-raising and training activities was underlined, noting that public awareness on the Charter remains low. As a result, the Commission announced a public consultation[23] on the development of a New Strategy for the Implementation of the Charter of Fundamental Rights. Eight months after the consultation, the Commission published a Communication Act on the Strategy to strengthen the application of the CFR in the EU. In the following part, COM (2010) 573 final and COM (2020) 711 final will be compared to visualise the redefinition of the application of the Charter.

[23] The public consultations took place in the period of 19 March 2020 – 16 April 2020.

Towards making the Charter a living reality for all

In *2010*, the Charter turned into an *innovative instrument* that ensures the protection of FR by making the rights visible and predictable for the benefit of citizens. This strategy was brought into being to adapt to the new legal environment that was created in 2007, therefore, the focus was laid on establishing a *fundamental rights culture* by incorporating FR in the legislative and decision-making processes of all Union institutions. Four points of action were formulated to ensure the effective application of the Charter by the EU: (1) enable those living in the EU to enjoy their rights; (2) mutual trust between EU countries; (3) public confidence in EU policy; (4) credibility of EU external action on human rights (Publication Office, 2016). The adoption of the CFR symbolized a new stage of European integration, where the Charter transformed into "one of the most modern and comprehensive legally binding fundamental rights instruments" (Council of the European Union, 2019, p. 3). In Figure 9, a deconstruction of the logic of reasoning of the first strategy (2010) can be found.

Figure 9. *Logic of reasoning (2010) (Own elaboration)*



2020. Building further on the first strategy on the Charter of Fundamental Rights, the second strategy focuses on making the Charter a reality for all; presenting a renewed commitment to ensure the effective application of fundamental rights in the European Union. Throughout the years, new EU legislation for the direct protection

and promotion of certain rights[24] was developed. Apart from that, the scope of interpretation of fundamental rights has been expanded through legal precedents of cases brought before the Court. The Charter transformed from an innovative instrument into the embodiment of EU rights and values, symbolising European identity "our EU bill of rights", and has been described as a quantum leap for European integration, reaffirming the foundation on which the EU is based; (1) fundamental rights; (2) democracy; (3) the rule of law.

Figure 10. *Components of strategy vision (Own elaboration)*

Making the Charter a reality for all
Ensuring effective application MS
Empowering CSO, rights defenders, justice practitioners
Fostering use of CFR as compass EU
Strengthening people awareness rights

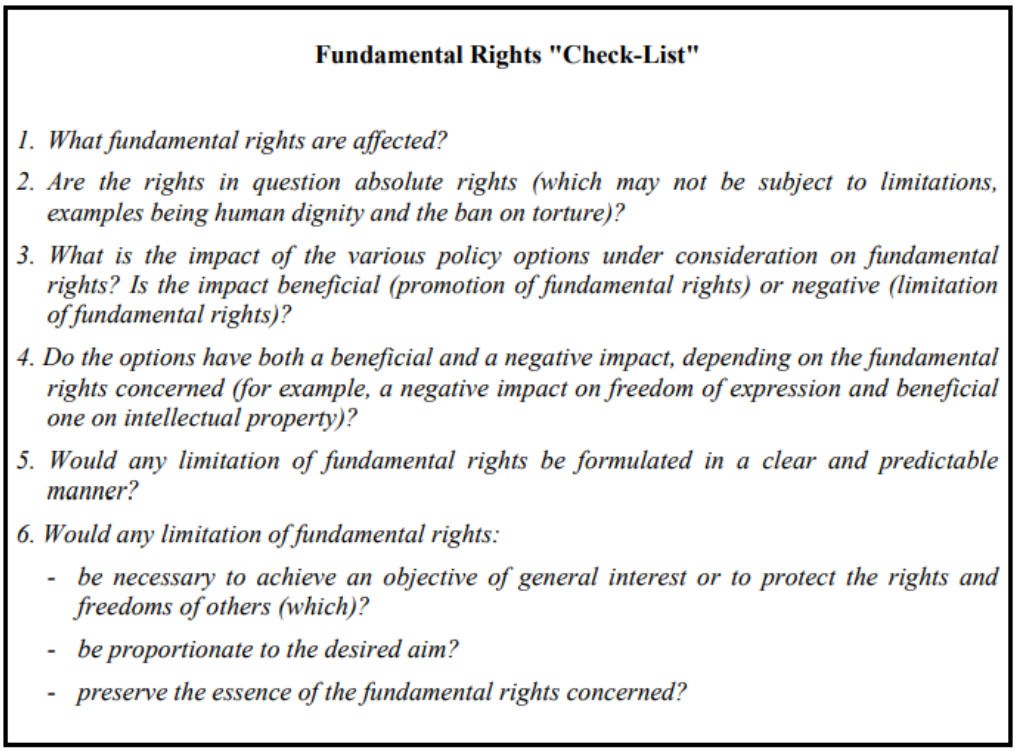
Methodology

In 2010, the focus was laid on the establishment of an internal structure to ensure the compliance with FR in the work of the institutions and bodies of the Union. The EP as an intermediary in "finding out about" the situation in MS with regards to fundamental rights, involved through questions and petitions. The Fundamental Rights Agency has been described as a **tool** *to help* institutions and MS implementing Union law. The Agency was to be encouraged to provide *reliable and comparable data on fundamental rights*- crucial input for the annual report. In accordance with this strategy, the role of national authorities (Supreme Courts, independent national human rights bodies, national authorities responsible for the assessment of the impact of national legislation *on* fundamental rights) could be interpreted as a passive one- the Commission "will also take on board information provided by all stakeholders" (European Commission, 2010, p. 13). Other sources of information could be derived from the *monitoring machinery* of the Council of Europe (international human rights organisation) and the United Nations, and information from civil society. The annual

[24] Such as data protection, gender equality, whistle blowers, fair trial and defence rights, victims of crime.

report would *enable* all stakeholders to "make a contribution". Apart from that, the Communication Act offered a "Fundamental Rights "Check-list":

Figure 11. *Fundamental Rights Check-list (European Commission, 2010)*



Fundamental Rights "Check-List"

1. *What fundamental rights are affected?*
2. *Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?*
3. *What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?*
4. *Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?*
5. *Would any limitation of fundamental rights be formulated in a clear and predictable manner?*
6. *Would any limitation of fundamental rights:*
   - *be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?*
   - *be proportionate to the desired aim?*
   - *preserve the essence of the fundamental rights concerned?*

In the footnote of the page containing the Fundamental Rights "Check-list", there has been referred to Communication of the EC called "Compliance with the Charter of Fundamental Rights in Commission Legislative proposals" (2005-ongoing). In this Communication, a methodology for 'systematic and rigorous monitoring' has been outlined. In the Stockholm programme, there has been described that, the clear and comprehensible drafting of EU legislation *will* help citizens to effectively exercise their rights. Therefore, it is expected that the Charter is *taken into account*, in the ex-post evaluation of Union instruments, especially in "reports on the application of sensitive legislation and in the mutual evaluation process". In 2009, a special guideline[25] on Impact Assessment was put in place (currently no longer in use).

The objective of the latest strategy (2020) is to *ensure the effective application by Member States*, by partnering with Member States (national, local); it is an overarching strategy with targeted efforts to increase the tangibility of EU rights and

[25] https://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf

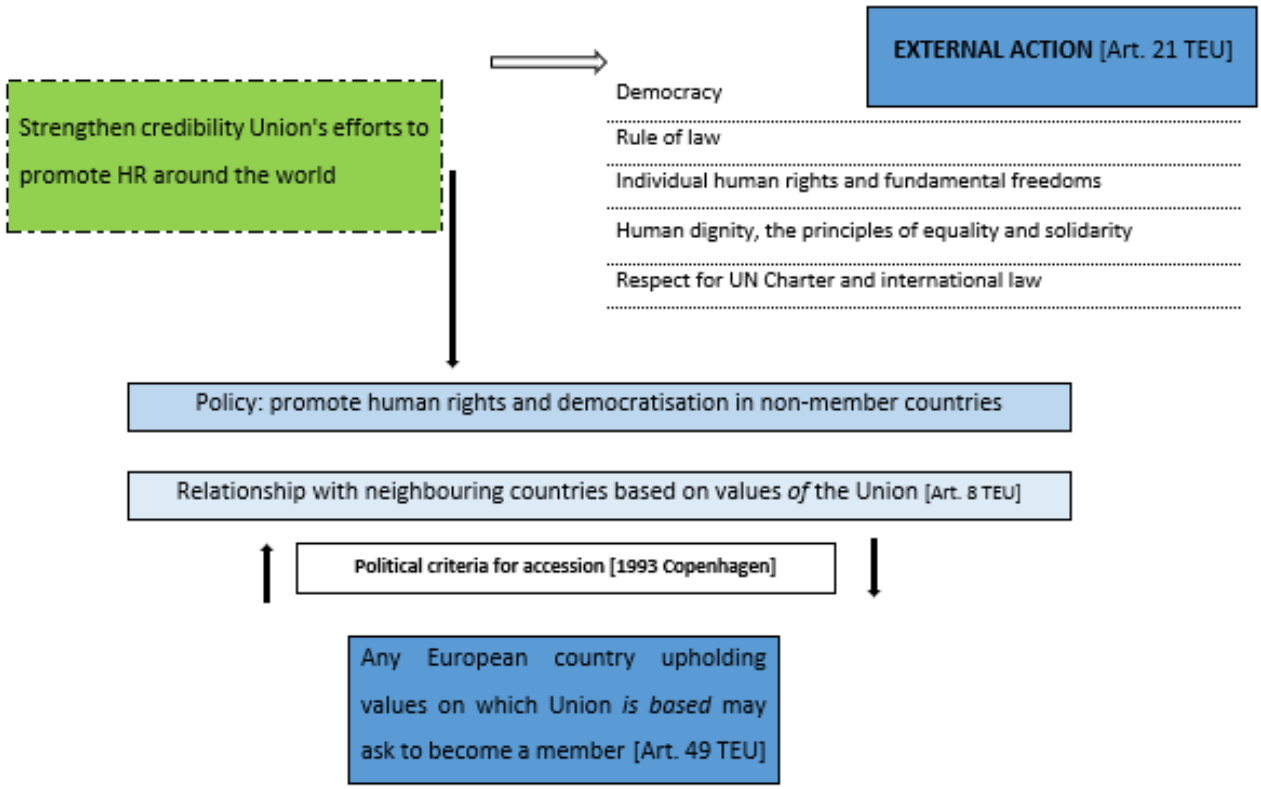
values, including, e.g., the European democracy action plan (COM(2020)790), the first Rule of Law report (COM(2020)580). Steps have been taken by the Commission to help Member States ensure that EU funded programmes are implemented in compliance with the Charter. The proposal for the Common Provision Regulation (CPR) in which rules for the EU budget 2021-2027 have been laid down, offers a so-called *enabling condition*; all programmes that receive funding from the EU (under CPR funds) would be governed by a mechanism put in place to ensure their compliance with the Charter, from the first stage on. It should be noted that, the legislative proposal (2018/0196(COD), on which the sub-paragraph 'ensuring the application of the Charter in EU funding' lines of action have been based, is still awaiting the Council's first reading position. In other words, the formulation of a part of the strategy has been based on a legislative proposal that had not been approved since 2018 (dated moment of publication of the new strategy).

External action and credibility

Fundamental rights are the basic principles on which EU external action has been based; advancing democracy, "the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and the respect for the principles of the United Nations Charter and international law" (Art. 21 TEU in European Commission, 2010, p. 4). Article 8 (TEU) stipulates that, relations with neighbouring countries are based on the values of the Union. The internal dimension has been concerned with putting appropriate checks and balances in place, with the aim to strengthen the externally perceived credibility of the EU in promoting human rights worldwide (Strategy 2010). Respect for fundamental rights would contribute to building mutual trust between MS, thereby, public confidence in Union's policy. Apart from that, the implementation of the CFR has been considered essential to ensure the effective operation and the strengthening of the cooperation machinery in the area of freedom, security and justice. Furthermore, external relations of the Union have been based on the promotion of human rights and democratisation in non-member countries, as well as building relationships with neighbouring countries based on the values *of* the Union (Art. 8

TEU). The objective of this strategy (2010) "*Union must be exemplary"*, was to be achieved by the adoption and incorporation of a FR methodology in the decision-making processes, to strengthen the Union's credibility in the promotion of human rights around the world. Next, ambitious FR policy has been considered an essential component in the *construction* of the Union. In the first strategy, the focus was laid on establishing the foundation required for enabling the *enforcement* of the Charter; transforming it into a compass guiding the institutions. In this process, less attention was paid to the engagement of stakeholders. Finally, the CFR offered more visible and legally secured rights *for the citizens.* In Figure 12, a breakdown of the focus of EU external action in 2010 has been outlined.

Figure 12. *Focus of EU external action 2010 (Own elaboration).*

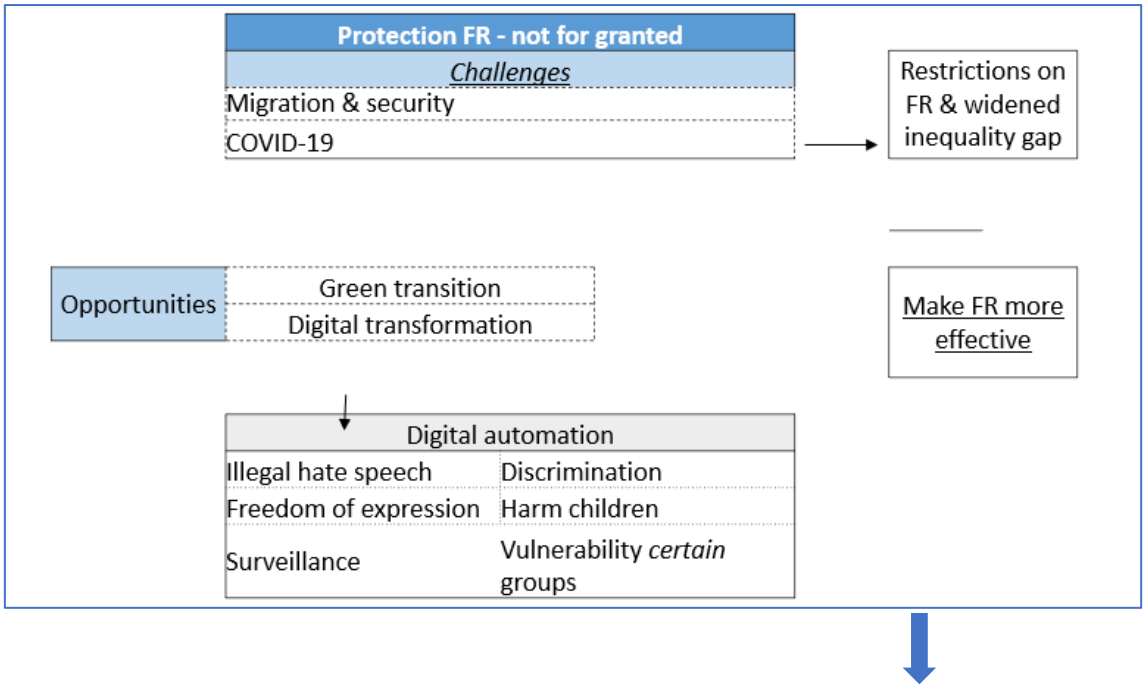


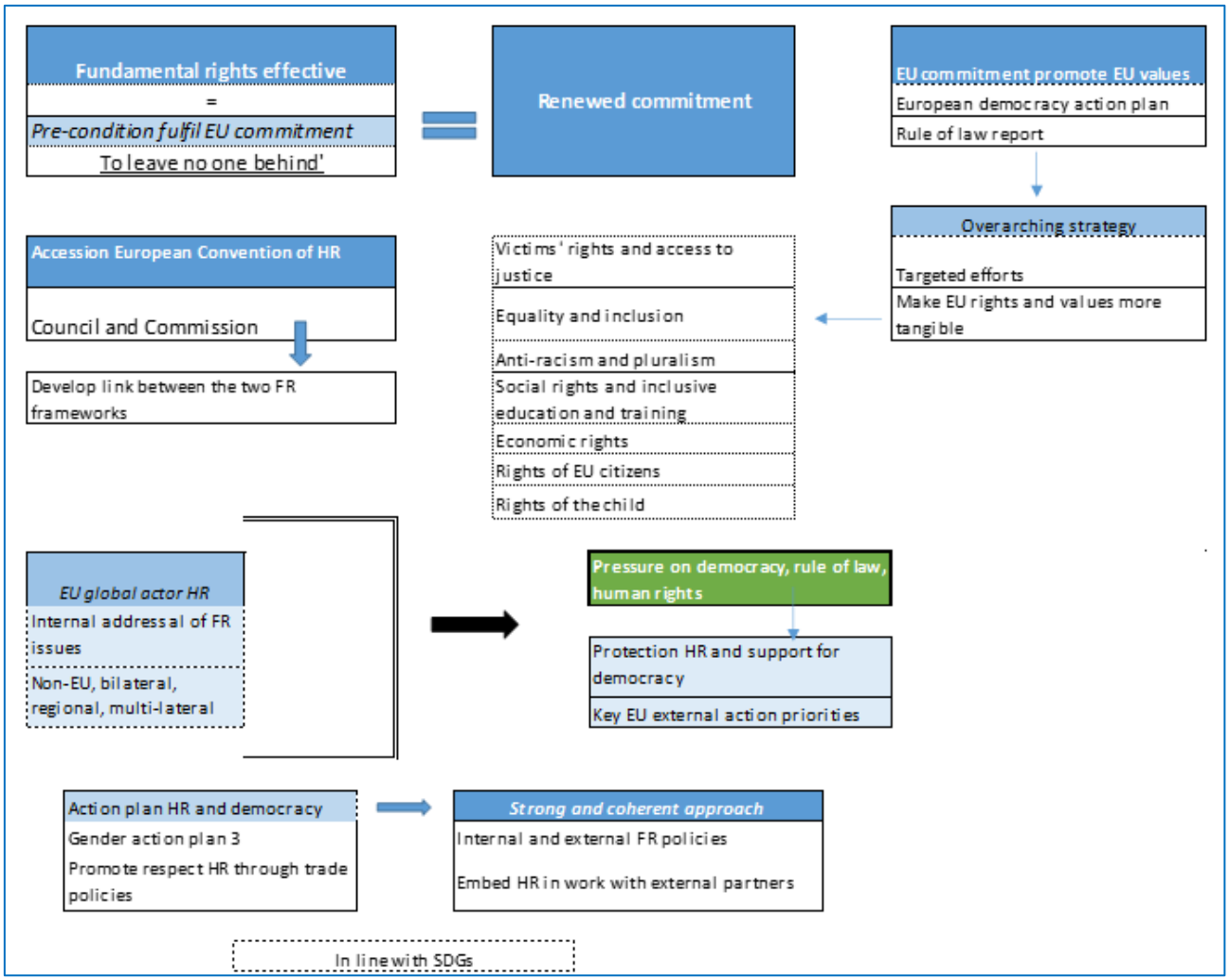
Finally, in the first strategy (2010), three principles for the enforcement of fundamental rights have been specified: (1) prevention; (2) infringement procedures; (3) situations outside the scope of the Charter. The last principle highlights the importance that the function of the Charter is not to replace the existing systems of Member States that ensure the compliance with fundamental rights; the Charter only

applies to breaches taking place in situations governed by EU law. However, when there is a "clear risk of a serious breach or a serious and persistent breach" of EU values by a Member State, a political mechanism of last resort can be triggered: Article 7 (European Commission, 2010). In Appendix 3.1. an overview can be found with the comparison of specific elements of both strategies.

The first strategy focused on effective implementation *by* the EU, the second strategy revolves around strengthening the application *in* the EU. There has been stated that, the protection of fundamental rights should not be taken for granted; challenges have arisen in the areas of migration and security, restrictions have been imposed on fundamental rights and freedoms in the context of the pandemic, and the inequality gap has widened. The EU is considered a global actor when it comes to the promotion of human rights; worldwide pressure on democracy, the rule of law and human rights are reasons why EU action would be required in this area. However, in order to *construct* the EU as a global actor for human rights, fundamental rights issues should be addressed inside the EU [Member States], and should be taken as a basis for all action taken in non-EU, bilateral, regional and multi-lateral cooperation. In Figure 13, a visualisation of the logic based on the information presented in the strategy can be found.

Figure 13. *Focus external action 2020 (Own elaboration).*

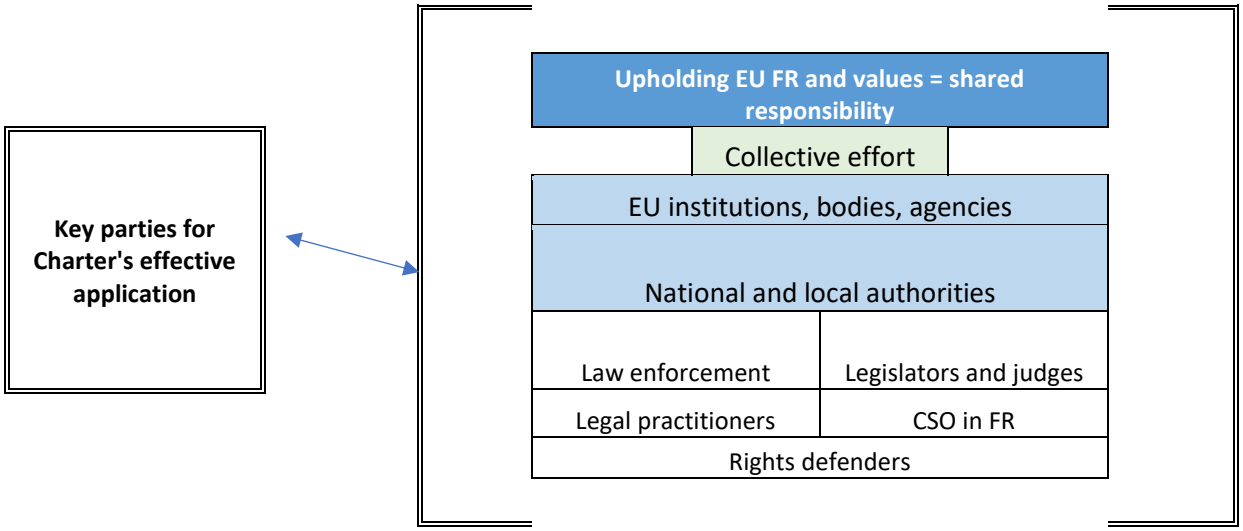




Moreover, there has been argued that fundamental rights could only be effective with independent courts guaranteeing protection, an open and informed democratic debate, independent media, and an active civil society (In Strategy 2020). Civil society organisations, rights defenders and justice practitioners have been described to be empowered through the creation of a supportive and enabling environment, part of the new Union values strand of the Citizens, Equality, Rights and Values programme. In the latest strategy, the role of stakeholders changed from a passive one to an active one; EU institutions, bodies and agencies; national and local authorities; law enforcement, legislators and judges, legal practitioners, CSO in FR, rights defenders, all *have a key role to play* in realising the effective application of the Charter. Upholding EU FR and values has been described as a *shared responsibility*, requiring a collective effort from all stakeholders. In addition, CSOs and rights defenders have been described as key

parties in the *Charter's enforcement chain*; all parties in the "enforcement chain" have the duty to ensure that the Charter turns into a living instrument, "protecting fundamental rights in Europe for the benefit of all" (European Commission, 2020, p. 19). According to the European Commission (2020), the increasing number of independent National Human Rights Institutions (NHRIs) and bodies in Europe lays down "solid foundations for the enforcement of *individual's rights* in practice" (p. 2). The effective application of Charter is considered a precondition to fulfil the Union's commitment to "leave no one behind". Different mechanisms for the protection and enforcement of fundamental rights have been introduced under the strategy, focused on (1) prevention; (2) promotion and application; (3) coordination; (4) enforcement.

Figure 14. *Parties in Charter application (Own elaboration)*



Strands of work mutually reinforce each other
Effective protection FR in the EU
National and international FR protection systems
Constitutional traditions
International obligations [common to MS]

3.4 Upholding EU values

The comparison of the two strategies on the Charter of Fundamental Rights demonstrated a shift of the Union's logic in the justification of actions outlined in the strategies. The underlying idea of public reason, that justice denies that the loss of freedom for some is made right by a greater good shared by others. The interpretation of the meaning of freedom in this sense is a difficult one, especially when it concerns freedoms to be guaranteed by a power structure beyond the nation state. In the previous parts, key moments in the path of European integration have been determined, pointing at the democratization of the EU, the increasing focus on the "European citizen", and the need to legitimize the actions taken by the Union at the international level, based on human dignity, freedom, equality, the rule of law and human rights. To this end, the focus on the creation of externally perceived legitimacy has been visibly present in both strategies. The results show that, among others, Article 7 referred to as a FR enforcing mechanism in the first strategy, has been replaced by newly proposed mechanisms in the second strategy: application of the Charter in EU funding, coordination through Charter focal points, focus on CSOs and rights defenders (capacity building). On that note, discussions have been taking place on the integrity of EU external action in the eyes of the public. Furthermore, per the logic of the aforementioned tools, stakeholder groups from civil society, law enforcement, as well as legislators, judges, legal practitioners and rights defenders, would be directly involved in the application of the Charter. As previously discussed, the Charter may not be interpreted in a way that it would extent the competences of the EU beyond what has been laid down in the Treaties. These conclusions result in the need to determine the input and output legitimacy of the new strategy on the Charter of Fundamental Rights. This comparison shed light on the reinterpretation and recontextualization of role of the Charter of Fundamental Rights of the European Union:

1. Adapting to new legal context vs. protection of FR should not be taken for granted
2. Institutionalisation of a fundamental rights culture vs. our EU bill of rights
3. CFR as an instrument vs. CFR as the embodiment of Union citizenship;
4. Methodological compliance vs. integration of compliance mechanisms in different EU policy tools;
5. FR as a basis for External Action and the AFSJ for credibility and trust vs. addressing FR internally relates to EU external relations (bilateral, regional and multilateral)
6. Enforcing fundamental rights through prevention, infringement procedures, situations outside the Charter and Article 7 vs. prevention, promotion and implementation, coordination, enforcement (infringement procedures and annual report)
7. Infringement procedures vs. promotion and implementation, coordination

In the next part, there will be zoomed in on the primary mechanisms that exists in the legal framework of the EU to ensure the compliance of Member States with EU law: the rule of law framework, infringement procedures.

"In recent years, the European Commission has been confronted with crisis events in some EU countries, which revealed systemic threats to the rule of law. The Commission reacted by adopting the rule of law framework to address such threats in EU countries" (European Commission, n.d.).

The rule of law framework has been created with the objective to prevent a situation to escalate into the triggering of the Article 7 procedure, through dialogue with the Member State concerned. The rule of law is an enduring value of the EU, and its principles develop through legal precedents of cases brought before the Court. In fact, there are three legal procedures that could be started against a Member State in case of non-compliance with EU law: infringement procedures, preliminary cases, Article 7 TEU. Before the decision would be made to pursue legal steps against a Member State, it would be preferable to make use of the soft mechanisms available

under the rule of law framework. Even though the soft mechanisms do not directly result into legally binding implications, these mechanisms are perceived as having "political resonance" and could pave the way towards legal action (European Union, 2019). The case of Poland sheds light on the ineffectiveness of existing tools and mechanisms of *enforcement*: the threat to fundamental values and the activation of Article 7 (TEU) led to the application of the 'new EU Framework to strengthen the Rule of Law' for the first time.

Figure 15. *The rule of law framework (Own elaboration[26])*

The rule of law framework		
Objective		Mechanism with the aim to prevent the escalation leading to the activation of Article 7
How		Dialogue with EU country concerned
Process	1.	Commission assessment
	2.	Commission recommendation
	3.	Monitoring EU country follow-up recommendation
Last resort		Article 7

As previously outlined, an infringement procedure is one of the legal pathways to ensure compliance with EU law, and as legal precedents serve as the foundation for the (further) creation of principles of the rule of law in the EU, an analysis of infringement procedures in (1) Justice, fundamental rights and citizenship; (2) Home affairs, will be conducted. An infringement procedure is one of the four types of common cases[27] that could be brought before the Court[28]. An infringement procedure

[26] Based on: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en

[27] 1. Preliminary: check the proper application of EU law in MS. National courts may ask the court for advice when in doubt about the interpretation or validity of EU law. The advice given by the court is called a binding preliminary ruling; 2. Infringement proceedings: can be brought before the court by the EC and in some cases by a MS. This concerns the fact that a MS is failing to fulfil its obligations under EU law. The court investigates the allegations and gives its judgment; 3. Proceedings for annulment: can be brought before the court by MS, the Council, the EC, the EP- if they think that certain EU law is illegal, can ask for annulment. Individuals may also use this proceeding; 4. Proceedings for failure to act: under the treaty, the EP, Council and EC are required to make certain decisions under certain circumstances. If there is believed that they have failed to do so, a MS, other EU institutions, individuals or companies can lodge a complaint.

[28] The Court of Justice, located in Luxembourg, ensures the equal interpretation and application of EU law in all Member States. It checks the legality of EU institutions, ensures that all MS comply with their obligations and interprets EU law at the request of national courts. Member States, EU institutions, businesses and individuals all have the right to appeal to the Court.

could be launched by the Commission as guardian of the Treaties, or in special cases by a Member State. The first step of an infringement procedure is concerned with the issuance of an official letter of formal notice to the government in question. In a letter of formal notice, there would be elaborated on the situation in which the Member State in question is considered to be infringing EU law. Within a given period, a detailed reply is to be sent by the Member State, and if the Member State fails to correct the matter during this procedure, a reasoned opinion may be issued by the Commission. Finally, if the first stages of the infringement procedure turn out unsuccessfully, the case could be referred to the Court of Justice.

The database of the European Commission on infringement procedures has been consulted to determine the number of infringement procedures in the policy areas of (1) Justice, Fundamental Rights and Citizenship; (2) Home Affairs. The search entries on the two policy areas have been narrowed down with the following parameters:

Figure 16. *Search parameters infringement database (Own elaboration[29])*

List of infringement	Status	Type of infringement	Infringement number	Decision date
By case	Active cases	Non-communication cases	Blank	From
By decision	Closed infringement cases	Other		To
	All	All		
Decision type	**Press release/Memo**	**Country**	**Policy area**	**Title**
Blank	Yes	Blank	Justice, Fundamental Rights and Citizenship	Blank
	No		Home Affairs	

In the process of data gathering, the decision has been made to filter the search results based on the presence of press releases or memos attached to the case. This was considered necessary to enable the verification of the cases. During the process of data analysis, it appeared that the links to press releases and memos to separate cases were invalid. However, after altering the links; replacing the dash signs by underscores, all links appeared to work. Consequently, the process of information checking began, which led to the identification of another error in the information provided in the

[29] Based on the infringement database from the European Commission

database; most of the cases that were indicated to be open cases, were closed. At the same time, the status in the database would most likely refer not to the status of the lawsuit, but of the infringement procedure itself. Nevertheless, the distinction between the active status of a case referring to either the procedure in its entirety or the judgment of the case has not been offered on the database. These results complicated the process of data analysis, nevertheless, as reasoning takes place behind the veil of ignorance, the most significant information that has been gathered through the European Commission infringement database will be outlined.

3.3.1 Justice, Fundamental Rights and Citizenship

The search on Justice, Fundamental Rights and Citizenship resulted in a list of 22 [twelve active] cases against fifteen countries (2006-now). Next, the number of cases was narrowed down to eleven cases by excluding those that started before 2006, and those concerned with the incorrect transposition of Directives. This resulted in the exclusion of three cases from 2006 (the Netherlands, Belgium, Sweden), and the exclusion of eight cases concerning the (incorrect) transposition of a Directive (Germany 2010; Germany 2011; Austria 2011; UK 2011; Sweden 2011; Czech Republic 2011; Lithuania 2011; Bulgaria 2012). In Table 5, an overview can be found with the specifics of the selected cases.

Table 5. *Infringement cases: Justice, FR and citizenship (Own elaboration[30])*

Number	Country	Formal notice	Reasoned opinion	Referral to Court	Closing case	Status database
INFR(2011)4147	**Italy**	**24-11-2011**	**17-10-2013**	16-10-2014	**24-1-2019**	**Closed**
VIOLATION DE LA DIRECTIVE 2004/80/CE RELATIVE À L'INDEMNISATION DES VICTIMES DE LA CRIMINALITÉ.				C-601/14	25-11-2016	
INFR(2012)2011	**Hungary**	17-1-2012	7-3-2012	25-4-2012	**16-10-2014**	**Closed**
VIOLATION OF INDEPENDENCE OF DATA PROTECTION SUPERVISORY AUTHORITY				C-288/12		
INFR(2012)2012	**Hungary**	17-1-2012	7-3-2012	25-4-2012	20-11-2013	**Closed**
RETIREMENT AGE OF JUDGES, PROSECUTORS AND PUBLIC NOTARIES				C-286/12		
INFR(2013)2084	**Finland**	**20-6-2013**	**20-11-2013**	10-7-2014	**Removal from register**	**Closed**

[30] Making use of Export to Excel option through the European Commission database, having reformatted the table, as well as repairing the broken links to the press releases, and adding information from the e-Curia database.

Non-conformity of Finnish legislation with Directive 2000/43/EC as regards the competences of the national equality body				11-9-2015		
INFR(2017)2110	**Hungary**	13-7-2017	4-10-2017	7-12-2017	18-6-2020	**Active**
VIOLATION OF EU LAW BY THE ACT ON THE TRANSPARENCY OF ORGANISATIONS SUPPORTED FROM ABROAD (ACT LXXVI/2017) ADOPTED ON 13 JUNE 2017				C-78/18		
INFR(2017)2119	**Poland**	28-7-2017	12-9-2017	20-12-2017	6-12-2019	**Active**
VIOLATION OF EU LAW BY THE LAW AMENDING THE LAW ON ORDINARY COURTS ORGANISATION.				C-192/18		
INFR(2017)2121	**Poland**	2-7-2018	14-8-2018	20-12-2017	**Closed**	**Active**
VIOLATION OF EU LAW BY THE NEW LAW ON THE SUPREME COURT				C-619/18		
INFR(2019)2076	**Poland**	3-4-2019	17-7-2019	10-10-2019	**Active**	**Active**
VIOLATION OF EU LAW BY THE NEW DISCIPLINARY REGIME FOR JUDGES IN POLAND				C-791/19		
INFR(2020)2182	**Poland**	29-4-2020	30-10-2020		**Active**	**Active**
VIOLATION OF EU LAW BY THE LEGISLATIVE CHANGES AFFECTING THE JUDICIARY						
INFR(2020)2300	**Cyprus**	20-10-2020				**Active**
CYPRUS INVESTOR CITIZENSHIP SCHEME						
INFR(2020)2301	**Malta**	20-10-2020				**Active**
MALTA INVESTOR CITIZENSHIP SCHEME						

Next, the cases have been grouped based on the categories established in the press releases or per country. First of all, the latest cases concerning [Country] Investor Citizenship Scheme will be discussed. Secondly, the cases against Poland from 2020-2017 with regards to the judiciary will be outlined. Next, there will be looked at the cases against Hungary 2017-2012, with a main focus on the Hungarian law on foreign-funded NGOs. Finally, there will be looked at the remaining cases, Finland and Italy.

Selling EU citizenship *(INFR(2020)2300/2301)*. In October 2020, the initiation of the infringement procedures against Cyprus and Malta was announced by the European Commission in one press release. Both cases are concerned with [country] Investor Citizenship Scheme. The topic of the infringement procedure has been described in the headline of the press release as *"selling" EU citizenship* (European Commission, 2020a). The investor citizenship scheme has been referred to as "golden passport" schemes. The Commission argues that, the granting of nationality in exchange for a predetermined payment of investment, is in conflict with Article 4 (3)

TEU, and undermines "the integrity of the status of EU citizenship"[31]. In this aspect, the granting of nationality has been directly connected with EU citizenship; this scheme undermines the essence of EU citizenship. In this press release, there has been stated that, the Commission would write to Bulgaria as well, highlighting the same issue. At the same time, the only case of Bulgaria that appeared in the filtered search results is a case from 2012, concerned with the participation of EU citizens in European elections.

Figure 17. *Snapshot press release (European Commission, 2020a).*

> In a resolution adopted on 10 July 2020, the European Parliament reiterated its earlier calls on Member States to phase out all existing citizenship by investment (CBI) or residency by investment (RBI) schemes as soon as possible. As stated by President von der Leyen in the State of the Union Address of 16 September 2020, European values are not for sale.

Protecting judges in Poland from political control. The four infringement procedures Commission v Poland (C-619/18; C-192/18; C-791/19; INFR(2020)2182)), are concerned with the rule of law in Poland. The press releases of the formal letters and reasoned opinions have been processed in WordStat8 to determine the topics of the infringement procedures in the area of Justice, Fundamental Rights and Citizenship, resulting in the word cloud below:

Figure 18. *Word cloud based on frequency: Poland (Wordstat8).*

[31] Article 20 of the Treaty on the Functioning of the European Union

The rule of law is one of the common values[32] on which the EU is based. In 2016, a dialogue has been opened with Poland under the Rule of Law Framework; “The Commission stands ready to continue the ongoing rule of law dialogue with Poland, which remains the Commission's preferred channel for resolving the systemic threat to the rule of law in Poland” (European Commission, 2018a). When referring to the e-Curia database, it appeared that cases C-619/18 and C-192/18 have been closed, in contrast to the status of the procedures in the European Commission infringement database.

The Hungarian law on foreign-funded NGOs. Case INFR(2017)2110, Commission v Hungary (C-78/18) has been concerned with Transparency of associations (receiving of foreign donations). While in the database of the European Commission, the case has been marked as an active case, the e-Curia website indicates that the case has been closed; the judgment of the Court was issued on 18 June 2020, concluding that the law on the Transparency of Organisations poses unjustifiable restrictions on foreign donations to CSOs, thereby, breaching its obligations under Article 63 TEU, Articles 7-8 and 12 of the CFR. However, in February 2021, a new letter of formal notice was sent concerning the failure of compliance with the ruling of the Court of Justice.

Independence authorities and measures affecting the judiciary. In January 2012, two infringement procedures were started against Hungary, with regards to the independence of authorities and measures affecting the judiciary, that came in force with Hungary’s new constitution. After carrying out a legal assessment of the new legislation, the Commission concluded that, the Hungarian law was in conflict with EU law. The cases were combined in the press releases of the formal notice, reasoned opinion, and the referral to the Court. In April 2012, the Commission expressed its satisfaction with the changes brought to the Central Bank statute, but referred Hungary to the Court concerning two other cases: the independence of data protection authority (C-288/12), and the retirement ages of judges (C-286/12).

[32] Article 2 TEU

Finland (C-538/14). In July 2014, Finland was referred to the Court based on "not having a racial equality body for employment matters" (European Commission, 2014). The equality body of Finland does not carry out specific tasks in the area of racial equality and employment. The proposed Non-Discrimination Act (April 2014) by the Finnish government was considered to be insufficient to solve the issue. Adding this up to the fact that the extensive discussions with Finland did not result in concrete progress, the decision was made to refer the case to the Court.

Italy: Insufficient rules on compensation for crime victims. In November 2011, the infringement procedure against Italy was launched with the issuance of a formal notice. Over the course of three years, Italy failed to undertake the necessary steps in amending its legislation. Therefore, the case was referred to the Court in October 2014. The judgment on the case was delivered in 2016, the Italian Republic was ordered to bear its own costs, as well as those from the Commission, and the Council was ordered to bear its own costs. On the infringement database of the Commission, the procedure was indicated to have been closed in January 2019.

3.3.2 Home Affairs

The search on the policy area of Home Affairs resulted in a list of 13 infringement cases against nine countries (2010-now); seven active cases, five closed cases. After referring to the e-Curia webpage from the Court, it appeared that only two cases are open at this moment INFR(2019)2193; INFR(2018)2247 (Hungary). Be it as it may, it could be the case that the status of the cases refers to the infringement procedure in its entirety, but those would be assumptions based on non-presence of information on the database. In Table 6, an overview is offered of the case results, including *(working)* links to the press releases enclosed to each case that appeared with the aforementioned search parameters.

Table 6. *Infringement cases: Home Affairs (Own elaboration[33])*

Number	Country	Formal notice	Reasoned opinion	Referral to Court	Closing case	Status database
INFR(2010)2093	Belgium	30-9-2010	29-9-2011	21-11-2012	14-3-2014	Closed

[33] Making use of Export to Excel option through the European Commission database, having reformatted the table, as well as repairing the broken links to the press releases, and adding information from the e-Curia database.

NON-CONFORMITE AVEC LE REGLEMENT (CE) 2252/2004 SUR LES ELEMENTS BIOMETRIQUES DANS LES PASSEPORTS				C-139/13		
INFR(2012)2237 Implementation of the right to appeal against a visa refusal/annulment/revocation	**Slovakia**	**21-2-2013** 17-10-2013	**16-10-2014** 26-2-2015	**17-5-2018** C-614/18	**Removed from register**	**Closed**
INFR(2013)2182 Lack of implementation of certain obligations under EU document security legislation	**Bulgaria**	**23-1-2014**	**29-4-2015**	**17-11-2016** C-130/17	**Removed from register**	**Closed**
INFR(2015)2197 INCORRECT IMPLEMENTATION BY CROATIA OF THE RECAST EURODAC REGULATION (EU) 603/2013	**Croatia**	**10-12-2015**	**14-6-2017**			**Active**
INFR(2015)2201 INCORRECT IMPLEMENTATION BY HUNGARY OF EU ASYLUM AND MIGRATION ACQUIS	**Hungary**	**10-12-2015**	**7-12-2017**	**19-7-2018** **C-808/18**	**Closed**	**Active**
INFR(2015)2202 INCORRECT IMPLEMENTATION OF THE RECAST EURODAC REGULATION (EU) 603/2013	**Greece**	**10-12-2015**			**8-12-2016**	**Closed**
INFR(2015)2203 INCORRECT IMPLEMENTATION OF THE RECAST EURODAC REGULATION (EU) 603/2013	**Italy**	**10-12-2015**			**8-12-2016**	**Closed**
INFR(2017)2092 FAILURE TO IMPLEMENT CORRECTLY BY CZECHIA COUNCIL DECISIONS (EU) 2015/1523 AND 2015/1601 ON RELOCATION	**Czech Republic**	**14-6-2017**	**26-7-2017**	**7-12-2017** C-719/17	**Closed**	**Active**
INFR(2017)2093 FAILURE TO IMPLEMENT CORRECTLY BY HUNGARY COUNCIL DECISION 2015/1601 ON RELOCATION	**Hungary**	**14-6-2017**	**26-7-2017**	**7-12-2017** C-718/17	**Closed**	**Active**
INFR(2017)2094 FAILURE TO IMPLEMENT CORRECTLY BY POLAND COUNCIL DECISIONS (EU) 2015/1523 AND 2015/1601 ON RELOCATION	**Poland**	**14-6-2017**	**26-7-2017**	**7-12-2017** C-715/17	**Closed**	**Active**
INFR(2018)2247 VIOLATION OF EU LAW BY MEANS OF THE ACT VI OF 2018 AMENDING CERTAIN ACTS WITH RESPECT TO MEASURES AGAINST ILLEGAL IMMIGRATION AND THE SEVENTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY	**Hungary**	**19-7-2018**	**24-1-2019**	**25-7-2019** C-821/19		**Active**
INFR(2018)4087 Incorrect implementation of the Long-term Residents Directive (2003/109/EC)	**Hungary**	**19-7-2018**	**24-1-2019**	**25-7-2019** C-761/19		**Closed**
INFR(2019)2193 DE FACTO DETENTION OF RETURNEES IN THE TRANSIT ZONES	**Hungary**	**25-7-2019**	**10-10-2019**			**Active**

The cases have been grouped based on categories established by the press releases, the Court or per country. First of all, there will be looked at three procedures against Hungary: *De facto detention of returnees in the transit zones* (INFR(2019)2193), the incorrect implementation of the long-term residents Directive (C-761/19), and the case concerning EU asylum and return legislation (C-821/19).

Secondly, the combined case against Poland, Hungary and the Czech Republic will be discussed. Furthermore, the procedures against Italy, Greece and Croatia with regards to the Eurodac regulation, as well as C-808/18 against Hungary, will be outlined. Finally, there will be looked at the remaining individual procedures against Bulgaria (C-130/17), Slovakia (C-614/18), and Belgium (C-139/13).

Hungarian transit zones (C-821/19 and INFR(2193). On 25 July 2018, the Commission announced the referral of Hungary to the Court regarding the criminalization of activities in support of applicants for a residence permit or asylum (C-821/19, 2018), the exclusion of non-EU nationals possessing a long-term residency permit (C-761/19) from exercising the veterinary profession (European Commission, 2019). As shown in Table 7, the formal notices of cases 2247 and 4087 were published on the same day, but in different press releases. The latter was included in a general memo of that month "July infringement package: key decisions", and the former had an individual press release that simultaneously served as the announcement of the referral to the Court of the first infringement procedure (2201) ever started against Hungary in this area regarding the incorrect implementation of the EU asylum and migration acquis.

Table 7. Home Affairs: Hungary *(Own elaboration)*

INFR(2018)2247	**Hungary**	19-7-2018	24-1-2019	25-7-2019
Measures against illegal immigration				C-821/19
INFR(2018)4087	**Hungary**	19-7-2018	24-1-2019	25-7-2019
Long-Term Residents Directive (2003/109/EC) (Veterinary profession)				C-761/19
INFR(2019)2193	**Hungary**	25-7-2019	10-10-2019	
DE FACTO DETENTION OF RETURNEES IN THE TRANSIT ZONES				

Table 8. *EU Asylum and migration acquis – Hungary (Own elaboration)*

INFR(2015)2201	**Hungary**	10-12-2015	7-12-2017	19-7-2018
INCORRECT IMPLEMENTATION BY HUNGARY OF EU ASYLUM AND MIGRATION ACQUIS				C-808/18

On 19 July 2018, the formal notice of cases INFR(2018)4087 and INFR(2018)2247, the issue concerning the criminalisation of activities in support of asylum and residence applications, as well as the Hungarian law on foreign-funded

NGOs, were announced. In this press release[34], there has been referred back the first infringement procedure with regards to Hungarian asylum laws (C-808/18). Next to that, the Commission sent a letter for formal notice, initiating a new infringement procedure against Hungary, with regards to the non-provision of food in transit zones with Serbia (INFR(2019)2193). The new case is concerned with those[35] who are compelled to stay in the Hungarian transit zones at the border with Serbia. The compulsory nature of the stay of people in Hungarian transit zones has been qualified as detention under the Return Directive[36]. Consequently, there has been argued that, the detention conditions in the Hungarian transit zones are not in line with the material conditions applicable, as laid down by the Return Directive and the CFR.

In 2015, an infringement procedure against Hungary was launched. After receiving the reply provided by the Hungarian authorities, the decision was made to refer the case to the Court. This decision was based on the grounds that a large number of the issues that had been previously addressed, had not been resolved by the Hungarian authorities. Furthermore, Hungarian legislation was said to be found incompatible with EU law in three areas: Asylum procedures (transit zones at external borders); Reception conditions (breach Reception Conditions Directive); Return (inconsistency with EU law). The letter of formal notice was concerned with Hungarian law, referred to as "Stop Soros" by the Hungarian authorities, that criminalises all forms assistance provided in support of asylum or residence applications. Hungary has been offered support and assistance by the Commission. The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights published a joint opinion on the new Hungarian legislation and the constitutional amendment (European Commission, 2018b).

[34] https://ec.europa.eu/commission/presscorner/detail/EN/IP_18_4522

[35] Persons whose applications for international protection have been rejected, waiting to be returned to a third country.

[36] DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

Figure 19. *Word cloud based on frequency: Hungary (Wordstat8).*

Commission v Republic of Poland, Hungary, Czech Republic. The cases C-715/17, C-718/17 and C-719/17 were joined by the Court for the purpose of judgment. The three defendants have been brought before the Court due to failure of meeting obligations under Decisions (EU) 2015/1523 and (EU) 2015/1601[37], as well as the provisional measures concerning international protection in support of Italy and Greece. The three Member States have failed to comply with the obligation to indicate at least every three months an *appropriate* number of applicants that could be relocated to their territories (CJEU, 2020).

Migration and asylum. In December 2015, the Commission launched eight infringement procedures to ensure the implementation of the Common European Asylum System, concerning Greece, Croatia, Italy, Malta and Hungary. In the press release of the formal notification (cases INFR(2015)2203 INFR(2015)2202), Greece, Croatia and Italy were urged to implement the Eurodac regulation (Regulation (EU) No 603/2013), relating to fingerprinting of asylum seekers and data transmission to the Eurodac central system. The implementation of the Eurodac regulation is necessary for

[37] Article 5(2) and 5(4) to 5(11)

the functioning of the relocation schemes and the Dublin regulation (European Commission, 2015).

In 2018, Slovakia (C-614/18) was taken to Court due to failure of providing judicial remedies against refusals, annulments or revocations of visas. The infringement procedure against Bulgaria (C-130/17) was initiated in 2013, and referred to the Court about three years later. The case has been concerned with the failure to implement rules on e-passports and e-residence permits. Furthermore, Belgium (C-139/13) was brought before the Court for failure to comply with criteria for biometric passports with fingerprints.

In the previous parts, the infringement procedures in the policy areas of (1) Justice, Fundamental Rights and Citizenship; (2) Home Affairs, have been discussed. After the analysis of the results that were gathered based on the presence of press releases, the decision was made to lift the veil of ignorance and determine the reality of the total number of cases with and without press releases. As previously outlined, several errors were found in the database, first of all, the links to the press releases were broken, the filter on active or closed cases is not up to date and fails to clarify when a case would be considered closed. The filter criterion of only displaying cases that include links to press releases and/or country memos was included to verify the sources of information. The search based on the previously outlined criteria resulted in 22 cases in the policy area of Justice Fundamental Rights and Citizenship. The same search in the policy area of Home Affairs resulted in 13 hits. The same search, but without the filter on press release/memo country, resulted in 307 cases in the former, and 152 cases in the latter. As indicated in Figure 20 and 21, most infringement procedures in the first area have been initiated against Austria (26), Ireland (23) and Italy (23), and against Italy (17), Hungary (12) and Cyprus (10) in the second area. The figures created based on the years of infringement can be found in Appendix 4.

Figure 20. *Total number of cases per country: JFRC (Own elaboration).*

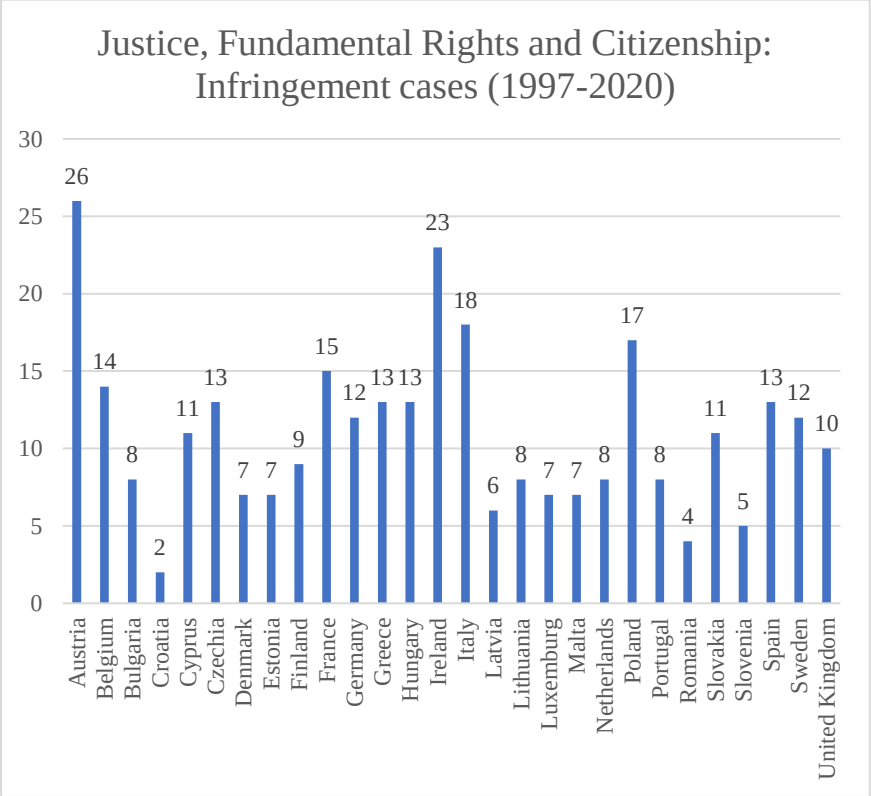
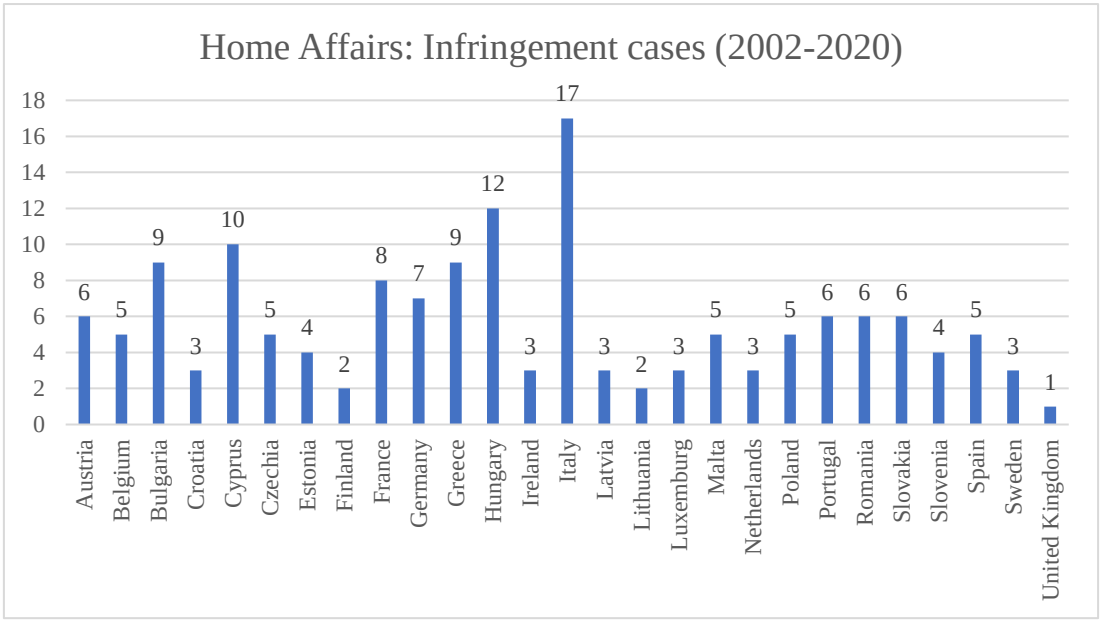


Figure 21. *Total number of case per country: HA (Own elaboration).*



4. DISCUSSION

In this chapter, an analysis of the literature review and the results obtained in the empirical part will be conducted. The purpose of this dissertation has been studying the issue of the formation of public reason outside national (state) identity. Next to that, the aim has been to develop theoretical knowledge on the formation of public reason in a post-truth era. The object of study has been European governmentality and public reason, and the subject has been the role of fundamental rights in the formation of public reason in the European Union.

First of all, in accordance with the literature review, the role and utilisation of citizenship, identity, values and principles has been determined. Despite the fact that the constitution for Europe was never ratified, the results show that actions are still being taken to construct a common identity. In theory, European citizenship could be understood as a symbolic institution; in practice, the CFR has been framed as a symbol of European citizenship- this would indicate that on a certain level, a link has been established between human rights, the Charter (a symbol of identity), and European identity. On that note, it is necessary to refer to the concept of thick and thin public reason as introduced by Crum; the depth of public reason was described to be determined by the core functions carried out by a state at the domestic level. The results show that the EU adopted micro-technologies of governing in an attempt to influence the level of self-identification of individuals with European citizenship and identity. These technologies do not require the expansion of EU competences established in the Treaties, instead, there is made use of implicit but explicit mechanisms, e.g., measuring the level of knowledge of Europeans on basic rights and values. In turn, input legitimacy has been derived from public opinion surveys on awareness and EU citizenship. Particularly, on the awareness and training component, because “people would like to receive more information”, there is a strong need. However, by posing this question and measuring the responses, the results have been presented as a factual

observation, but are actually opinions; are you against, in between, or in favour of getting more knowledge about your rights and the EU? Consequently, the following question could be posed: why would you be against receiving knowledge about where to find information about your rights? Can these opinions be treated as legitimate for the justification of the need to further integrate and construct normative standards of collaboration and behaviour? In accordance with the formulation of the strategy, it can. Nevertheless, I would propose to consider that increasing the basic level of an average citizen on their national rights and laws would (not) deserve prioritization over efforts taken to spread awareness about European identity.

Apart from that, what is missing in the latest strategy is the discussion of the use of available opportunities (Habermas, 1995) in contrast with the opportunities offered- if the Charter is indeed a list of rights familiar to the constitutional traditions of the Member States, there would not be a need to put a focus on its promotion. After all, strategies are part of public policy, and public policy is developed based on the need of a society, which would require standard methods of policy and program evaluation, not a justification based on a public opinion poll about the interest in receiving information.

The framing of the infringement cases against Cyprus and Malta is an interesting example of the change in value added to the concept of citizenship. The existence of European citizenship is utilised to justify the need to interfere in the domestic situations of the two countries with regards to the granting of national citizenship, and is being directly linked with European values; “EU values are not for sale”.

Therefore, a question that could be posed for further research would be: what happens when Europeans would add more value to European identity, citizenship and rights, than their national identity, citizenship and rights? Next to that, it is important to consider the (possible) role of education (mechanisms); education is the basis for the construction of the ideal citizen. Considering the harmonization of education, designed to stimulate free movement, or the use of the Erasmus+ programme as a consciously chosen tool, for the spread of awareness. Consequently, another question could be posed, considering post-national identity construction; which (new) tools are used in

constructing a (post-national) citizen? At the same time, I would argue that there could be looked at identity vs. citizenship, as identities are the entities that can be influenced.

Secondly, the two strategies on the implementation of the CFR have been analysed and compared to determine the redefinition and recontextualization of values and principles. Considering the identity crisis of contemporary nation states, the rise of populism and identity politics, the construction of a fragile and imagined concept as identity is subject to different actors trying to manipulate the self-identification of individuals, among which the EU appears as this "neutral" actor promoting human rights across the globe. As previously mentioned, a link has been established between human rights and a symbol of European identity, which could possibly lead to a rise of expectations of citizens. In turn, a friction between obeying/adhering/living by a certain set of standards, would be created. However, since intuition is not determined by a legal classification, but self-identification, trust and the meaning that is given to it, I would argue that; the more people believe and trust, the sooner impetus will be given for its realisation. It should be kept in mind that the current reality is likely to be in its beginning stages of this formation.

The results show that, in 2010, the focus was laid on the creation of a fundamental rights culture that would serve as a compass guiding the work of institutions. The legally binding status of the Charter reflects the integration of normative outlooks into legal principles.

Furthermore, the main narrative of this strategy has been concerned with upholding and protecting EU fundamental rights and values; a shared responsibility, a collective effort, that could only be achieved if, civil society organisations would be sufficiently equipped with tools required to ensure the effective application in practice in a supportive environment. The expansion of the engagement of individuals and civil society organisations in transnational relations enables the participants to directly incorporate common sets of values and justification in their self-governance. The results of the analysis conducted on the strategies (CFR) indicate that, as of 2020, stakeholders would have an active role in the integration of fundamental rights in the normative standards of the EU. Thereby, a new value chain would be created, in which

local groups would be directly targeted without the necessity to firstly address the government of a country. As stated by Kjaer, once normative outlooks become part of legal principles, norms obtain an indirect strategic role, and turn into tools guiding decision-making processes. On that note, the results show that the CFR did not only gain an indirect strategic role, it was *given* a *direct* strategic role in guiding, not solely, decision-making processes, but in establishing normative standards of behaviour as well. However, the CFR has not been taken as the foundation from which reasoning takes place, but as a check-list that is applied afterwards. And a check-list culture is something people make jokes about on a daily basis. In policy science, a model is a representation of a reality, but the danger exists that this simplification of reality will come to shape our realities. And this specifically, can be observed in the approach taken in the strategies, where strategic intensions are presented as goals, rather than being reformulated into genuine goals that are informed by a moral identity, and where opinions are presented as factual evidence that were gathered to answer this question specifically, and are utilised as input legitimacy, it turns into a self-fulfilling prophecy. In turn, the following question could be raised; which ethics are taken into account in the formulation of something as a strategy on the implementation of the CFR in the EU?

Even though the CFR may not be interpreted in a way that it would extent EU competences, it is used in an explicit way to implicitly shape and guide behaviour. And by strategically utilising law as a framework for justification, there is moved beyond the need to expand on EU competences, taking place through processes of socialisation.

Moreover, the attempt to strengthen the credibility and to maintain the integrity of the EU at the international stage, and efforts to ensure the "compliance" with common values inside the EU are two sides of the same coin. Even though, the focus in the strategies was laid on visualising the rights of citizens, the underlying narrative seemed to be dominated by the focus on external action in relation to the Union's credibility in promoting human rights worldwide. Therefore, I would suggest differentiating between *image creation* and *positive behaviour activation*.

Next, the fact that Article 7 has been "replaced" by newly proposed mechanisms and strategies of enforcement could be explained by the fact that the EU has been unable to uphold its common values and fundamental rights inside the Union. The need to strengthen the application of fundamental rights in the EU was motivated by the, what I would frame as, legitimacy crisis of the EU, pointing at its, self-proclaimed or perceived, inability to uphold the rule of law and fundamental rights and values internally. The statement made that EU rights and values should be protected would imply that those rights and values are under threat. In the creation of this rhetoric, on the one hand, there has been referred to migration and security, and COVID-19; on the other hand, to the green transition and digital transformation (2020). A direct link has been created between the need to uphold the rule of law and fundamental rights and values in the EU for the sake of not losing credibility at the international stage as a worldwide promotor of human rights.

The narrative "the protection of fundamental rights should not be taken for granted" has been created by the European Commission itself, possibly, without taking into consideration that the formulation and presentation of the latest strategy also confirms the presence of a legitimacy crisis, while "factually seen", the number of infringement cases presented to the online society is relatively small. And this is about the post-truth of information, and the narrow selection of information is reflected in the online presentation of press releases of which the links were broken.

Furthermore, the results show that, basic democratic values as a prerequisite for the existence of public reason exist outside a formal constitution; despite the absence of a ratified constitution, the governmentality of the EU continued to pursue the creation of a demos and a sense of unity through strategies and action plans. Consequently, there could be argued that European governmentality as an implicit form of knowledge in and beyond the EU, continues the path of European integration, finding its way, directly or indirectly, around the need to adopt a regulation, directive or decision, through the creation of action plans, annual reports, strategies, or the issuance of recommendations and opinions.

If the reliance on strong abstract normative principles in the case of the EU is indeed far-fetched, as argued by Kjaer, policymaking frameworks would turn into aesthetic forms, that lack strong substance and significant normative guidance. On the one hand, conforming Kjaer, there could be argued that policy frameworks indeed turn into aesthetic forms lacking a strong substance and significant normative guidance. On the other hand, the comparison of the two strategies shed light on the complexification and professionalisation of building an interrelation between common values and fundamental rights in all policy areas by the EU. In addition, efforts taken to institutionalise values and fundamental rights would indicate that normative guidance is not only present, it actually came to govern European governmentality. Likewise, there could be argued that, efforts taken by the EU have started to move beyond abstract normative principles; "The Charter is not a text setting out abstract values, it is an instrument to enable people to enjoy the rights enshrined within it when they are in a situation governed by Union law" (European Commission, 2010, p. 3). Next to that, it is an interesting observation that the Charter has been presented as an EU bill of rights, while the constitution for Europe was never ratified, efforts are continued to be taken to (further) construct a European Union and a European citizen by further establishing common practices of collaboration. Therefore, there could be argued that, the absence of a ratified constitution does not result in a change of mentality, but has been a reason to develop and make use of other mechanisms through which normative standards could be created.

Finally, the results of the analysis of the infringement procedure database of the European Commission demonstrate that there is a distortion between infringement procedures presented to the public and the actual number of cases. The aim of this study, however, is not to account for the reasons why only a small selection of cases has been presented through case specific press releases, but to discuss the fact that only a limited number of cases has been presented. The presentation of the cases outlined in the results could be perceived as a tool used to establish normative standards of behaviour. At the same time, efforts were taken to analyse the press room of the European Parliament, observing it as a European citizen in search of discussions and

press releases or news articles related to Article 7 of the Treaty on the European Union. The attempted analysis of the platform shows that the website of the European Parliament does not meet the criteria of transparency and accessibility, and therefore obstructs the ability to carry out the duty of civility; doing what they can to hold government officials to it. The fifth element of the permanent structure of the idea of public reason is concerned with “Citizens' checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity” (Rawls, 1997, p. 767).

5. CONCLUSION

The purpose of this dissertation was to study the issue of the formation of public reason outside national (state) identity, with the EU as a case study, and to develop theoretical knowledge of the formation of public reason in a post-truth era. In the globalising and digitalising world, a shift has been taking place in the functions, and understanding of those functions, of the main structure governing a demos, no longer bound by geographical borders. In this aspect, debates have been taking place concerning the implementation of theoretical concepts that could be understood as tied to statehood, in the context of international cooperation. The European Union was described as a unique example of a "government" existing outside the nation state, an unidentifiable political object, that entered the path of political integration, and in the search for political legitimation, an increasing focus was laid on the process of subjectivation of a European demos. In this process, the appeal to a set of shared values and rights obtained a significant role.

First of all, the utilisation of the concept of governmentality as a method to study the EU proved to be useful; it allowed for the visualisation of tools and mechanisms employed in shaping, guiding, and managing behaviour; strategies, action plans, and the strategic use of law as a framework for justification. Based on the results and the discussion, the conclusion can be made that, the underlying thought of European governmentality never left the reality of a constitutional democracy, and is driven by the need to spread and institutionalise common values in the governance, in, of, and by the EU. On that note, the understanding that a constitutional democracy is a prerequisite of public reason, could be adjusted, by letting go of the strict definition of a constitutional democracy.

Secondly, the study on public reason in the EU shed light on the key role of basic democratic values and the existence of a set of shared norms and values under a common political structure. Throughout the course of European integration, efforts were taken to further democratize the Union, establishing European citizenship, and

the institutionalisation of common values and fundamental rights. Therefore, the conclusion could be made that, tools used to create unity, identity, shared values, rights, and culture could be key in a post-truth era. The EU has been moving beyond its legal scope with the use of implicit tools in developing and maintaining normative standards of behaviour. Nevertheless, the question to what extent the employment of corresponding tools for different purposes is ethical, is a question I would leave open for debate.

Moreover, the comparison of the Charters demonstrated that rights have been classified as goods; the implicit classification of rights as goods in the EU indicates that those goods could be distributed. Taking into consideration that normative issues could only be evaluated based on interests or values provided for by goods, offering justifications for the extension of technologies related to the distribution of rights as goods, could be potentially limitless, as rights have a positive connotation; it would be difficult to object to actions derived from the positive distribution of rights as goods.

Furthermore, the conclusion can be made that levels of political obligations resulting in the exercise of collective political autonomy, are no longer solely determined by the state [Member States], instead, with the introduction of EU citizenship, a direct relation between the EU and citizens has been established, with consequent anticipations, of which the implications have been visualised in this case. Therefore, it could be concluded that, the scope of consequences ruled through justice that is determined by the extent to which a shared framework of political deliberation enables its justification, is no longer bound to the interpretation of Member States only. Thus, the formation of public reason in the European Union is no longer dependent on the positions taken by Member States as legitimate representatives of the people to provide this position, i.e., the positions taken by Member States as representatives of their peoples could be different from the positions taken by the peoples they represent.

In my opinion, there is a need for a moral identity; blunt aims and goals should be genuinely reformulated: if someone would offer you help, and they say; I am only offering you help because it is good for my image- would you accept that help? – these are the things that should be kept inside. Speaking about the need for a moral identity,

it is necessary to refer back to one of the concepts outlined in the introduction of this dissertation; the need for a third-person perspective. In this understanding, a third-person perspective would require those involved in the forum to adopt the perspective of one of the others, not by choice but by random selection, or to apply a general third-person perspective.

The stage was set based on an interpretation of the post-truth era, arguing that, it did not only come to shape the realities of citizens, but the formation of public reason as well. The results showed that, EU action has obtained a significant normative foundation, that is, value-based principles informing decision-making, as well as internal and external relations. Governmentality was expected to differ in each situation, while the core values do not change, its interpretation does. In turn, attention is paid to the ways in which rule is made possible. The results of the analysis of European integration visualised the increasing focus on democratization and citizenship. At the same time, new areas of collaboration were established, which led to the formation of new common practices, especially in the area of freedom, security and justice. In turn, those common practices led to the establishment of a shared set of reasons and political conceptions appealed to in the public political forum. In a post-truth era, basic democratic values, political conceptions of justice, shared frameworks of deliberation, in the absence of a ratified democratic constitution, can be further established through governmentality, employing micro-practices of governing, implicitly establishing normative standards of behaviour, and using not only law as a strategic framework for the justification of political decisions, but the appeal to emotions, beliefs, values and norms as well. Realities have been changing, and so should the approaches that are taken in theory.

Finally, as stated in the introduction “a conception of post-truth is to be kept in mind when interpreting the to be presented information”- its presence has been implicit throughout the discussion, its existence is implicit; the categorisations offered in the introduction of this dissertation, were based on one of the perceptions I have on the shape of a post-truth. The efforts taken to obtain sources of information through EU websites were not in vain; the links to the Eurobarometers to outline the values of

Europeans, are no longer available; the website changed, resulting in a decrease of usability, complicating the Duty of Civility. What do we base our opinion on when information keeps disappearing and the selection of presentation, not even considering the changes in communication and argumentation, is everything but transparent? Who decides which information appears and disappears in all of its shapes? The interpretation of a post-truth is left open for those who got an implicit gist of it while reading this dissertation.

From Ancient Greece to the twenty-first century. Humankind. Theories competing for attention on how to explain how society is ought to function. Different rationales are employed by nation states, different rationales exist within nation states, mentalities and identities are created beyond nation states.

What is our final destination? It is human nature, psychological, it will never be good enough; just like technology, we keep evolving.

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7. APPENDICES

Appendix 1.

Figure 1. *Four analytical dimensions of governmentality analysis* (In Derous & de Roeck, 2019, p. x)

Table 1. Four analytical dimensions of governmentality analysis (dimension 2 is based on Dean 2010 & Oels, 2005, p. 189; dimension 3 is based on Death, 2010).

No.	Analytical dimension	Subdimension	Guiding questions
1	Genealogy	N/A	What is the historic trajectory that lead to this form of governmentality?
2	Analytics of government	Fields of visibility	What is illuminated, what obscured? What problems are to be solved?
		Forms of knowledge	Which forms of thought arise from and inform the activity of governing?
		Formation of identities	What forms of self are presupposed by practices of government? Which transformations are sought?
		Technical aspects	By what instruments, procedures and technologies is rule accomplished?
3	Analytics of protest	Fields of visibility	What is illuminated, what obscured? How does this contest/reinforce power effects rooted in dominant mentalities and governmental conduct?
		Forms of knowledge	Which forms of thought arise from and inform the activity of dissent/protest? How does this contest/reinforce power effects rooted in dominant mentalities and governmental conduct?
		Formation of identities	What new identities/subjectivities emerge from the observed activities of dissent/protest. How does this contest/reinforce power effects rooted in dominant mentalities and governmental conduct?
		Technical aspects	What techniques are employed by the observed activities of dissent/protest? How does this contest/reinforce power effects rooted in dominant mentalities and governmental conduct?
4	Ascending analysis	N/A	To which overarching concepts can this local manifestation of governmentality be linked?

Appendix 2. Scope of EU Law

Figure 3. Competences of EU Law

Exclusive	May legislate and adopt legally binding acts (Art. 2(1) TFEU)	Customs union, competition rules, monetary policy (MS with Euro), conservation of marine biological resources under common fisheries policy (Art. 3 TFEU)	International agreements within scope (Art. 3(2) TFEU)	
	EU and MS may legislate and adopt	Internal market; social policy; economic, social, territorial cohesion; agriculture & fisheries; environment;	Research, technological development & space (define	Development cooperation & humanitarian aid (carry out

Shared	legally binding acts (Art. 2(2) TFEU)	consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters (Art. 4 TFEU)	and implement programs)- but *will not prevent MS from exercising their competence* (Art. 4(3) TFEU)	activities and common policy) – *will not result in preventing MS to exercise their competence* (Art. 4(4) TFEU)
Supporting (Art. 6 TFEU)	Actions to support, coordinate or supplement MS actions	Protection and improvement human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation (Art. 6 TFEU)		

Figure 6. Sources of law

Primary	Secondary	Supplementary
Treaties- TEU, TFEU, Euratom	Unilateral acts	Case law of CJEU
Specify distribution of competences between EU and MS	Regulations, directives, decisions, opinions, recommendations (Art. 288 TFEU)	International law
Legal framework	Atypical acts, communications and resolutions, white and green papers	General principles of law
Amending EU treaties, protocols annexed, treaties on accession, Charter on Fundamental Rights, general principles of law per CJEU		

Figure 7. Types of EU legislation *(Own elaboration)*

Regulation	General application; binding in its entirety
Directive	Law binds (a group of) MS to achieve a particular objective; translated into national law: MS decide how the specified results is to be achieved
Decision	Addressed to MS, groups of people, individuals: binding in its entirety
Recommendations & opinions	No binding force: provide guidance

Appendix 2.1

Table 2. *Legal basis of the area of freedom, security and justice (Own elaboration)*

CREATION AFSJ				
TITLE V TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION				Article 3 (2) TEU
			LINKED WITH	
LEGAL SOURCE	ARTICLE	Topic	CHARTER	CONVENTION
TEU	16		CFR	ECHR
TFEU	8	Elimination of inequalities		
TFEU	15(3)	Access to institution's documents		
TFEU	16	Protection personal data		
TFEU	18-25	Non-discrimination and citizenship of the Union		

Appendix 3. Comparison strategies on CFR

2020

Ensuring effective application by MS		
		Partnering with MS
	Charter = legally binding instrument	
National and local administrations, MS parliaments, law enf. A		
	Central to promo and protect	
Prevention		
Promotion and application	*e-Justice portal*	
Coordination	*Charter focal point*	
Enforcement	*Guardian of the Treaties*	
	New Annual report [FR in digital age]	
		Charter in EU funding
Common Provisions Regulation (CPR)		
Empowering CSO, rights defenders, justice practitioners		
		Protecting CSO and right defenders
	A supportive environment	
	Strong and independent NHRIs	
	Capacity building to defend people's rights	
		Supporting judges and other law practitioners
Fostering use of Charter as a compass for EU institutions		
		Update and develop tools EC
		Must comply
		Charter mainstreaming throughout 'European' leg. process
	EP and Council	
Strengthening awareness		
Information campaign		
Young people through Erasmus+		
Children's rights		

2010

Union *must be* exemplary	
	Fundamental rights culture
Preparatory consultations	
Impact assessments	
	Mainstreaming FR into Impact Assessment steering groups
	Operational guidance on FR
	Impact assessment board
Drafting of acts	
	Targeted recitals
	Summary FR issues in expl mem
	Charter - legislative process

Methodology	
Amendments	
Inter-institutional dialogue	
Ensuring MS respect Charter..	
Prevention	
Infringement procedures	
Outside scope Charter	
Better informing the public	
Information needs	
Rights of the child	
Knocking on the wrong door	
Lack of suitable information	
Commission action	
Information Union's role in FR	
Information existing legal remedies	
e-Justice portal	
Annual report	
Objectives	Transparent, continuous, consistent
	Annual exchange of views (EP and Council)

Appendix 3.1 Comparison elements 2020-2010 Strategies

2020	2010
A culture of values based on the rule of law, democracy and FR *FRA forum HR 2021: awareness, further development of culture of values*	**A fundamental rights culture/culture of fundamental rights** *FR culture throughout legislative process*
Mainstreaming - *Charter mainstreaming EU laws* - *Equality mainstreaming toolbox* - *Charter mainstreaming throughout legislative process*	**Mainstreaming** *Mainstreaming of FR in the Impact Assessment steering groups*
Prevention - *Dialogue and support for Member States* - *If prevention and dialogue unsuccessful:* ***capacity building*** *(1) Prevention;* *(2) Promotion and implementation* *(3) Coordination* *(4) Enforcement*	**Prevention** - *Reminding in appropriate cases, the authorities (…).* ***Principles for the enforcement of fundamental rights:*** *(1) Prevention;* *(2) Infringement procedures;* *(3) Situations outside the scope of the Charter* - *Article 7 TEU - mechanism*

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Promotion and implementation

Comply with EU law..

- *MS promote development of tools, monitoring mechanisms, trainings and strategies*
- *Encourage mutual learning*
  - *European e-Justice portal*
  - *Council: working party FREMP*

Coordination

- *Cooperation and communication between different levels of government, EU institutions, rights defenders, CSOs*
- *MS encouraged to appoint a Charter focal point*

Enforcement

- *New Annual report*
  - *See annual report*
- Infringement procedure
  - *EC as guardian of the Treaties*
  - *Launch.. as appropriate (breach of EU law)*

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Upholding fundamental rights

Principle – expanding EU acquis in AFSJ, non-discrimination, Union citizenship, information society, environment

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Infringement procedure

- *EC as guardian of the Treaties*
- *All means at disposal ensure adherence..*
- *Non-compliance with CFR*
- *Part of Annual Report*
  - *Could reduce need for infringement procedures*

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Annual report

- *2021 new annual report*
- *EP and the Council- organisation of substantive discussion*
- *Partnership EU institutions and agencies*
  - *FRA info and data*
  - *Expert groups MS*
  - *Sources…*
  - *FR in the digital age*

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Annual report

Partnership with institutions and stakeholders, work with FRA

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Appendix 4. Infringements

Figure 22. *Total number of case per years: JFRC (Own elaboration).*

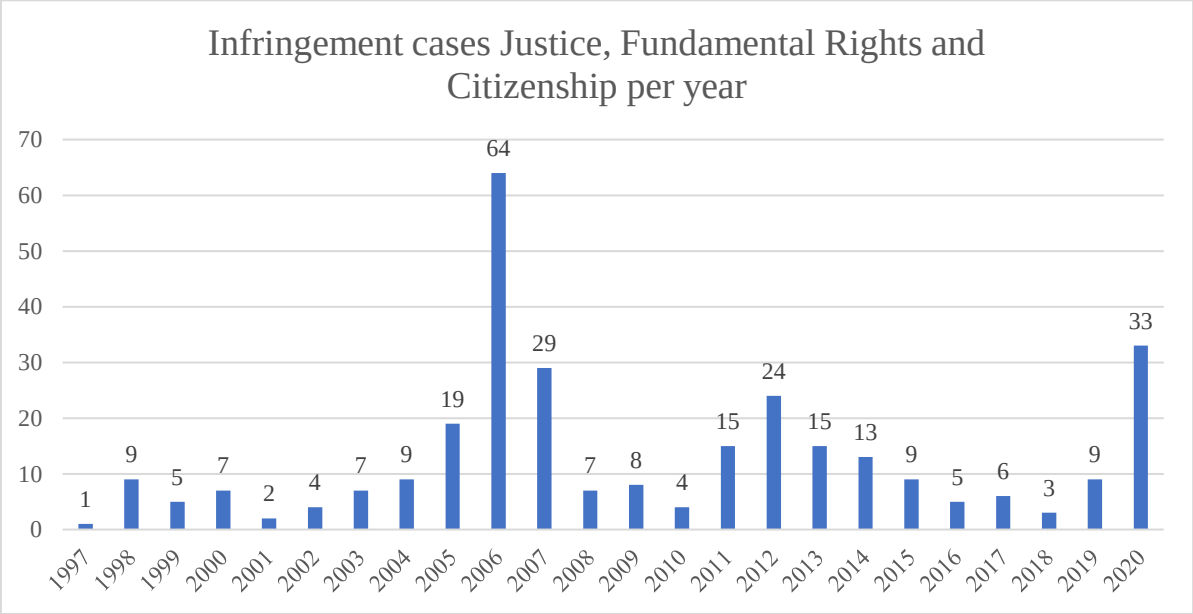

Figure 23. *Total number of case per year: HA (Own elaboration).*