

Towards an Ever Closer Union Between Residents and Citizens?

On the Possible Extension of Voting Rights to Foreign Residents in Luxembourg

Michèle Finck*

Alien suffrage in Luxembourg – The traditional concept of the electorate – Link between nationality and voting rights – From the national to the resident worker? – The decoupling of nationality and citizenship – The transformation of the state as a consequence of European integration – Comparison to other EU member states – Consequences for EU law of domestic reform – The intertwining of constitutional spheres in the EU

INTRODUCTION

This essay addresses an issue that might seem utopian to many, namely the extension of voting rights to foreign residents in national legislative elections, a reform that might soon occur in Luxembourg. Such debates are indeed absent from other EU member states, in some of which foreigners' right to vote even in local elections remains subject to lively controversy.¹ Whether Luxembourg will become the first country in the EU generally to allow foreign residents to vote in national legislative elections will be determined via a referendum in summer 2015,² the outcome of which the Luxembourg Government has vowed

*Fellow at the London School of Economics and Lecturer in EU Law at Keble College, University of Oxford. I am grateful to Liz Fisher, Luc Heuschling, Azin Tadjini, Antoine Vauchez, Steve Weatherill and the anonymous reviewers for helpful comments and discussions. I gratefully acknowledge funding from the Luxembourg National Research Fund.

¹ Marine Le Pen argued in 2011 that such a right would be dangerous, as 'providing an additional weapon to fundamentalist Muslims' that would 'break the Republic and our laws'. Speech M. le Pen, 'Contre le droit de vote des étrangers' (Paris 8 December 2011), text and video available at <www.frontnational.com/videos/contre-le-droit-de-vote-des-etrangers-discours-de-marine-le-pen/>, visited 8 May 2015.

² The date of the referendum has been set for 7 June 2015.

to respect.³ One of the referendum questions asks whether non-Luxembourgish residents should be able to register as voters in national legislative elections, subject to two conditions. First, that the individual has resided for at least ten years in the Grand Duchy, and, secondly, that he or she previously participated in municipal or European elections in Luxembourg.⁴ In order to grasp the potential impact of such a reform, it should be noted that Luxembourg has – by far – the highest proportion of foreign residents in the EU. Almost half of its population does not have Luxembourg nationality. Most foreign residents are, however, European citizens as 38 per cent of its population are non-Luxembourgish European citizens.⁵

The perspective adopted by this paper is doubleheaded. It, first, draws attention to a possible national constitutional reform and its potential consequences. Secondly, however, it also examines this evolution from the perspective of EU law and integration. In the light of the intertwining of the domestic and European legal spheres, domestic constitutional change cannot occur in a vacuum.⁶ Constitutional spaces in the EU have become a polycentric spider's web, in which a 'pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole'.⁷ Thus, while questions pertaining to Luxembourg constitutional law rarely make the hearts of European lawyers race, this potential reform pertains deeply to EU law. It can be read as a test case, or maybe even a *cas limite*, of European integration, an unlikely evolution that appears to have been taken from a cosmopolitan utopia rather than the current Union.⁸ This story, full of paradoxes,⁹ allows for a new perspective on the nature and possible future of the integrated, multicultural EU member state as well as the

³ Art. 51(7) Luxembourg Constitution provides that referenda may be held to consult 'voters'.

⁴ The draft question, which will be asked in German, French and Luxembourgish, the three official languages, is at present formulated as follows: 'Approuvez-vous l'idée que les résidents non luxembourgeois aient le droit de s'inscrire de manière facultative sur les listes électorales en vue de participer comme électeurs aux élections à la Chambre des Députés, à la double condition particulière d'avoir résidé pendant au moins dix ans au Luxembourg et d'avoir préalablement participé aux élections communales ou européennes au Luxembourg?' (Three other questions are asked in the referendum).

⁵ J. Gerkrath, 'The Figure of Constitutional Law of the "Integrated State": The Case of the Grand Duchy of Luxembourg', 10 *EuConst* (2014) p. 109 at p. 116.

⁶ On this, see also Gerkrath, *supra* n. 5, generally.

⁷ L.L. Fuller, 'The Forms and Limits of Adjudication', 92 *Harvard Law Review* (1978) p. 353 at p. 395.

⁸ If predictions are correct, foreign residents may soon outnumber those of Luxembourg nationality in the Grand Duchy. Should foreign residents be able to vote in legislative elections, Luxembourgers would voluntarily give up control over their State to an extent that cannot at present be observed elsewhere in the EU, or even the world.

⁹ I am grateful to Antoine Vauchez for drawing my attention towards these paradoxes.

European Union itself.¹⁰ Given the range of aspects addressed, the paper is of a largely descriptive nature. It aims to inform the reader about a domestic constitutional debate rather than seeking to map the potential reform in its entirety. Whereas the question raised in the referendum is profoundly normative in nature it also relates to a number of intriguing legal questions at which this paper will look in turn.¹¹ The analysis is structured as follows. It first introduces socio-demographic realities in Luxembourg in order to ground subsequent discussion. The second section then examines the traditional view of the national electorate of a state; and the third section illustrates how this link has come under pressure as a consequence of European integration and citizenship. The fourth section looks at the possible consequences of the enfranchisement of foreign residents for Luxembourg's constitutional structure. The paper then evaluates the possible reform from an EU law perspective. The article concludes by reflecting on the intertwinement of constitutional spheres within the European space, a theme running through its entirety.

THE BACKGROUND

The programme of Luxembourg's coalition government¹² announces that, in order to further 'democratic renewal', a referendum will be held in which Luxembourgers will pronounce on 'the political rights of their fellow citizens, who do not have Luxembourg nationality.'¹³ Polls from 2013 indicate that 50 per cent and, later, 59 per cent of Luxembourgers were in favour of such reform.¹⁴ For the first time in decades the conservative party does constitute the executive and the current Government considers itself to have 'the mission and the courage' to undertake 'the reforms necessary' to create a 'project of the future' and a 'new dynamic' for Luxembourg and 'all its inhabitants' by strengthening democracy, transparency and dialogue in a multicultural society.¹⁵ As 'contextual differences

¹⁰ Gerkrath, *supra* n. 5, p. 110: in order to understand the European Union 'it seems essential to improve the understanding of its implications on the status of the States it comprises'.

¹¹ C.M. Rodríguez, 'Noncitizen voting and the extraconstitutional construction of the polity', 8 *ICON* (2010) p. 30 at 30: 'Whether a society adopts alien suffrage, however, does reflect that regime's particular constitutional values and structures, as well as assumptions about the manner and pace at which the body politic ought to incorporate noncitizens.'

¹² The current Luxembourg Government is a coalition of three parties: the liberals (DP), the social democrats (LSAP) and the Green Party.

¹³ Gouvernement du Luxembourg, *Programme gouvernemental* (2013) p. 6, <www.gouvernement.lu/3322796>, visited 26 March 2015 (my own translation).

¹⁴ See 'Sondage TNS ILRES, Partie 4: Droit de vote' (October 2012), <www.2030.lu/fileadmin/user_upload/documents/2030.lu_TNS_ILRES_Droit_de_vote_FR_28032013.pdf> p. 4, visited 8 May 2015.

¹⁵ Gouvernement du Luxembourg, *supra* n. 13, p. 3 (my own translation).

between states also ground differences in the way questions of citizenship are approached', an overview of Luxembourg's demographic and socio-political structure is in order.¹⁶ Luxembourg has almost 563,000 inhabitants, of whom 45.9 per cent do not have Luxembourg nationality.¹⁷ 16.4 per cent of the population are Portuguese nationals, 7 per cent French nationals, 3.3 per cent Belgians, 3.5 per cent Italians and 2.3 per cent are of German nationality.¹⁸ Despite 150 nationalities being represented in the Grand Duchy, 86 per cent of all foreign residents are European citizens.¹⁹ Mainly EU citizens would, therefore, be concerned by the reform.

Two hundred years ago, Luxembourg was a predominantly rural country. Its population has more than doubled in the past century.²⁰ The exploitation of iron ore allowed for economic growth as a steel industry emerged, from the 1960s onwards largely replaced by the financial sector, which entailed significant economic expansion.²¹ Given its rapid economic growth and modest population, Luxembourg needed to rely on foreign workers to make its economy function. In addition to the large proportion of foreign residents, about 167,000 people not living in Luxembourg (the *frontaliers* referred to here as 'cross-border workers') cross the French, Belgian, and German borders each day to work in the Grand Duchy.²² Foreign residents and cross-border workers make up 71 per cent of the country's workforce.²³

Luxembourg is a founding member state of the EU, so that migration from other member states is facilitated by the existence of an internal market,²⁴ the rules inherent of which govern the status of EU citizens working in Luxembourg.²⁵

¹⁶ S. Choudhry and C. Saunders, 'Symposium on Citizenship: Foreword', 8 *ICON* (2010) p. 6.

¹⁷ Statec, 'Communiqué de presse No 11-2015' (8 April 2015), <www.statistiques.public.lu/fr/actualites/population/population/2015/04/20150408/20150408.pdf>, visited 8 May 2015.

¹⁸ Statec, *supra* n. 17.

¹⁹ IndexMundi, 'Luxembourg Demographics Profile 2014', <www.indexmundi.com/luxembourg/demographics_profile.html>, visited 8 May 2015; Statec, *supra* n. 17.

²⁰ In 1910, Luxembourg had about 260,000 inhabitants, most of Luxembourg nationality. See Statec, 'Population totale, luxembourgeoise et étrangère, de résidence habituelle au Luxembourg selon le sexe 1821-2014', <www.statistiques.public.lu> under Population et emploi – Etat de la population, visited 8 May 2015.

²¹ For an overview of Luxembourg's history, see G. Trausch, *Histoire du Luxembourg* (Hatier 1992); M. Pauly, *Histoire du Luxembourg* (Université de Bruxelles 2013).

²² Gouvernement du Grand Duché de Luxembourg, 'Population and multiculturalité' (updated 28 April 2015), <www.luxembourg.public.lu/en/le-grand-duche-se-presente/luxembourg-tour-horizon/population-et-multiculturalite/index.html>, visited 8 May 2015.

²³ There are 10,000 people employed by the EU institutions in Luxembourg; see Gouvernement du Grand Duché de Luxembourg, 'Luxembourg job market' (updated 5 May 2015), <www.luxembourg.public.lu/en/travailler/marche-emploi/index.html>, visited 8 May 2015.

²⁴ It cannot, however, be excluded that similar migratory flows would have occurred had the EU not been created.

²⁵ In particular, Art. 45 TFEU; also Council Regulation 1612/68/EEC, *OJ Spec. Ed. I-475*, amended by Regulation (EEC) 312/76, *OJ L3/2*, and Council Regulation 2434/93/EEC, *OJ L25/1*.

In accordance with the principle of non-discrimination, they must be treated no less favourably than Luxembourgers.²⁶ EU law, moreover, provides that European citizens residing in a state of which they do not have the nationality must be able to vote and stand for election in municipal²⁷ and European, but not national, elections.²⁸ Luxembourg, however, benefits from a partial derogation from this obligation.²⁹ Article 14 of Directive 93/109³⁰ and Article 12(1) of Directive 94/80/EC³¹ provide that if a member state's population accounted for more than 20 per cent of non-national EU citizens of voting age in 1996, it may restrict their right to vote in European and/or local elections. Luxembourg no longer applies this exception with regard to European elections but continues to require a residence period of five years before EU citizens can cast their ballot in local elections.³² As a matter of EU law, Luxembourg is in no way required to take the step it might be taking. Rather, EU law explicitly recognises that 'the very fact that EU citizens are present in large numbers and could present, therefore, a significant challenge to the system has been sufficient reason to deny, effectively, the implementation of Article 19 EC [now Article 22 TFEU].'³³ EU law, accordingly, considers that a state has a legitimate interest in ensuring that those that vote in elections (even local and European) should mainly be nationals of the state.

At present, only Luxembourgers participate in legislative elections, so foreigners wishing to exercise such political rights need to acquire the nationality. Anyone having resided in the country for seven consecutive years can apply to become a Luxembourg national.³⁴ The applicant must demonstrate a

²⁶ Art. 18 TFEU.

²⁷ The meaning of 'municipal' has been interpreted differently in various member states. In Germany and Austria, for instance, foreign residents can vote only in local and not in *Länder* elections. See Austrian Constitutional Court B3113/96, B3760/97 [1997] (holding that disenfranchisement in the election for Vienna of EU citizens is admissible because the right to vote for local elections granted by EU law does not include the right to vote for a municipality which is also a *Land*). In the UK, however, EU citizens can participate in elections for the devolved legislature of Scotland, Wales and Northern Ireland. See Scotland Act 1998, s. 11(1); Government of Wales Act 2006, s. 12(1); Northern Ireland Act 1998, s. 34(5)(a) and Northern Ireland Assembly (Elections) Order 2001, Art. 4.

²⁸ See Art. 22 TFEU and Council Directive 93/109/EC, *OJ* 1993 L329/34, and Council Directive 94/80/EC, *OJ* 1994 L368/38. This right has also been enshrined in the Charter of Fundamental Rights of the European Union, namely Art. 39(1) and Art. 40 of the Charter.

²⁹ European citizenship is established by Art. 20(1) TFEU.

³⁰ See Art. 14 of Directive 93/109/EC.

³¹ Council Directive 94/80/EC.

³² See Art. 2(4) Loi électorale du 18 février 2003 [*Luxembourg Election Law*].

³³ A. Lansbergen and J. Shaw, 'National Membership Models in a Multilevel Europe', 8 *ICON* (2010) p. 50 at p. 62.

³⁴ Art. 6(2) of the Loi du 23 octobre 2003 sur la nationalité luxembourgeoise [*Luxembourg Nationality Law*].

‘sufficient degree of integration’ into Luxembourg society³⁵ and demonstrate active and passive knowledge of at least one of the three official languages (Luxembourgish, French and German).³⁶ A certain command of Luxembourgish, the sole ‘national language’ must always be demonstrated.³⁷ It is worth noting that the Luxembourg Government also plans to facilitate access to Luxembourg nationality.³⁸ This is somewhat paradoxical, since facilitated access to nationality and to voting rights for foreigners are conventionally presented as alternative, not simultaneous, means of furthering the integration of migrants. It is worth noting that Luxembourg also accepts dual (and multiple) nationality and some of the main countries from which immigrants originate, such as Portugal, do too.³⁹ After setting out the background of my analysis, the next section evaluates voting rights and their link to nationality.

THE TRADITIONAL CONCEPT OF THE ELECTORATE: THE (UNBREAKABLE?) LINK BETWEEN NATIONALITY AND VOTING RIGHTS

Voting rights are traditionally perceived as a corollary of nationality. Members of a given community vote to designate those in charge of establishing rules that must be followed by all. The relevant ‘community’ for these purposes is generally understood as that of nationals, rather than residents, of a state. Accordingly, the ‘disenfranchisement of non-citizens in democratic governments is close to universal.’⁴⁰ Beckman estimated in 2006 that ‘approximately 10 million adult long-term resident aliens in Europe (...) are denied the right to participate in the democratic process.’⁴¹ Whereas significant variations exist regarding voting rights of non-citizens within the EU,⁴² no member state allows non-nationals to vote in legislative elections, except for Ireland and the UK, which have created, by treaty

³⁵ Art. 6 Luxembourg Nationality Law (my own translation).

³⁶ As defined by the Loi du 24 février 1984 sur le régime des langues [*Luxembourg Language Law*].

³⁷ Art. 7(1)(b) Luxembourg Nationality Law. Art. 1 Luxembourg Language Law establishes Luxembourgish as the national language.

³⁸ Ministère de la Justice, ‘Réforme de la loi sur la nationalité luxembourgeoise’ (26 November 2013), <www.gouvernement.lu/3286869/Nationalite/3287118/Mesures-proposes>, visited 8 May 2015.

³⁹ Lei no. 38/81 de 3 Outubro, Lei da Nacionalidade [*Portuguese Nationality Act*] departed from the previous state of the law in no longer requiring that one person can only have the nationality of one country. Art. 27 and Art. 28 Portuguese Nationality Act provide rules for the resolution of conflict when dual citizenship occurs.

⁴⁰ L. Beckman, ‘Citizenship and Voting Rights: Should Resident Aliens Vote?’, 10 *Citizenship Studies* (2006) p. 153 at p. 153.

⁴¹ Beckman, *supra* n. 40, p. 154.

⁴² F. Fabbri, ‘Voting Rights for Non-Citizens: The European Multilevel and the US Federal Constitutional Systems Compared’, 7 *EuConst* (2011) p. 392 at p. 394.

and for historical reasons, this option solely for British, Irish and Commonwealth citizens.⁴³ International law, under which a regime protective of political rights has developed over time, explicitly allows only nationals to cast a ballot in domestic elections.⁴⁴ This reflects the current state of Luxembourg law. Article 52 of the Grand Duchy's Constitution and Article 1 of the Election Law accordingly define nationality as a prerequisite of electoral rights.

According to the statist, Westphalian conception of voting rights, foreign residents do not form an integral part of the political process.⁴⁵ One individual is presumed to belong to one community, that of which he or she is a national. This idea dates back to times when most individuals would spend their lives in the territory into which they were born. Over time, there has been a move away from this monolithic conception of citizenship towards the recognition that simultaneous membership of various communities is possible. In federal systems, for instance, citizens participate in different communities through voting.⁴⁶ The monolithic and static concept of political rights has also come under pressure as a result of European integration. First, individuals form part of two communities, the national and the supranational. Secondly, if they exercise their freedom to move, EU citizens entertain a relationship both with their state of origin and their state of residence. Thirdly, European citizenship, as defined by Article 9 TEU, has multiplied voting rights horizontally, as an individual can vote in municipal and European elections in member state A (based on residence) and in national elections in member state B (based on nationality).⁴⁷

Voting rights have a dual dimension, being both a human right and a tool of democracy. Depending on the concept relied on, the interest of the individual or of society constitutes the rationale underlying the right to vote. The human rights perspective was mainly, though not exclusively, at the basis of the enfranchisement of women and of people of colour in the U.S., for instance.⁴⁸ Although the two

⁴³ See *infra* text at n. 55.

⁴⁴ See Art. 25 ICCPR and Art. 16 ECHR, which expressly allow the political rights of aliens to be restricted, even though Art. 3 of the First Additional Protocol to the ECHR codifies a fundamental right to vote. This provision, however, refers to the right to vote of 'the people' rather than the citizens.

⁴⁵ This reflects Arendt's view that 'only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, [and] persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin.' H. Arendt, *The Origins of Totalitarianism* (Harcourt 1994) p. 275.

⁴⁶ C.J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 4th edn. (Blaisdell Publishing 1968) p. 197.

⁴⁷ As a result of these changes, individuals can, in some scenarios, participate in local elections in two different member states. See Art. 1 of Council Directive 94/80/EC.

⁴⁸ On women's suffrage, see F.O. Ramirez et al., 'The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990', 62 *American Sociological Review* (1997) p. 735. Voting rights were extended to African Americans by the Voting Rights Act of 1965

aspects of the right to vote cannot be neatly separated, the Luxembourg debate seems to relate mainly to democratic inclusiveness. In 2007, a collective entitled 'Refresh Democracy', composed of the youth organisations of all the country's major political parties, kicked off the current debate by claiming that, in accordance with the spirit of universal suffrage, foreigners must vote to legitimise the democratic process.⁴⁹ Their initiative reflected the idea that 'the core substantive principle of democracy is that those who are subject to the law ought to have a say in its formulation'.⁵⁰ The Luxembourg Government seems to have been inspired by these ideas, which are deeply paradoxical in the light of conventional discourses about incentives in politics, according to which the ruling class seeks its own renewal and to further its own self-interest.⁵¹ Rather than striving to empower and perpetuate themselves, some Luxembourgers seem willing to loosen their control over the system. While such behaviour is paradoxical for a number of reasons, it could be understood against the background of European integration, and as an utterance of the *de facto* solidarity famously alluded to in the Schuman Declaration.⁵² Should such solidarity have infiltrated voters' mentalities, the referendum's outcome will trigger electoral reform. Through such reform, a conceptual shift would occur as the capacity to vote in national elections would be determined by the criterion of residence rather than nationality, symbolising the decoupling of nationality and citizenship.

THE EVOLVING DEFINITION OF THE ELECTORATE: FROM THE NATIONAL TO THE RESIDENT WORKER?

There is nothing revolutionary in having the capacity to vote in the legislative elections in two countries. This indeed corresponds to the situation of many dual

(42 U.S.C. §§ 1973–1973bb-1). On voting rights in the U.S., see A. Keyssar, 'The Right to Vote: The Contested History of Democracy in the United States' (Basic Books 2009). See also M.J. Pitts, 'The Voting Rights Act and the Era of Maintenance', 59 *Alabama Law Review* (2008) p. 903 - 985.

⁴⁹ See Refresh Democracy, 'Press Conference of 10 December 2007', <www.asti.lu/2007/12/10/refresh-democracy/>, visited 8 May 2015.

⁵⁰ Rodríguez, *supra* n. 11, p. 30.

⁵¹ The current vice-Prime Minister, for instance, stated that 'all those that live, work, have children, and pay taxes must have the right to decide the politics of a country, to participate in the decision-making process. This appears logical to me.' In *Luxemburger Wort*, 16 January 2013, quoted in L.Heuschling, 'La citoyenneté de résidence, divers logiques et la science juridique', 32 *Forum für Politik Gesellschaft und Kultur in Luxemburg* (2013) p. 32 (my own translation).

⁵² The Schuman Declaration of 9 May 1950, <europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/>, visited 6 February 2015: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.'

citizens across the globe. It is also true that a number of countries such as Chile,⁵³ New Zealand,⁵⁴ the United Kingdom⁵⁵ (only for Irish and qualifying Commonwealth citizens) and Ireland (only for the British) have extended voting rights in national elections to residents.⁵⁶ These scenarios differ, however, from that envisaged in Luxembourg in important respects. The voting rights that emerge in these contexts are either due to the possession of multiple nationalities or a particularly strong bond between the state of origin of the foreign resident and the host state. What is more, these extensions were fashioned by a variety of reasons specific to the respective domestic contexts, none of which relates to European integration. An extension of voting rights to foreign residents in Luxembourg could, however, be conceptualised as a spillover effect of EU integration.⁵⁷ As a result of EU citizens exercising their freedom to move, member states' demographic compositions are becoming ever more varied. The Luxembourg debates about social inclusiveness were triggered by its changed demographic structure. If these debates were to result in electoral reform, the notions of citizenship and nationality would be decoupled with regard to legislative elections, a process already initiated by the participation of European citizens in municipal and European elections.

The impact of European citizenship

Voting rights raise important issues of 'us versus them'.⁵⁸ They contribute to the self-definition of a socio-political group, traditionally defined by the criterion of nationality. This state of affairs has been modified by virtue of European citizenship. The attached voting rights attribute to EU citizens 'limited political participation rights' based 'on their residence and their common status as "citizens of the Union"'.⁵⁹ Notions of 'us' and 'them' are accordingly subject to redefinition, as European citizenship 'narrows the gap in political rights possessed by a resident alien EU national and the nationals of the Member State in which he or she resides'.⁶⁰

⁵³ Art. 14 of the Chilean Constitution.

⁵⁴ Electoral Act 1993, s. 74.

⁵⁵ Representation of the People Act 1983, s. 1(1)(c). See H. Lardy, 'Citizenship and the Right to Vote', 17 *Oxford Journal of Legal Studies* (1997) p. 75.

⁵⁶ D.C. Earnest, *Old Nations, New Voters: Nationalism, Transnationalism, and Democracy in the Era of Global Migration* (State University of New York Press 2008) p. 29.

⁵⁷ I am not, however suggesting, that it could only be understood as such. Arguably the same evolution could be taking place in the absence of European integration.

⁵⁸ Choudhry and Saunders, *supra* n. 16, p. 6, arguing that '[h]owever citizenship is conceived, there is always an "other".'

⁵⁹ S. Day and J. Shaw, 'European Union Electoral Rights and the Political Participation of Migrants in Host Polities', 8 *International Journal of Population Geography* (2002) p. 183.

⁶⁰ R. Koslowski, 'Intra-EU Migration and Political Union', 32 *Journal of Common Market Studies* (1994) p. 392 at p. 396.

Under EU law, residents enjoy voting rights only in municipal and European elections. Luxembourg has extended this right to all foreigners, not just EU citizens, perhaps in the light of the marginal share of non-Europeans in its immigrant population.⁶¹ The rationale behind the electoral rights inherent in EU citizenship is that, once individuals had moved to a different state, they could often no longer vote in municipal and EU elections 'simply because they are no longer in their Member State of nationality'.⁶² European integration had led to the disenfranchisement (in local and European elections) of European citizens who had left their state of origin. This was seen as a 'paradox of political integration' in a Union founded on democracy.⁶³ The creation of voting rights remedied this paradox.⁶⁴ As the ability to vote in national elections is conventionally linked to nationality, however, no disenfranchisement occurs if nationals of one state move to another state unless their state of origin prohibits expatriate voting.⁶⁵ Mechanisms such as voting at a distance or by proxy ensure that those that have left the territory can still cast their ballot.⁶⁶

Defining voting rights as the privilege of nationals reflects a view of the *demos* as composed of a community of nationals rather than of residents. Via elections, the *demos* governs itself.⁶⁷ EU citizenship modified this connection between nationality and voting rights. Weiler argued that, normatively, European citizenship symbolises the

very conceptual decoupling of nationality from citizenship and as the conception of a polity the *demos* of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms.⁶⁸

⁶¹ Art. 2 and 3 Luxembourg Election Law.

⁶² Commission of the European Communities (1988), 'A People's Europe: Proposal for a Council Directive on Voting Rights for Community Nationals in Local Elections in their Member State of Residence', *Bulletin of the European Communities*, Supplement 2/88, at p. 26.

⁶³ Koslowski, *supra* n. 60, p. 370. Art. 2 TEU provides that the EU is founded on a number of values, including democracy.

⁶⁴ Day and Shaw, *supra* n. 59, p. 184.

⁶⁵ According to Kochenov, seven member states at present deny expatriate voting (some only after the national has spent a number of years abroad), namely Cyprus, Greece, Ireland, Hungary, Malta, Slovakia and the United Kingdom. See D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights', 15 *Columbia Journal of European Law* (2009) p. 169 at p. 201.

⁶⁶ Art. 168 to 182 Luxembourg Election Law, which regulate voting at a distance in legislative elections in Luxembourg.

⁶⁷ J. H.H. Weiler, 'To Be a European Citizen – Eros and Civilization', 4 *Journal of European Public Policy* (1997) p. 495 at p. 503: 'Demos provides another way of expressing the link between citizenship and democracy. Democracy does not exist in a vacuum. It is premised on the existence of a polity with members – the *demos* – by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a *demos*. Simply put, if there is no *demos*, there can be no democracy.'

⁶⁸ Weiler, *supra* n. 67, p. 509.

Heuschling agrees, recognising that ‘the demos has already been denationalized at local level’, as residents can exercise their vote in municipal elections.⁶⁹ Whereas at present this apparent decoupling has mere symbolic effects, allocating the franchise to resident foreigners would alter this state of affairs. Nationality would no longer constitute the basis of citizenship but rather residence. With regard to local ballots this evolution is common to all member states. Its practical effects, however, remain limited, since local authorities often have very limited competences, especially in a small and centralised country such as Luxembourg.⁷⁰ Conceptually, the decoupling of citizenship and nationality has thus already been initiated due to European citizenship. This decoupling would, however, be pushed further if foreign residents were to be able to cast their ballot in national elections.

The decoupling of nationality and citizenship and national elections

Gerkrath noted that the possible Luxembourg reform indicates that:

The relationship between the concepts of citizenship and nationality is, thus, evolving not only under the influence of Union citizenship, which is in addition to national citizenship, but also under the demographic pressure of European citizens exercising their right to free movement.⁷¹

A domestic constitutional reform resulting from side effects of economic integration could concretise the decoupling of nationality and citizenship more radically than did EU citizenship. The Luxembourg Government refers to foreign workers as ‘foreign citizens’ or ‘foreign co-citizens’ when announcing that ‘access to Luxembourg nationality and political participation’ must be facilitated for ‘foreign citizens living in Luxembourg.’⁷² This language might surprise those that take citizenship and nationality for synonyms. Non-nationals are indeed considered to be ‘citizens’.⁷³ They are not, however, referred to as ‘fellow European citizens’, indicating that the concept of common citizenship has been transposed from the European to the domestic scale. Europeans are understood as sharing not merely a supranational citizenship but also a citizenship on a national

⁶⁹ Heuschling, *supra* n. 51, p. 33 (my own translation).

⁷⁰ Also in federal States, such as Germany, electoral rights for EU citizens are limited to the local scale, as they do not apply at the level of the *Land*. See Art. 28(1) (3) Grundgesetz [*German Constitution*].

⁷¹ Gerkrath, *supra* n. 5, p. 116.

⁷² See, for instance, Gouvernement du Luxembourg, *supra* n. 13, p. 188 (my own translation).

⁷³ This confusion can be located even in EU primary law: Art. 9 TEU, which provides that ‘every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it’.

scale. Foreign residents and Luxembourg nationals are referred to as having been fused into a unitary category of citizenship that is defined by territory, denoting a spirit of commonality absent from notions of 'nationals' and 'foreign residents'. These statements indicate that the bond between citizenship and nationality has been torn apart. It is no longer a correct to say that the citizens of Luxembourg are those with a Luxembourg passport. Rather a novel category has emerged, which Heuschling describes as a 'citizenship of residence'.⁷⁴ The criterion determining citizenship is accordingly no longer nationality but rather residence. This has an impact on the notions of citizenship, which becomes a 'thicker' notion, and of nationality, which becomes a 'thinner' notion.

At this stage, the 'citizenship of residence' finds expression in efforts for social cohesion and voting rights in local and European elections. Plans to facilitate the acquisition of Luxembourg nationality and consultations on whether voting rights should be extended denote a desire further to fuse nationals and foreign co-citizens into a homogeneous body of resident citizens. The simultaneous attempt to open up the franchise and facilitate the acquisition of nationality constitutes a conceptual paradox, as both elements are usually presented as alternatives to each other. This combined effort denotes that Luxembourg treats its foreign residents differently from other countries with a similarly large proportion of immigrants, such as, for instance, Qatar. Merely 15 per cent of the overall Qatari population are Qatari nationals and the large body of migrant workers enjoys no political rights and is in many ways oppressed.⁷⁵ This aside illustrates that evolution towards voting rights in a state with a large population of foreign residents is not self-evident. Such differences are rooted in many socio-cultural and economic factors that this paper will not go into. It is worth noting, however, that European integration may play a significant role in this respect. As already outlined above, the desire to optimise the social inclusion of foreigners who are largely citizens from other member states can be an expression of the '*de facto* solidarity' between the peoples of Europe. This solidarity may indeed be more advanced in Luxembourg than other parts of the EU, not only due to its highly diverse population but also because the Grand Duchy has a long history of forming part of other countries, not disposing of absolute sovereignty, and sharing its territory with different nationalities.⁷⁶ This might very well remedy the sort of anxiety

⁷⁴ Heuschling, *supra* n. 51, p. 32.

⁷⁵ J. Kinninmont, 'Qatar's delicate balancing act', *BBC News* (16 January 2013), <www.bbc.com/news/world-middle-east-21029018>, visited 3 February 2015; N. McGeehan, 'Dispatches: Qatar's Labor Reforms Fall Short', (11 February 2014), <www.hrw.org/news/2014/02/11/dispatches-qatar-s-labor-reforms-fall-short>, visited 3 February 2015.

⁷⁶ For an overview of Luxembourg's history, see Trausch, *supra* n. 21. See also Gerkrath, *supra* n. 5, p. 114, who argued that Luxembourg's membership since 1815 of the German Confederation, the

observed elsewhere in the EU with regard to integration. Luxembourg has indeed long been seen as a frontrunner in the process of European integration, which led to the award of the Charlemagne Prize (*Karlspreis*) to the people (the nationals!) of Luxembourg in 1986 'for the fact that they were convinced Europeans from the outset'.⁷⁷

There can be no denying that foreign residents and Luxembourgers share a common destiny. The socio-economic future of both Luxembourg and its foreign residents is dependent upon their collaboration.⁷⁸ If a redefinition of citizenship and nationality were to take place, definitions of 'us' and 'them' would undergo a process of modification. They would not, however, disappear altogether, because whenever a community defines itself it does so by delimitation from another community.⁷⁹

Electoral reform could give effect to the 'ever-closer union' between the peoples of Europe.⁸⁰ The citizenship of residence would be a united structure, counting diverse component parts, illustrating what unity in diversity could mean in Europe's future at domestic level. This opening of the social contract would partly remedy Mill's concern that no electoral arrangement 'can be permanently satisfactory in which any person or class is peremptorily excluded – in which electoral privilege is not open to all persons of full age who desire to obtain it.'⁸¹ The potential reform would recognise that 'everyday lives [...] and their economic, social, cultural, and political activities' define human beings to a more pronounced extent than their nationality.⁸² As citizenship through residence could emerge in

Zollverein, the Belgo-Luxembourg Economic Union and the Benelux 'have enabled it to acquire the experience indispensable for being prepared for the legal implications of its membership of the European Communities and Union'.

⁷⁷ Der Internationale Karlspreis zu Aachen, 'Charlemagne Prize Laureate 1986: The people of Luxembourg', <www.karlspreis.de/en/laureates/the-people-of-luxembourg-1986/biography>, visited 8 May 2015.

⁷⁸ The Luxembourg Government's programme specifies that Europe is a 'community of destinies' that constitutes the framework of the future in Luxembourg and also of 'all of its citizens'. This 'community of destinies' also takes place at the level of the member state. The fact that all residents are equally concerned in it provides a ground of justifying that all should enjoy electoral rights. Gouvernement du Luxembourg, *supra* n. 13, p. 189 (my own translation).

⁷⁹ In EU law, this distinction is embodied in the differences between EU citizens and third country nationals. In the Luxembourg context, differences would emerge between those foreign nationals who have lived in Luxembourg long enough to be able to vote and those for whom this is not so.

⁸⁰ The Preamble to the Treaty on European Union provides that the member states are resolved 'to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.

⁸¹ J.S. Mill, *Considerations on Representative Government* (Parker, Son & Bourn 1861) p. 159-160.

⁸² J. Carens, 'Membership and Morality: Admission to Citizenship in Liberal Democratic States', in R.W. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America 1989) p. 31.

one of the Union's member states, the aspirations in the Schuman declaration gain practical force (Robert Schuman, who later on assumed public office in France, was a German national born and raised in Luxembourg) through the redefinition of the Luxembourg polity as one which defines its *demos* beyond nationality.

Profound conceptual challenges do, however, emerge. Beckman demonstrated that electoral rights are based either on the notion of 'membership' or on the 'all affected principle'.⁸³ In the first scenario, voting rights are a privilege of nationality, which is currently the case in 'virtually every democratic country'.⁸⁴ However, as 'the inhabitants of most nations are less and less sharing the same citizenship' (understood as nationality), this criterion 'works more in the direction of political exclusion'.⁸⁵ This leads to a 'citizen gap'⁸⁶ as political rights are not distributed evenly, which gives rise to 'unequal rights among people living in the same country'.⁸⁷ This gap justifies extensions in voting rights to any person 'affected by the government's actions',⁸⁸ that is to say, anyone residing in the country. Lansbergen and Shaw have argued that the all-embracing principle 'considers any person who is affected by a governmental decision to be entitled to representation as a member of the political community'.⁸⁹ This criterion, however, creates a particular challenge with respect to Luxembourg.⁹⁰ The 150,000 cross-border workers who work in Luxembourg, pay taxes in Luxembourg and enjoy the related benefits of the welfare state are doubtlessly affected by the rules governing the Luxembourg polity, maybe even more so than by those in the own country. Their professional success and personal wealth is largely dependent on the economy of the Grand Duchy. This raises the obvious question whether they should also be entitled to cast their ballot. Further, if the all-embracing principle determines voting rights, one must wonder whether the voting rights of nationals living abroad, who currently engage in expatriate voting, need to be rethought.⁹¹

It follows that a redefinition of voting rights would have an impact on the concepts of citizenship and nationality. The following section underscores that

⁸³ Beckman, *supra* n. 40, p. 154.

⁸⁴ Beckman, *supra* n. 40, p. 154.

⁸⁵ Beckman, *supra* n. 40, p. 155.

⁸⁶ A. Brysk and G. Shafir, 'Introduction', in A. Brysk and G. Shafir (eds.), *People Out of Place: Globalization, Human Rights and the Citizenship Gap* (Routledge 2004) p. 6.

⁸⁷ Beckman, *supra* n. 40, p. 155.

⁸⁸ Beckman, *supra* n. 40, p. 158.

⁸⁹ Lansbergen and Shaw, *supra* n. 33, p. 65.

⁹⁰ R.E. Goodin, 'Enfranchising All Affected Interests, and Its Alternatives', 35 *Philosophy & Public Affairs* (2007), p. 40 at p. 52.

⁹¹ On voting rights of expatriates, see C. López-Guerra, 'Should expatriates vote?', 12 *Journal of Political Philosophy* (2005), p. 216.

electoral reform would also affect a fundamental principle of Luxembourg's constitutional structure, namely that of national sovereignty – which would undermine the very legitimacy of the Luxembourg State.

THE TRANSFORMATION OF THE STATE AS A CONSEQUENCE OF EUROPEAN INTEGRATION

National constitutional structures are undergoing transformation as 'the substance, the spirit and the practice of these States are being transformed under the influence of their belonging to the Union'.⁹² It has already been shown that a link between a possible extension of voting rights and European integration can be established. This section examines the potential consequences which this development could have on Luxembourg's domestic constitutional structure.

Article 32(1) of the Luxembourg Constitution states that 'Sovereign power resides in the Nation'.⁹³ A process of constitutional revision is currently underway,⁹⁴ but also the proposed new text announces that 'Sovereignty resides in the Nation'.⁹⁵ The attachment to the principle of national sovereignty leads to the question of whether voting rights for foreign nationals would be constitutional, and, if sovereignty no longer resides in the nation, who or what the novel bearer of sovereignty would be. Whereas there is nothing in Luxembourg constitutional jurisprudence or doctrine that provides an answer to these questions, interesting insights can be gained via the adoption of a comparative perspective, as two of Luxembourg's neighbouring countries, France and Germany, have in the past been faced with similar issues.

In 1990, the *Bundesverfassungsgericht* (the German Constitutional Court) issued two unanimous judgments that addressed the conflict between voting rights for non-nationals and national sovereignty. The first decision arose after Schleswig-Holstein allowed some foreigners to vote in local elections.⁹⁶ The Court held this to be in violation of Article 20(2)(1) of the Constitution, according to which all public power emanates from the 'Volk'.⁹⁷ The term 'Volk' (which literally translates as '(the) people') is understood to include only those of German nationality, so that voting rights cannot be granted to foreigners.⁹⁸ According to

⁹² Gerkrath, *supra* n. 5, p. 110.

⁹³ 'La puissance souveraine réside dans la Nation' (my own translation into English).

⁹⁴ On this, see J. Gerkrath, 'Some Remarks on the Pending Constitutional Change in the Grand Duchy of Luxembourg', 19 *European Public Law* (2013), p. 449.

⁹⁵ 'La souveraineté réside dans la Nation' (again, my own translation).

⁹⁶ BVerfG 31 October 1990, BVerfGE 83, 37, *Ausländerwahlrecht I*. For a comment, see O. Beaud, 'Le droit de vote des étrangers: L'apport de la jurisprudence constitutionnelle Allemande à une théorie du droit de suffrage', *Revue Française de droit administratif* (1992) p. 409.

⁹⁷ This provision reads 'Alle Staatsgewalt geht vom Volke aus.'

⁹⁸ BVerfGE 83, 37 (50).

the principle of the sovereignty of the nation, the *demos* concerned with the democratic exercise can only be composed of nationals.⁹⁹ The same conclusion was reached in a second decision regarding a Hamburg law that extended voting rights in local elections to foreigners who had resided in Germany for eight years.¹⁰⁰ Whereas German law was modified as a result of European citizenship, the decision illustrates that, as a matter of constitutional theory, national sovereignty is generally understood to mean that only nationals can legitimise public power through the franchise.¹⁰¹ The German Court moreover ‘explicitly rejected the principle of affected interests as the basis for a claim to political equality and access to the franchise’¹⁰² in holding that the concept of popular sovereignty

does not mean that the decisions engaging state authority must be legitimated by those affected by them; rather state authority must be based on a people understood as a group of persons bound together as a unity.¹⁰³

The French *Conseil constitutionnel* was faced with a similar issue in its decision on the constitutionality of the Maastricht Treaty.¹⁰⁴ It found voting rights for foreign residents in local elections to conflict with Article 3 of the Constitution, according to which national sovereignty belongs to the *peuple* – the people, a notion understood to designate only those of French nationality. Allowing foreign citizens to vote in local elections would violate this principle, as mayors contribute to the election of the senators. The council found that, as a legislative chamber at national level, the Senate contributes to the exercise of national sovereignty and can therefore be chosen only by French nationals. This conflict was later remedied by the introduction of Article 88(3) into the French Constitution. That specified that, while European citizens can vote and stand for election in local elections, they cannot be mayors or participate in the election of senators,¹⁰⁵ a limitation on the electoral rights of EU citizens that is lawful under EU law.¹⁰⁶

These decisions are based on German and French law respectively and not on Luxembourg constitutional law. Nonetheless, the principle of national sovereignty constitutes a cardinal principle of all three constitutions. As a result of an opening

⁹⁹ BVerfGE 83, 37 (50).

¹⁰⁰ BVerfG 31 October 1990, BVerfGE 83, 60, *Ausländerwahlrecht II*.

¹⁰¹ Beaud, *supra* n. 96, p. 412.

¹⁰² Lansbergen and Shaw, *supra* n. 33, p. 56.

¹⁰³ BVerfGE 83, 37 (51) (my own translation).

¹⁰⁴ Conseil Constitutionnel 9 April 1992, No. 92-308 DC. For a comment, see Beaud, *supra* n. 96.

¹⁰⁵ Art. 88(3) of the French Constitution and Loi constitutionnelle no. 92-554 du 25 juin 1992 ajoutant à la Constitution un titre : ‘Des Communautés européennes et de l’Union européenne’ (1).

¹⁰⁶ Art. 5 of Directive 94/80/EC.

up of the suffrage to non-nationals, questions regarding the constitutionality of this practice would arise, as it could be argued that a restructuring of the vote undermines Luxembourg's constitutional right to self-determination. It would be paradoxical for Luxembourg simultaneously to engage in constitutional revision, which upholds the principle of national sovereignty, yet also to seek to extend voting rights to foreigners. It also seems illogical for Luxembourg to uphold its restrictive regulation on the access of EU citizens to local elections given that with regard to national elections in Luxembourg. This would indeed mean that Luxembourg renders participation in local elections more difficult for EU citizens than does any other member state, yet would be the only member state allowing all EU citizens in its territory to vote in legislative elections. It seems difficult to identify a rationale for any such discrepancy. Since electoral reform would entail the abolition – or at least significant modification – of a core constitutional principle underlying the very legitimacy of the state, the question is no longer simply whether European integration is advanced enough to justify changes in voting rights but also whether it can justify transformations of the state itself.¹⁰⁷

DOMESTIC ELECTORAL REFORM AND ITS CONSEQUENCES FOR EU LAW

After an excursion into Luxembourg's domestic context, the remaining part of this paper briefly deals with the consequences of an extension of voting rights to foreign residents under EU law.

Voting rights for foreign residents as an incentive or a barrier to the free movement of workers?

Creating further avenues to political participation for EU citizens in their host state strikes one as a factor that facilitates their integration into the host society. Voting rights could lead to a more adequate representation of the interests of migrant workers, as the denial of such rights 'is likely to adversely affect these people in social and economic terms.'¹⁰⁸ Electoral reform could further attribute more magnitude to the concept of EU citizenship, which 'involves closer political integration of the migrant and the host polity' including 'voting rights based on residence *without* the acquisition of the badge of formal legal membership, i.e. nationality or national citizenship.'¹⁰⁹ Voting rights in legislative elections would equip foreign residents with a voice, generally accorded only to nationals, actively to shape the polity they live in.

¹⁰⁷ These transformations would of course occur in addition to those already triggered by European integration.

¹⁰⁸ Beckman, *supra* n. 40, p. 153.

¹⁰⁹ Day and Shaw, *supra* n. 59, p. 185, emphasis in original.

Luxembourg is, however, one of the rare countries that have a system of compulsory voting. Voting is mandatory for anyone below 75 years of age¹¹⁰ and non-compliance with this obligation is punishable by fines, even though it appears that this penalty has not been enforced in past decades.¹¹¹ This points to a choice that needs to be made – that is, whether foreigners will be subject to an obligation to vote or merely have the option to do so. Both scenarios raise some intriguing legal questions. With regard to mandatory voting, it is questionable what the basis for the obligation would be. Compulsory voting is generally understood as enforcing a civic duty of nationals, as a corollary of the rights attached to nationality.¹¹² If the obligation to vote were imposed on foreign residents, this could arguably amount to an obstacle to the free movement of workers under Article 45 TFEU. National practices that prevent or substantially hinder the access of EU nationals to the market of a member state that is not their own are prohibited¹¹³ if they cannot be justified by imperative reasons that relate to the public interest.¹¹⁴ Whereas voting requires minimal time and effort, it constitutes an expression of personal opinion that many systems feel they cannot oblige their nationals to undertake; this explains why, in most states, voting is a right and not a duty. Further, an obligation to vote would impose a degree of integration on residents that they might not wish to have. If voting rights are granted after a residence period of a number of years which exceeds the residence period necessary to apply for the nationality, the electoral reform would catch merely those that made the choice not to become Luxembourgers. In that scenario, an obligation to vote might force individuals to form part of the polity, whereas they themselves might wish only to be visitors in transit. We must thus wonder whether an obligation to vote in national legislative elections could amount to a violation of Article 45 TFEU. If this would be so, another paradox would emerge, as a national measure aimed at facilitating the integration of EU citizens would be precluded on the ground that it conflicts with another goal of the European project, namely market integration. Article 8 of Directive 93/109/EC provides that '[i]f voting is compulsory in the Member State of residence, Community voters who have expressed the wish to do so shall be obliged to vote.'¹¹⁵ The interpretation of those 'who have expressed the wish to do so' is crucial in this respect, as it needs to be

¹¹⁰ Art. 89 Luxembourg Election Law.

¹¹¹ See Art. 90 Luxembourg Election Law.

¹¹² On compulsory voting, see S. Jackman, 'Voting: Compulsory', in N.J. Smelser and P.B. Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier 2001) p. 16314.

¹¹³ On this, see, by way of example, ECJ 25 July 1991, Case C-76/90, *Säger v Dennemeyer & Co Ltd.*; ECJ 31 March 1993, Case C-19/92, *Kraus v Baden-Württemberg*; ECJ 30 November 1995, Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.

¹¹⁴ ECJ 25 July 1991, Case C-76/90, *Säger v Dennemeyer & Co Ltd.*, para. 15

¹¹⁵ Council Directive 93/109/EC.

determined whether a participation in local or European elections could lead to a duty to vote in national elections. It appears likely, however, that such an obligation would be found to be justified under the first sentence of Article 4(2) TEU as an expression of Luxembourg's constitutional identity.¹¹⁶

Luxembourg could also merely give foreign residents the option to vote. Indeed, for municipal and EU elections, residents decide freely whether to be put on the electoral lists¹¹⁷ even though, once they are on the list, the obligation to vote arguably applies also to them.¹¹⁸ Yet in this context Luxembourg did not have much of a choice, as the optional nature of the vote is mandated by Article 22 TFEU, which provides that EU citizens 'have the right' to vote and stand for election. This option could also be retained with regard to national legislative elections. The subsequent sub-section shows that this solution would not be without complications from an EU law perspective.

Voting rights for foreign residents and the doctrine of reverse discrimination

Luxembourgers could thus be obliged to cast a ballot, whereas foreign residents might merely have the option to do so. This would result in a difference in treatment arguably in conflict with Article 18 TFEU, which provides that 'any discrimination on grounds of nationality shall be prohibited'. Under EU law, nationals cannot, however, rely on Article 18 TFEU, in accordance with what is commonly referred to as the 'doctrine of reverse discrimination'. Under this doctrine, nationals cannot invoke the free movement provisions against their own member state unless they have exercised their right to free movement.¹¹⁹ An examination of the rationale underlying this doctrine shows that it would become obsolete once foreign residents had the franchise.

The doctrine which emerged as 'reverse discrimination' was understood not to impede European, and in particular economic, integration.¹²⁰ Workers were initially perceived as mere 'factors of production',¹²¹ picturing the individual as a

¹¹⁶The emergence of litigation raising these questions would most probably presuppose that Luxembourg fines someone for not voting, which has not, however, happened lately.

¹¹⁷Art. 2(5) and 3(5) Luxembourg Election Law.

¹¹⁸To my knowledge, this question has not been settled as a matter of Luxembourg constitutional law.

¹¹⁹On this, see ECJ 28 March 1979, Case 175/78, *The Queen v Saunders*; ECJ 28 June 1984, Case 180/83, *Moser v Land Baden-Württemberg*; ECJ 8 December 1987, Case 20/87, *Ministère public v Gauchard*; ECJ 29 May 1997, Case C-299/95, *Krenzow v Republik Österreich*; cf. also D.M.W. Pickup, 'Reverse Discrimination and Freedom of Movement for Workers', 23 *CMLRev* (1986) p. 135.

¹²⁰ECJ 15 January 1986, Case 44/84, *Hurd v Jones*.

¹²¹In the context of the free movement of workers, the purely internal situation rule was first uttered in *Saunders*, *supra* n. 119, para. 11.

‘market citizen’.¹²² According to this view, workers are ‘instruments to be used in the process of the construction of the internal market’ and the law merely stepped in where their status as factors of production, but not their rights *per se*, was at stake.¹²³ The concept of the individual under EU law has, however, undergone a process of modification, symbolised by EU citizenship and fundamental rights. Notwithstanding this transformative process, the ECJ continues to affirm the rule of reverse discrimination in its case law.¹²⁴ It made it very clear that ‘citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law.’¹²⁵ Secondly, the doctrine is justified by the fact that ‘migrants cannot necessarily gain access to the host state’s political process so Union law intervenes on their behalf to correct laws which discriminate against them.’¹²⁶ As nationals have an influence on the laws to which they are subject *via* their political rights, foreign residents do not. If Luxembourg proceeds to an electoral reform that allows foreign residents to vote, this statement would no longer be true. As a consequence, the doctrine would simply no longer be tenable – at least in the Luxembourg context. A domestic electoral reform would accordingly place a central foundation of EU free movement law in jeopardy, underlining how dynamics in one constitutional sphere produce effects in another. A paradox would emerge if EU integration were advanced enough to lead to a redefinition of the *demos* in a state but the doctrine of reverse discrimination, based on differences between *demos* and their respective political rights, were to persist. In this scenario, integration would proceed at a quicker pace domestically than it would at supranational level.¹²⁷

¹²² On the notion of market citizenship, see M. Everson, ‘The Legacy of the Market Citizen’, in J. Shaw and G. Moore (eds), *New Legal Dynamics of European Integration* (Clarendon 1995) p. 73.

¹²³ A. Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen’s Europe’, 35 *Legal Issues of Economic Integration* (2008) p. 43 at p. 47.

¹²⁴ ECJ 2 October 2003, Case C-148/02, *Garcia Avello v État belge*, para. 26; ECJ 12 July 2005, Case C-403/03, *Schempp v Finanzamt München*, para. 20; ECJ 26 October 2006, Case C-192/05, *Tas-Hagen and Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, para. 23.

¹²⁵ ECJ 5 June 1997, Joined Cases C-64/96 and C-65/96, *Nordrhein-Westfalen v Ücker and Jacquet v Nordrhein-Westfalen*, para. 23.

¹²⁶ C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 3rd ed. (Oxford University Press 2010) p. 231. See also ECJ *Ücker and Jacquet*, *supra* n. 125, para. 23.

¹²⁷ Also outside the Luxembourg context, the doctrine of reverse discrimination has been subject to criticism. See, by way of example, the Opinion of AG Tesaura 28 June 1994, Joined Cases C-363/93 and C-407-411/93, *Lancry and others v Direction Générale des Douanes and others*, para. 28; Opinion of AG Sharpston 28 June 2007, Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government*, para. 116. M. Poiars Maduro, ‘The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination’, in C. Kilpatrick et al. (eds), *The Future of European Remedies* (Hart Publishing 2000) p. 117; N. Nic Shuibhne, ‘Free Movement of Persons and the Wholly Internal Rule: Time to Move on?’, 39 *CMLRev* (2002)

CONCLUSION: ON THE INTERTWINEMENT OF CONSTITUTIONAL SPHERES IN THE EU

Two conclusions can be drawn from the analysis above. First, that foreigner voting would entail many consequences that might not be apparent at first sight and which must be discussed before the referendum. Secondly, the paper illustrates that the possible electoral reform is deeply connected to European law and the process of integration more generally. It cannot be causally proven that Luxembourg's demographic structure and the possibility of electoral reform are the direct consequence of European integration.¹²⁸ Nonetheless, it appears that domestic constitutional reforms that occur in the context of the 'spider's web' fashioned by EU and domestic constitutional law cannot be separated from EU law and EU integration. Stating that the domestic and supranational constitutional spheres are intertwined is of course hardly a novel statement.¹²⁹ This paper, however, reveals an as yet unknown consequence of such intertwining. Luxembourg's demographic structure is unique and an electoral reform could lead to greater inclusion of EU citizens into the Luxembourg polity. Such a reform would have consequences both domestically and on an EU scale, cementing the conclusion that the various 'scales' composing the complex European legal order are deeply interlinked. If the many EU citizens working in Luxembourg were to be given further voice through voting rights in legislative elections, the identity of the Grand Duchy's *demos* as well as the very constitutional structure of this member state might be revised, maybe even to a much greater extent than the combined effects of EU integration have brought about thus far. Such a reform would in turn have an impact on EU law, in putting in doubt a doctrine central to it, namely EU integration.



p. 731; Tryfonidou, *supra* n. 123; F.G. Jacobs, 'Citizenship of the European Union – A Legal Analysis, 13 *European Law Journal* (2007) p. 591.

¹²⁸ In this context, it is noteworthy that Schleswig-Holsteings and Hamburg's attempt to reform their respective electoral systems occurred after European integration had taken place but was not considered to be a consequence thereof.

¹²⁹ On this, see Gerkrath, *supra* n. 5; M. Claes, 'The Europeanization of National Constitutions in the Constitutionalisation of Europe: Some Observations against the Background of the Constitutional Experience of the EU-15', 3 *Croatian Yearbook of European Law and Policy* (2007) p. 1; J. Ziller (ed.), *L'europeanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe* (L'Harmattan 2003).