A FOREIGNER IN THE EU

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In many moments of history, in many places on earth, in many social and cultural contexts, in many metaphysical frameworks and a multitude of languages, people have formulated how they are a foreigner. This speech act transcends the boundaries of any particular discourse and goes directly to experiencing the essence of being human. The expression itself speaks a universal language, which is in no way possessed by religion, philosophy, law, metaphysics, or any ideology-driven language. How does such expressiveness relate to legal articulations as forwarded by the European Union?

The Kings and Queens, the Duke and Presidents were of course not present when they took place at their virtual table. The location was Paris, Rome, Paris again, Maastricht, Amsterdam, most recently Nice. Those cities staged the continuous completion of a primal scene. The game of calculating sovereignty was played: how much to give, to exchange and to receive. Their 1950 Treaty of Paris, 1957 Treaty of Rome or 1992 Treaty of Maastricht established among them a Market, a Community, a Union. Plenipotentiaries had to make the legal language of the Kings and Queens come true. Three important issues determine that scene.

First, they closed a *contract* and as a consequence they described themselves as "High Contracting Parties". So the Kings and Queens had become parties of a contract, where in the times before that date they were just neighbors, sometimes even family members. It would never have occurred to them to be a "party in contract" *before* the actual closing of such a deal. Contract and its language form one and the same speech act. Linguists call it a *performative* act, the doing is in the saying. Such performance is basic to contract law. Citizens who come under the conditions of that act experience a change in their lives.

Second, they established that contract *among themselves*. They acted as if there was no outside force or any authority that commands them to close the deal. No, there was no commanding third party involved. So they fulfilled the major condition in contract theory, which is the *free will* to contract. Changing from neighbors and families into parties of a contract should appear as an act of freedom. The subject of their contract was sovereignty; the involved Nation-States redistributed and reshuffled sovereignty *among themselves*. New institutions were established to organize and control this redistribution, but those institutions could not expand the sovereignty they received from the High Contracting Parties. All new meanings were expressed by means of only one word: *Nation* States had become *Member* States. Sovereignty of a *Nation* changed into the sovereignty of a *Member*. Community and Union made that differentiation of sovereignty concrete through newly designed institutions.

Third, the Treaties created *a new legal space for the Member State citizens*. That is of immediate importance to our theme. Article 8 of the Rome Treaty formulated "Citizenship of the Union is hereby established" and Article B of the Maastricht Treaty reconfirmed "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a Citizenship of the Union". That space was created through abolishing the shared Nation-State borders, and

individuals that live in the Member States were subjected to a new experience.

Four freedoms, as articulated in the Third Title of the 1957 Rome Treaty, are the Pillars of the Union as a new legal space. Notice, however, that those freedoms of persons, good, services and capital, are *legally defined* freedoms. They define *legally acceptable* behaviors of institutions and individuals. Law and a geography without internal borders created the meaning of the expression "among themselves", as written in the Preambles of the Treaties. That expression enhances the belonging to an "us" without which there would be no new space to consider. Sociologists clarify how there is never any membership possible without enhancing a belonging. That is also the case in the making of the European Union. However, there are many expressions for the commonness that forms the core issue of belonging. I suggest considering two such concepts.

A particularly subtle legal expression is the "*acquis communautaire*". The expression is difficult to circumscribe. A *narrow* definition is prominently legal, and aligns with the activities of the ECJ, that means what the Court decisions articulate and set out as their goals. A *broader* definition is legal as well as political, and can be found in the opinions of the President of the Commission or of individual Commissioners. It is clear from the beginning, that the expression pertains to all what is *commonly acquired* in the Union and therefore became a *common property* consisting of rights and duties of all Union members through the functioning of Union institutions. The new legal space became determined by what is qualified as "*common*ly" acquired. So, look at the life of the individuals in their new legal space as determined by Membership. European Union Law suggests, that Membership be only accomplished in the full adoption of the *acquis communautaire*. Philosophically spoken, Membership is a matter of *identification with the acquis*, by State institutions as well as its citizens. That is a most important issue for our

question what it means to be a foreigner in the Union. Full members have, legally spoken, *internalized* Union rules, standards and policies, and citizens are supposed to do the same. After such internalizing process, can they still be a foreigner?

Another expression for the commonness that characterizes the new legal space is the concept of a *market*. The Treaties and their scenery are inconceivable without the idea of a market. To become a party in contract implies obtaining a market position in its metaphorical sense. A market suggests a geography, a place of communication and interaction, of exchange, of peace, mutual understanding and freedom. Although that metaphor is not legal in itself, it contributes to understanding the life of Union citizens in a *juridical* manner. The idea to legally determine the space for a citizen's life was already inscribed in the 1950 *European Coal & Steel Community* Treaty. Whoever introduces the idea of a market must define the external borders of that region, both legally and geographically. The borders between Member States became gradually abolished, a process that began with custom regulations. The legal determination rooted in the four freedoms: the legal space existed where individuals and institutions were permitted to perform their freedom of establishment, work, service or payments and transition of capital. Their exercise was on the market and became secured by legal recognition of what was commonly acquired through judgments of the ECJ or the ECHR, and the Regulations or Decisions of the Commission in co-decision with Parliament. This commonness of the internal market required emphasis on the external borders of that market. Whoever speaks about "internal" creates a difference in the form of an "external". "Third countries", "third parties", "Non-Union States or Regions" were concepts added to the language of the Members; a specific dynamic between "us" and "they" came into effect. In the course of the last decades, hundreds of Agreements were concluded with "Non-Union States", reaching from Mauritius to the *Mercosur* countries of Latin America (as the

Barcelona Conference in 1995 showed) and covering all fields from Trade, Stock Market, Pharmaceutical Products and Medical Provisions towards Education and Cultural Exchange. An Enlargement machinery copes with the outside pressures of "Non-Union States" and their citizens who want to become a Member State.

What is a market without people going around, being active and living their lives? The entire Union machinery serves its peoples and individuals who unfold their life within the boundaries of this new legal space. Read the Preamble of Maastricht: "...to deepen the solidarity between their peoples while respecting their history, their culture and their traditions", attached "to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law". The commonness of the common market in the Union emphasizes the *common* as well as the *market*. The *market* indicates the positions, which are provided for the individuals. The *common* shows the limits of their action in the dimensions of the legal space. If this goes to all 375 million individuals that live within the external borders of the Member States, and if some 100 million individuals are today waiting to join that Membership and profit from these conditions for life, *what then about being a foreigner*?

That is the issue at stake, and it requires a precise legal answer. There are two semantically different expressions to consider, which go beyond the Spanish language. English has the distinction between a *foreigner* and an *alien*, which are both "extranjero" in Spanish. A *foreigner* is different from others and their social context because of his cultural customs, his view on life or his different patterns of action and behavior. An *alien* can be even an extraterrestrial being, but is normally an individual with a different citizenship. The question "what about being a foreigner?" fascinates in this light. With the establishing of the Community and more recently the Union and the introduction of

Union Citizenship, the number of *aliens* reduced dramatically. Within the Union as a totality of Member States and their nationals, one can no longer be an alien, since Union citizenship supersedes national citizenship. In how far one can be a *foreigner* in the Union, does not depend solely on law and legal determinations, but also to the degree in which individuals or groups have internalized the *acquis communautaire*. Emphasis is therefore not only on legal dimensions but for instance also on *identification* and *learning*. Non-aliens can still become labeled as foreigners, for instance because of their eating habits or clothing, their religious practices or other issues that represent their general life style. So, one can be a foreigner (cultural criterion) without being a foreigner (an alien, legal criterion). *Foreigners are in this perspective those who experience how it is to be in the law and external to the law at the same time*. That experience might be the essence of being a foreigner in the Union today.

Such connotations of the expression "foreigner" become intensified by the progress which the Union makes towards unification. The famous "Maastricht Urteil", of the *German Constitutional Court* [*Brunner v The European Union Treaty*, pertaining to the complaint of a German citizen, Martin Brunner and others] had to check in 1994 whether Germany's Membership of the Union was legally correct and whether the rights and duties following from that Membership obliges citizens. That type of case is now, seven years later, hardly conceivable because of the degree of unification, which changed the question of membership and the position of its citizens considerably.

Our attention should go for a moment to two different aspects of the issue.

One is, that the boundary between being *in* the law and being *beyond* the law is no longer a strict delineation, since that boundary became a matter of identity formation – a process rather than a fixated situation. Focus is in our days on *(im)migrants* as

soon as we speak of foreigners. Another is, that the appreciation of being a foreigner relates more than ever to the issue of *fundamental rights* because of the unfolding juridical unification of the Union.

Migrants often deploy political or economic motives for their need to resettle, and enter the Union. The 1951 U.N. convention on refugees limits the right of asylum to the so-called *political refugees*, that is to persons who seek a safe haven from political oppression and persecution in their home country. Today one should re-consider the multiple meanings of that U.N. expression, especially with regard to "political persecution". Governments can deliberately create poverty and famine, either to submit regions to their regime or to force a population to migrate. Is the result of such situations a *political persecution* that produces *political refugees* or the cause for *economic refugees*? To what category do civil wars or ethnic conflicts belong? Any in-depth study of such concepts makes us question the effect of anchoring the behavior of migrants in U.N. administrative categories so that their behavior can be justified and lead to recognition of their status in one of the Member States. More importantly, the term also applies to individuals who flee a country that was only their "habitual residence", not their country of birth. The European Union protects, in concordance with U.N. conventions, their right to life, protects them from torture and ill treatment, and suggests their freedom of movement as it guarantees this freedom to its own citizens. Keep in mind, how this goes mostly to *aliens*. And, one asks, are *migrants* really needed and therefore welcome? Contrary to popular perception, they are.

Western Europe needs increasing access to *foreign* (often also *alien*) workers for high-tech jobs as well as for low-wage service jobs and other manual work. The Union needs this migration of labor for at least four reasons.

1. There is the continuous *shortage of specific occupations*, such as nursing, nannying, electronic high-tech and communication as well as bioengineering jobs.

2. Another important issue is that more workers are needed to supply the financial means for *sustaining the Union's aging population*. In other words, migrant laborers help to pay the pensions and health provisions for the increasing group of elderly citizens. This is not specific for the Union, *one* retired person in the US requires today *three* full time working individuals to provide the necessary social security level, and the latter number will soon rise.

3. *Globalization* is a catchword in recent developments of the Union. This begs the question whether the Union can exist as a conglomeration of relatively closed national markets. The answer is: no, there exist no national economies anymore, and the Union is designed to realize forms of globalization within its proper dimensions and even beyond them, as the enlargement policies show. Flexible forms of cross-border labor circulation are necessary, and they will contribute to diminish many difficulties in the lives of migrants. Their job contexts and professional cultures provide them the support to achieve an appropriate identity formation. This is more important today in the circulation of professionals in finance, telecommunications and other specialized functions than in low-wage service jobs.

4. Migrants are needed to accomplish *the multicultural features of the Union*, as developments in North Western Europe show. Debates on whether English should become the first language in schools where the native language is different, or debates on how to organize education where fifteen nationalities come together in one classroom (as is the case in schools in the UK or in the Benelux Countries), debates on proposals of EU *Parliament* and *Committee of the Regions* to make the appropriation of two Union languages together with one's native

tongue mandatory, demonstrate this multicultural society in development.

Those four issues greatly diminish the overall importance of being an *alien*, and emphasize the need to come to terms with all implications of being a *foreigner*. They show another reality than the far-rightwing politicians propagate: "being a foreigner" *enhances* a European society in development towards multiculturalism and globalization. In its turn, it contributes to the realization of the goals of the Union as formulated in the Preambles. This is particularly true for the process of European integration. A citizenship common to all nationals of the Member countries involved is in that perspective a strong legal and symbolic reality.

One should furthermore not forget how the need to draw on foreign workers in Europe is a part of its history, it accompanies its history as a colonizing power and later as a factor in Europe's industrialization. Labor surplus and labor shortage were always outweighing each other. Immigration to Western Europe has never been a straightforward success story from poverty to wealth. Regions and specific cities, invisible ties of culture that determined the history of economic relations were often causing the flows of migration. Globalization should be mentioned again: many migrant workers do not search for a new home in a foreign country. They just want to expand the scale of their labor market possibilities, a market that they perceive as global by its very nature. A free circulation of migrants would show that many prefer a residence in their country of origin combined with free access to temporary labor in countries of their choice. The number of immigrants in need of permanent residence is yet a dark number, but it might *not* be very high. The general public does not know this and politicians often speak and calculate as if those numbers do not exist. They want to maintain the traditional, often Nation State-type of political reasoning and not develop a clear and realistic European policy towards migrants. The latter

project is, however, the only possibility to create a better labor market, to dissuade human trafficking and to reduce exploitation and illegal migrant practices.

One should, however, not underestimate how immigration has negative influences. Those who work in the sectors where migrants work or built their social web in regions or neighborhoods intruded by migrants, can tell the story. Urban sociologists have issued warnings against these socially disrupting forces, and trade unions in Europe have opposed the overflow of migrant labor because of the depressing effects on wage levels and the social or psychological pressure. The increasing permanency of migrant communities does not do away with the many advantages of stimulating the use of the large seize of the European market and its potential for sound globalization processes. The introduction of heterogeneous religious and culture patterns might undermine an easy-going political consensus in Europe. But it certainly stimulates the emergence of a multicultural society that develops into an area without internal borders. At the same token, it should maintain justice, democracy and the rule of law in its policy to maintain its external frontiers. A large region with a unified institutional framework and with multicultural and multilingual attitudes foreshadows globalization in a positive manner. That is a unique chance for Europe's role on a world scale. Its basis is in doing away with the reality of being an alien within its own Union of nations; its necessary development is towards what the Committee of the Regions has called "a learning society".

That expression is very important indeed; the *semantics of citizenship* pertain to the *creation, management* and *learning of meanings* in the Union. Citizens of the Union are invited, even urged, to position themselves in new structures of their Union society. They carry a *double set of meanings*, and have to acquire their personal identity within that context. "To be a National of a Nation State who became a Member State of the Union" is the precondition for European citizenship. The proclaiming of a new

citizenship does not suffice to have this citizenship function as an everyday-life reality. Semantics must always fulfil two conditions, they must become *institutionally* embedded, and result from *learning processes*. A central issue in both is the experience and interpretation of what it means to be *a subject of law* – a question closely related to what it means to be *a foreigner*. A strong interest in legal subjectivity, for instance in the question "what am I entitled to do?" belongs to the awareness of becoming a citizen. It challenges the process of identity formation in citizenship. Political dimensions become visible where an individual's identity remains either a matter of Nation State identity, or of an encompassing legal entity such as the Union, or of an entity in smaller dimensions such as a Region. It is a bewildering observation how new interpretations of *learning* are at stake in this context. As was said before, European citizens are today the nationals of in bygone day's *sovereign* Nation States, which were then *autonomous legal entities* and are now *actors* in a new emerging legal space. To be such actor, and to act appropriately in that space *must be learned!* One is *legally* a European Union citizen by the power of Article 8 of the Treaty. However, one is *socially* and *psychologically* a European Union citizen through new and complex learning processes, for instance about multicultural perspectives or multilingual experiences. That becomes mirrored in many components of the meaning of *alien* and *foreigner*. So, becoming a Union citizen requires an understanding beyond the balances between one's rights and obligations. Does this occur in the same manner as one was taught in an autonomous Nation-State? How does an individual citizen develop its identity in cases where the Nation-State is no more the single point of normative reference? How can a plural citizenship and a singular legal subjectivity go together? Today's reality shows how *living together* is *learning together*. Where it confirms the importance of that reality, the Union's *Committee of the Regions* does not solely refer to a (legal) subject that appears

as the central constitutive force in modern citizenship. It does not confirm the habitual dominance of the *rights/duties paradigm* in law. Learning processes surpass that simple mechanism! Its special position in legal theory and philosophy of law should be abolished and placed in larger semantic contexts. *Identity* is a good example in this regard. Identity is not a fixated point of reference from which all meaning emerges, not an acquired property for a lifetime. Identity is rather a position as the consequence of one's involvement in processes of ongoing social and personal change. *To learn is to change, and to change is to learn.* Such understanding deregulates the juridical paradigm and the juridical geometry that once provided the basis for the Union Treaty. Texts of the European institutions need to be read in the mirror of contract, but contract is also a model for interaction and living together *par excellence*. It is clear that a life-long "learning process" needs legal structures, but the purpose of Union Law is not only about legal frameworks; it is about maintaining and actually *living the greatest variety of life styles together.* Such goals never lead to formal structures of command. They rather shape a continuously balanced liability on the basis of ever changing identity structures, which are in essence forms of *interaction.*

The thesis of my contribution is that any "*foreigner*" in the EU is within that Union not an "*alien*". European citizenship overarches the differences between the nationality of a Nation State, which after the Treaties comes second. In that perspective there are *no* foreigners in the EU. Whether one is a foreigner in the other, psychological and cultural sense, depends on identity formation, on learning processes and also on how to master the ambiguity between being *in* the law and *beyond* it. That is not a legal issue. However, there is the more difficult question: if one can not be a foreigner in the EU, what about being a "*migrant*" in the EU? That issue is far from solved, neither legally or psychologically, by means of any of the Union provisions. The Union

has shifted from being a world region of emigration to being a magnet for migrants from other places. Immigrants in Europe counted in 1998 for about 5% of the total population, and that number has been growing since. A concluding consideration is in the following. There is no watertight legal regulation for the European labor market, or for the problems of migration and migratory labor. Illegal migration has many forms today. Most are forms of *economic* migration. These migrants have to overcome their being an *alien*, before working out how to be a *foreigner*. Some are *refugees*, such as Afghans fleeing the Taliban; Kurds fleeing the Turks or Sadam Hussein, other flee out of fear for religious, racial or political persecution. Most EU Member State governments issued strict control on legal immigration, and accept controlled migration of refugees under reference to U.N. conventions or the activities of the High Commissioner of the U.N., the UNHCR. Reference to *Human Rights* is not a formality in this context. The recent *Charter of Fundamental Rights in the European Union* completes the Treaties of Maastricht and Amsterdam, and should have been the basis for the Nice Treaty, concluded at the end of the year 2000. It did not, and this is one of the many reasons to look ahead, towards a further "post-Nice" articulation. There are numerous reasons for this Charter to be implemented, among them judicial co-operation in criminal matters, combating crimes beyond state borders, a common policy with regard to immigration and nationals of third countries, changes in the structure of the labor market and the globalization of the economy, not to mention Art. 6 (1) of the Amsterdam Treaty about the Union's attachment to fundamental social rights.

One of them must be highlighted in the context of our theme. Article 41 of the Charter lays the groundwork for "*the principles of good administration*" in the EU. That is not a matter of paperwork to be done fairly, or of the correct development and maintenance of e-technology in an administrative context. It is

the administration (the Maastricht Treaty articulated the "single institutional framework" in its Article C), which controls whether *aliens* in the Union rightly persist. It is the administration, which determines whether a *refugee* can obtain a legal status because his arguments are trustworthy. It is the administration, which decides on the lawfulness of a *migrant*'s situation. The three examples pertain to how one is a foreigner in the EU. So it is encouraging to read in the Charter's Article 41 (1): "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union" –"Toda persona tiene derecho a que las instituciones y órganos de la Unión traten sus asuntos imparcial y equitativamente y dentro de un plazo razonable"–. The Charter does not mention "Each *citizen* of the Union has the right..." but speaks in the style of Human Rights formulations of "Every *person*...", "Toda persona...". It is ethically of crucial importance that is written "Every person...". The recognition of a human being as a person in the sense of the Charter Article *precedes* any administrative discussion about his or her legal status. The diminishing of *being an alien* occurs through a superseding European citizenship, or through recognition of a status resulting from third country treaties or other legal relationships. *Being a foreigner* diminishes by means of the recognition of the legal subject as a person. It is of utmost importance and a unique position of the Union to forge a relationship between any type of *migrant* with the *acquis* through the mediation of the Charter. Indeed, it is a *thin* relationship, but one that shows human dignity. Yes, a migrant can be denied entrance to the Union, but that process of denial shall be completed in the territory of the Union with respect for all human rights involved, the application of all principles of good administration included. That expectation is underlined in the Charter. One waits for the first case to be brought before the ECJ after the Charter can be legally enforced.

A paradox appears: can one remain a foreigner in the EU? An *alien*, yes! A *foreigner*, no! Three propositions can be formulated by way of summary to help a discussion unfold.

1. Not only contemporaries such as Nietzsche, Derrida or Blanchot but already Aristotle and Plato designed ideas on friendship which determine the future of the European Union. That future does not only depend on legal regulations and juridical activities, but also on the citizens's attitude towards foreigners and aliens. Problems of xenophobia pertain to foreigners more than to aliens. One could read Plato's dialogue on friendship, the *Lysis*, as an essay on the Union's contractual basis. Differences between friends and partners in contract dissipate where the problem of *identity* (who is a friend?) and of the *good* (power in society) seem to become identical. It is the identity of the foreigner that disturbs us-why does he mingle with our lives, what are his motives, his goals, what is he going to take from me? Comparable motives are in the opinions of those who oppose the Union's Enlargement.

2. Active citizenship in the Union is not exclusively based on the exercise of rights. Citizens are not only bearers of rights and duties, but are also committed to issues that reach beyond the contractual properties of the Union society. An appropriate *management of differences* is one of the most important of those issues. That management is not an innate property of humans, it has to be learned. Citizens of the Union should engage in learning in the context of the Union as a so-called learning society. The leading idea is here that multiculuralism and altruism must be learned, especially in our highly individualistic society. The Union did hiterto nothing to specifically develop the frameworks and programs for such learning processes. Public opinion against further Enlargement shows an outcome of such negligence.

3. The discrepancy between the Union's *Charter of Human Rights* and the political practices of its citizens is noticeable. The latter show an intensification of xenophobic attitudes towards

foreigners in the Union. This forms the basis of increasing domination of right-wing political viewpoints. However, the Charter shows a different direction. In doing so, the text reaches beyond the privileged position of a legal subject as citizen of the Union and leads to the legal protection of every individual that was urged to enter the Union-not by contract but by necessity. Can political discourse follow the lead of law and ethics here?