



# MASTER THESIS

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## “Cloaking Common Sense with Rationality: The Indexation of Family Benefits for 24-Hour Care Workers”

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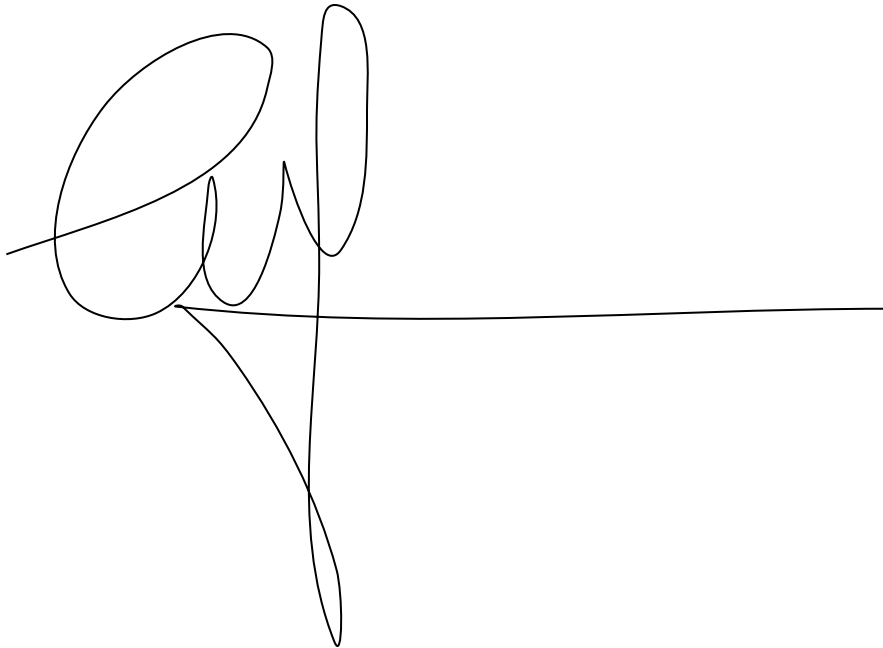
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“On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.”

A handwritten signature in black ink. It features a large, stylized initial 'A' on the left, followed by a vertical stroke that descends below a horizontal line. The horizontal line extends to the right, ending in a small loop. The signature is fluid and cursive.

Thank you Tristan, for all the love and support you've given me throughout this journey.

<b>1. Introduction</b>	<b>6</b>
1.1 Literature Review	11
1.2 Concepts	12
<b>2. The Status Quo: A Contextualization</b>	<b>16</b>
2.1 The Indexing Policy	16
2.2 Legal Nexus	18
2.2.1 Legality of the Indexing policy?	23
<b>3. Methodology</b>	<b>24</b>
<b>4. Discourse Analysis</b>	<b>26</b>
4.1. How to claim Justice, reshaped as “New Fairness”	26
A. Presented Arguments	26
B. The legitimacy claim can therefore be defined as follows:	27
C. Contextualization and Analysis	27
D. Evaluation of the Argument	30
E. Wider Implications	33
4.2. How to claim Morality: The Tale of Welfare Tourism versus 24-Hour Care Work	35
A. Presented Arguments	36
B. The legitimacy claim can therefore be defined as follows:	37
C. Contextualization and Analysis	37
C.1 Welfare Tourism: Fact or Fiction?	37
C.2 The Reality of 24-Hour Care Work	42
D. Evaluation of the Arguments	46
D.1. Argument 1	46
D.2 Argument 2:	47
E. Wider Implications	47

4.3. How to claim Rationality: What about Europe?	48
A. Presented Arguments	49
B. The Legitimacy Claim therefore has to be:	49
C. Contextualization and Analysis:	50
C.1 The difficulties of combining nationalism and “Europeanness”	50
C.2 Instrumentalizing National Sentiments	53
D. Evaluation of the Argument	55
4.4. How to claim legality: If the British are allowed, we are too.	55
A. Presented Arguments	57
B. The Legitimacy Claim must therefore be:	57
C. Discussion and Analysis:	58
C.1 How it all began: The winding roads of Brexit	58
C.2 Responses by the Council and the Commission	61
C.3 The Role of the European Court of Justice	63
C.4 The Austrian Perspective	66
D. Evaluation of the Argument	67
<b>5. Findings</b>	67
<b>6. Discussion</b>	71
<b>7. Conclusion</b>	76
<b>Appendices</b>	78
1. Abstract	78
a. English	78
b. Deutsch	78
2. Bibliography	80

# 1. Introduction

Unlike in the 20th century, when post-war Western Europe had quite a clear grasp on the importance of migration and foreign labour, the 21st century has seen a dramatic shift in public opinion on migration. In fact, the integration process of the European Union was often accompanied by intense anti-migration rhetoric. The 2006 campaigning of the then popular Austrian Freedom Party (FPÖ) springs to mind as a key example of such rhetoric entering mainstream discourse – albeit in unusual fashion. Heinz-Christian Strache, the party’s leader at the time, rapped in a hip-hop styled campaign song (and accompanying music video) for the Austrian general election: “Breaking and entering, burglary and assault, crime is on the rise everywhere. The Eastern Opening is a great thing.” In the background sirens could be heard. This was a clear reference to 2004’s EU Eastern enlargement and a display of prevailing prejudices and perceptions of Eastern Europeans as ‘other’.

This development is mirrored in the discussion on free movement and EU citizenship. The right to free movement, which contains the right to equal treatment of persons, is among the four fundamental freedoms of the EU and laid down in binding EU legislation. However, EU citizenship is still in a developing phase and its free movement and equal treatment privileges are still largely tied to economic activity or the respective individual having sufficient funds to meet set requirements. Hence, it is easy to replace an EU citizenship debate with one on EU migration – a topic at the heart of Eurosceptic concerns. Something that is being increasingly exploited by EU member states. Even though an infringement of free movement rights can be and has been brought before the European Court of Justice (ECJ), the ECJ’s weighing of interests too, has changed over time and has recently been leaning more towards the prevailing trend of rolling back social welfare access to “foreigners” and thus weakening the institution of equal treatment so central to any form of citizenship.

The ever-changing definitions of in- and out-groups within societies have been an important part of nation building, which is why citizenship research originally focused on the

bond between the individual and the nation state.<sup>1</sup> British sociologist T.H. Marshall defined citizenship as “[...] a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed.”<sup>2</sup> In 1992 European citizenship was established in the Treaty of Maastricht representing a unique case of regional citizenship. As an integral part of European integration and the internal market, free movement of EU citizens as well as equal treatment among the right to vote in EU elections and language rights were laid down. The European Court of Justice remarked in its *Grzelczyk* ruling in 2001 that: “EU Citizenship is destined to be the fundamental status of nationals of the Member States.”<sup>3</sup>

Celebrated as “the world’s first example of fully institutionalised trans – or post – national political rights beyond the nation-state”, the Brexit discourse yields evidence for member states’ difficult relationship with this concept.<sup>4</sup> In fact, net-receiving countries of EU migrants have been relentless in their restriction of equal treatment rights, wherever the Court and patchy legislation provided loopholes, as Blauberger and others demonstrate.<sup>5</sup>

The Austrian “indexing of child care benefits” introduced under the coalition government of the centre-right Austrian People’s Party (ÖVP) and the far-right FPÖ provides yet another hands-on example of policies restricting EU citizens’ access to social welfare. For children who do not live in Austria but whose parents are working and paying taxes in Austria, the country only pays a sum determined by the price index of the child’s place of residence. This was done in order to consolidate the budget and save a projected €100 million. Bulgarian children whose parents are working in Austria for example, face a reduction in benefits of 63% in comparison to

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<sup>1</sup> Piccoli, L. (2014). *Regional spheres of citizenship*. Retrieved 9 June 2020, from <https://ecpr.eu/Filestore/PaperProposal/516c9c71-2029-47b6-ac7d-00ac65cea83f.pdf>

<sup>2</sup> Marshall, T.H. (1983). Citizenship and social class. In *States and societies* (ed.) D. Held, 248-60. Oxford: Basil Blackwell. p. 253.

<sup>3</sup> Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001). ECR I-06193. Retrieved 13 Feb 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61999CJ0184&from=EN>

<sup>4</sup> Favell, A. (2010). European identity and european citizenship in three “eurocities” : a sociological approach to the European Union. *Politique européenne*. 30(1), 187-224. doi:10.3917/poeu.030.0187.

<sup>5</sup> Schmidt S., Blauberger M. & Sindbjerg Martinsen D. (2018) Free movement and equal treatment in an unequal union. *Journal of European Public Policy*, 25:10, 1391-1402, DOI: 10.1080/13501763.2018.1488887

the original rate.<sup>6</sup> This policy has been heavily criticized by the opposition, Eastern European representatives and by different EU institutions - most notably the European Commission.

This is ironic insofar as the Commission had proposed and adopted the very policy in its renegotiation of the British EU membership conditions with then Prime Minister David Cameron. The effect of the concessions made in this process are palpable long after Britain has evoked Article 50 and legally left the Union. The Austrian Indexation policy represents a perfect example of the complicated interplay between nationalist agendas pushed for by member state governments and EU institutions' response.

The process of perceiving EU neighbours as equals and partners instead of 'foreigners' is still underway, but has suffered immense setbacks in recent years. Not only have member states adopted a view of EU citizens as costly migrants but the European Court of Justice has also been increasingly restrictive in granting social welfare access to European citizens living in another member state. A deep exploration into media discourse reveals the role the politicization of migration plays. A media analysis conducted into five migrant net recipient EU member states showed that public debate around "welfare tourism" peaked in 2014 and 75% of media statements on cross border migration in the UK were deprecating in nature.<sup>7</sup> As Blauberger and others pointed out, while a legal positivist approach cannot account for the change in ECJ judgements surrounding citizenship, perhaps the fact that ECJ judges read the morning newspapers can.<sup>8</sup> Since judgements do not develop within a vacuum, for recent changes in EU Citizenship rights to be addressed, it is of the utmost importance to understand the political discourses surrounding them. In fact, the authors map out how the increasing prevalence of "social welfare tourism" tropes in the media chronically coincided with more restrictive judicature.<sup>9</sup> All the more important it will thus be to combine aspects of both law and political science in order to assess the current situation, since the Commission has officially sued Austria

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<sup>6</sup> Arbeiterkammer (2019): *Indexierung der Familienbeihilfe*. Retrieved 1 March 2020, from [https://www.arbeiterkammer.at/beratung/berufundfamilie/BeihilfenundFoerderung/Indexierung\\_der\\_Familienbeihilfe.html](https://www.arbeiterkammer.at/beratung/berufundfamilie/BeihilfenundFoerderung/Indexierung_der_Familienbeihilfe.html)

<sup>7</sup> Blauberger, M., Heindlmaier, A. Kramer, D., Sindbjerg Martinsen, D., Sampson Thierry, J., Schenk, A., & Werner, B. (2018). ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence. *Journal of European Public Policy*. 25:10, 1422-1441, DOI:10.1080/13501763.2018.148888. p. 1434.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid. 1438.



for breaching its obligations under the EU treaties because of its implementation of the indexation.

A key component of the Brexit campaign run by the UK Independence Party (UKIP), was also built on the tale of welfare tourism, a myth well established and nourished long before 2016. When Conservative Prime Minister David Cameron announced new free movement restrictions upon Bulgarian and Romanian citizens in 2013 (after the initial ones had expired), UKIP's Nigel Farage remarked: "This does nothing to stop an unrestricted flow of a very large number of unskilled people coming into Britain at a time when we have a million young unemployed people." Adding that it was "outrageous" that under the prime minister's proposal "somebody can come [to the UK] on January 1 from Romania and within 12 weeks be entitled to employment benefits."<sup>10</sup> The Conservative Party's pivot to these sentiments under David Cameron led to yet another EU wide discussion of restrictions to free movement of persons, equal treatment and thus citizenship in the form of his renegotiation of the British EU membership conditions.

The Austrian law on the indexation of family benefits is one remnant of this discussion. It is directly derived from the (ill-fated) compromise the EU made to meet David Cameron's demands and relates to them in ideological nature.

Despite Cameron's failure to sell less European solidarity as the strategy to save the EU from Brexit, restriction to welfare access of EU citizens has been nevertheless sold as a way to realize a "slimmer, more popular Europe". Despite the fact that the myth of "welfare tourism" within the EU has been debunked numerous times, it remains a prominent argument for many who claim to work towards a consolidated budget. Even though aging populations are in dire need of labour migration for the management of their ever-increasing demand for care work, restriction of free movement is argued to be a rational way of developing the EU.

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<sup>10</sup> BBC News. (2013, November 27). *Farage: Migrant benefits 'outrageous'*. Retrieved from <https://www.bbc.com/news/av/uk-politics-25117433/farage-government-s-migrant-benefit-plans-outrageous>

In the process of introducing the indexation of family benefits as presented by Kurz I, and especially the ÖVP, all of these arguments were invoked. But above all, the ÖVP claimed that implementing indexation was merely a question of reason and rationality. This thesis will therefore contain a discourse analysis aiming to understand and deconstruct the language of rationality that was used by the former Austrian government ('Kurz I') to justify the indexation policy. With it, a test of reason will be employed in order to examine whether the arguments were made in a coherent and logical manner that would warrant the assumption that the indexing represents an act of reason.

To illustrate possible shortcomings in the arguments employed, I chose to measure them in light of the indexation's effects on 24-hour care workers. Firstly, this nexus immediately took a prevalent role in the public critique of the policy, which can be viewed as an expression of the public awareness of Austrian dependence on migratory labour in the care sector. According to a report by the Ministry for Social and Labour affairs, 96% of live-in care workers were not Austrian with their most prevalent countries of origin being Slovakia (40%) and Romania (42%)<sup>11</sup>. Secondly, as they are mostly nationals from 'lower price' member states, 24-hour care workers are a direct target of these cuts. However their assistance is direly needed as the Austrian care system is projected to face imminent shortages and demand for live-in care is on the rise.<sup>12</sup>

This shows the need for a functioning internal market regime that encompasses the possibility to counter labour shortages where they occur. Correspondingly, one of the opposition's first concerns with the indexation was for the attractiveness of Austria to EU-care workers. As the Covid-19 crisis is currently demasking many societal realities the world over, it has brutally demonstrated Austria's dire dependence on cheap care-labour force from Eastern EU Member States. The same personnel that were just recently subject to a cut in child care benefits

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<sup>11</sup> Der Standard. (2017, July 11). *Pflege: Über 80 Prozent der Betreuer aus Slowakei und Rumänien*. <https://www.derstandard.at/story/2000061124324/pflege-ueber-achtzig-prozent-der-betreuer-aus-slowakei-und-rumaenien>.

<sup>12</sup> Der Standard. (2018, October 22). *24-Stunden-Pflege: Nur 96 Betreuerinnen aus Österreich*. <https://www.derstandard.at/story/2000089857463/24-stunden-pflege-nur-96-betreuerinnen-aus-oesterreich>

are currently being flown in from EU member states to the cost of different counties in order to face the imminent shortage of care.<sup>13</sup>

This thesis therefore poses the question which legitimacy claims were brought forward by the ÖVP to justify these spending cuts and how a language of rationality was employed to do so. This will be done while also portraying the EU-wide dynamics of the citizenship discourse.

## 1.1 Literature Review

**Paul** gives an account of the economic implications that restrictive migration labour force policies have had on the UK, Germany and France, and how these policies were increasingly expanded onto EU citizenship and interpreted as an expression of national sovereignty.<sup>14</sup> Her paper highlights how the increased lower-skilled labour recruitment by the EU8 in response to the Eastern Enlargement in 2004 defined the meaning and boundaries of citizenship. From the perspective of 2012, she asserts, quite prophetically: “While the EU and member states have increasingly neutralised a dichotomous migration and mobility regime as a ‘fact’ in their policy-making, voters might not distinguish between EU and non-EU migrants when economic recession hits and threatens ‘their’ jobs.”<sup>15</sup>

The gendered implications of restricted access to family-related social welfare are described by **Shutes** and **Walker** in the case of the UK, albeit mostly for unpaid care workers.<sup>16</sup> **Askola** specifically addresses the gendered effect of infringements of free movement for female care workers, pointing to the fact that they especially often suffer from unformalized work and precarious contracts: “Care remains a vague women’s issue, a private problem, and care and domestic work partly informalised ‘women’s work’, even when paid.”<sup>17</sup> Since privileges of EU

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<sup>13</sup> Ibid.

<sup>14</sup> Paul, R. (2013). Strategic contextualisation: free movement, labour migration policies and the governance of foreign workers in Europe. *Policy Studies*. 34:2, 122-141, DOI: 10.1080/01442872.2013.767584. p. 123.

<sup>15</sup> Ibid. p. 138.

<sup>16</sup> Shutes, I. & Walker, S. (2018). Gender and free movement: EU migrant women’s access to residence and social rights in the U.K., *Journal of Ethnic and Migration Studies*, 44:1, 137-153, DOI: 10.1080/1369183X.2017.1340829. p. 150.

<sup>17</sup> Askola, H. (2012). *Tale of Two Citizenships? Citizenship, Migration and Care in the European Union*. Retrieved 23 January 2020, from <https://journals.sagepub.com/doi/abs/10.1177/0964663912440817>, p. 150.

citizenship, especially equal treatment are increasingly based on economic activity, women are more likely to be excluded from these rights.

In 2016, **Fraser** explored a major new development in capitalist societies: the entering of women into the workforce. With it comes the necessity to replace typically female labour that was previously not remunerated. This new lack of care workers additionally coincides with major demographic changes in ageing societies. Hence, she identifies another capitalist crisis, “the crisis of care”. In a conversation with Sarah Leonhard she sums it up as follows. “The rise of capitalism intensified this gender division—by splitting economic production off from social reproduction, treating them as two separate things, located in two distinct institutions and coordinated in two different ways. Production moved into factories and offices, where it was considered “economic” and remunerated with cash wages.”<sup>18</sup>

In an attempt to critically weigh these developments, **Joppke** argues that rights expansion originates in independent and activist courts, which mobilize domestic law (especially constitutional law) and domestic legitimacy discourses, often against restriction-minded, democratically accountable governments. The legal-domestic hypothesis is qualified and differentiated according to polity, migrant group, and type of immigrant rights.<sup>19</sup>

## 1.2 Concepts

This thesis seeks to identify the legitimization methods of the ÖVP during the first coalition government under Chancellor Sebastian Kurz – ‘Kurz I’ – in the introduction of the indexing policy.

The art of persuasion is central to democratic culture. Politics without justification, is politics that does not answer to an electorate. Therefore, finding compelling reasons for the change or conservation of certain societal architectures and presenting them with conviction is the domain of the politician. Justification claims for certain policies carry within them much

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<sup>18</sup> Leonard, S & Fraser, N. (2016). Capitalism’s Crisis of Care. *Dissent*, 63(4), pp. 30-37.

<sup>19</sup> Joppke, C. (2001). The Legal-domestic Sources of Immigrant Rights. *Comparative Political Studies*, 34(4), 339-366. <https://doi.org/10.1177/0010414001034004001>

information on the political speaker, their set of beliefs and their targeted audience. A study of the way in which these claims are made can offer deep insights into the moral universe from which they stem.

Reus-Smit describes the search for justification to action as central to political actors aiming to formulate convincing claims of legitimacy. He adds that “[l]egitimacy claims denote the politics of legitimation, not necessarily legitimacy”.<sup>20</sup> Legitimacy, described by the author as a quality of overwhelming social recognition of the respective political practices, cannot be analyzed in this thesis – merely because evidence for social recognition of the indexing policy does not exist in the form of polls. The politics of legitimation on the other hand simply engages in the art of persuasion and can be analysed in the context of family benefit indexation, which will be the aim of this thesis.

In order to make these claims, so-called “framing” techniques are used, representing a process by which social or political agents engage in “reality construction”.<sup>21</sup> Framing means to selectively emphasize information in order to build a greater narrative and gain support for a specific policy or attract overall popularity. Frames help in establishing justifications for political actions especially for legitimacy claims. They are coined in a way to market the speaker to their audience and transform or control their relationship to each other. Frames however, do not only speak to their target audience but can also set a clear demarcation line between which listener is addressed and which listener is wilfully ignored – a distinction that can set the tone for the creation of in- and out-groups.

All democratically elected representatives must appeal to their electorate through policy. They do this by asserting that their realized policies are in line with their political mandate. To connect the two, a legitimization claim has to be made in order to prove that the political manifestation of the electorate’s choice corresponds to what was promised. Legitimization in turn, can be achieved once readily met with broad social acceptance and support. To realize this

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<sup>20</sup> Reus-Smit, C. (2007). International Crises of Legitimacy. *International Politics*, 44, 157–174. <https://doi.org/10.1057/palgrave.ip.8800182>. p. 160.

<sup>21</sup> Schatz, E. (2006). Access by Accident: Legitimacy Claims and Democracy Promotion in Authoritarian Central Asia. *International Political Science Review*, 27(3), 263-284. doi: 10.1177/0192512106064463

goal, certain social values are claimed in order to create traction from target audiences but also to change current social paradigms.

The claim itself however needs to be distinguished from legitimacy as in social recognition. As justifications invoking social values, claims can stand on their own, reasonably fulfilling what they declare to fulfill: the depiction of and advocacy for political objectives built on a certain set of values, be they justice, morality or rationality. Therefore, a legitimacy claim can lack legitimacy but still be valid in its own right. Conversely, legitimacy may be achieved even if the claim brought forward to earn it was weak.

This notion represents a relativist stance on legitimacy, indicating that social acceptance alone is the parameter of legitimacy. Other scholars attach to it certain quality conditions. Kenneth Arrow specifically holds that only those policies which satisfy certain rationality axioms can be deemed legitimate, while at the same time he doubts whether a democratic process can produce such a high quality form of decision-making.<sup>22</sup> For the purpose of this thesis, it is not necessary to settle for one school of thought when it comes to legitimacy as it is not the central question. Rather, this thesis explores the legitimacy claims themselves as arguments separate from their popularity and broader perception at the societal level.

It will examine whether their logical composition and normative justification warrant the claim that they are rational. If a justification offers tools to defend conclusions on chosen grounds, the defence can only be as strong as the tools employed. If a policy is introduced on the grounds of its rationality – and even more so, its absence – is deemed merely irrational, then the justification claim for this policy must be rational enough to withstand a critical public weighing.

As such, legitimacy claims amounting to arguments can be viewed as public justifications. According to Rawls: “We appeal to political conceptions of justice, and to ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable political institutions and policies. Public justification is not

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<sup>22</sup> Arrow, K. (1963). *Social Choice and Individual Values*, New Haven: Yale University Press.

simply valid reasoning, but argument addressed to others.”<sup>23</sup> Albeit the fact that Rawls’ emphasis lies on the second part of this assertion, the validity of an argument is acknowledged to be a central part of a compelling claim and or justification. It goes without saying that presenting invalid and or unsound arguments as rational, revealing intense vulnerability of the claims they encompass, defeats the purpose of justification.

Reus-Smit identifies rationality, legality, justice and morality as possible foundations upon which to build legitimacy claims. As long as these claims are made in a coherent and consistent manner referring back to their own normative systems, they convey validity, irrespective of opposing opinions.<sup>24</sup> This will be the basis for following observations. Even though rationality here is its own category, it must also be seen as an overarching justification claim, underpinning the moral, legal and normative causes as well. They too, must therefore be logical in themselves in order not to easily fall prey to their own claimed standards.

Another central theme to this thesis will be EU citizenship. The concept is first and foremost a legal one, as reflected in the treaty on the functioning of the European Union as well as the numerous additional directives further defining it. This will be explained further in the next section of this thesis. However, from a theoretical point of view, EU citizenship is akin but not entirely equivalent to national citizenship. It relies on national citizenship and cannot stand without it. Its membership criteria are built on nationality but depending on the respective privilege invoked membership also hinges on the economic conditions of the individual. Piccoli pointed out that neither a solely legal definition of citizenship, as “a formal status constitutionally recognized and granted to the members of a polity” nor a solely sociological definition as “a set of practices, civic engagement, identity, and loyalty to a polity” can fully grasp the multifaceted nature of citizenship.<sup>25</sup> For the purpose of this thesis, I will rely on his

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<sup>23</sup> Rawls, J. (1997). *The Idea of Public Reason Revisited*. Retrieved 11 June 2020, from <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5633&context=uclrev>. p. 786.

<sup>24</sup> Reus-Smit, C. (2007). International Crises of Legitimacy. *International Politics*, 44, 157–174. <https://doi.org/10.1057/palgrave.ip.8800182>. p. 160.

<sup>25</sup> Piccoli, L. (2014). *Regional spheres of citizenship*. Retrieved 9 June 2020, from <https://ecpr.eu/Filestore/PaperProposal/516c9c71-2029-47b6-ac7d-00ac65cea83f.pdf>, p. 2.

definition of citizenship, bridging a gap between those two schools of thought, “as a status of full and equal membership in a democratic polity that involves both rights and duties.”<sup>26</sup>

## 2. The Status Quo: A Contextualization

### 2.1 The Indexing Policy

On the 24th October 2018, a centre right-wing government consisting of the Austrian People’s Party (ÖVP) in coalition with the Austrian Freedom Party (FPÖ) adopted a new law foreseeing the indexing of child care benefits to the applicant’s country of origin’s price index, as measured by European statistics organisation, Eurostat. Accordingly, an increase in the paid amount for nationals from countries with higher price levels, such as Belgium and Denmark, was also introduced.<sup>27</sup> The policy, however, was introduced to save €100 million per year, as most former beneficiaries would come from countries whose price indexes were lower than that of Austria.

At the same time, Austria has been an advocate, among other countries, for changing EP Regulation 883/2004 on the coordination of social security systems to include the indexing policy. The regulation which is a directly applicable piece of secondary EU law that applies to member states directly, has been under review since December 2016. EU member states had agreed on the Commission’s proposal in June 2018 and the European Parliament voted on it in December 2018.<sup>28</sup> The Economic and Social Committee of the European Parliament processed Austria’s request for indexing in 2018. While Germany and Denmark opted for the reform, a staggering 75% of the representatives voted against the policy.<sup>29</sup>

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<sup>26</sup> Ibid.

<sup>27</sup> Frauen-familien-jugend.bka.gv.at. (2019). *Familienbeihilfenbeträge für Kinder, die sich ständig im EU/EWR-Raum und der Schweiz aufhalten: Frauen, Familien und Jugend im Bundeskanzleramt*. Retrieved 4 February 2020, from <https://www.frauen-familien-jugend.bka.gv.at/familie/finanzielle-unterstuetzungen/familienbeihilfe0/Familienbeihilfenbetr-ge-f-r-B-rger-aus-dem-EU-EWR-Raum-und-der-Schweiz.html>.

<sup>28</sup> European Commission. (2019, January 24). *Indexation of family benefits: Commission opens infringement procedure against Austria*. Retrieved from [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_463](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_463)

<sup>29</sup> Kopeinig, M. (2018, November 20). EU–Abgeordnete stimmen gegen Indexierung der Familienbeihilfe. *Kurier.at*. <https://kurier.at/politik/inland/eu-parlament-ist-gegen-indexierung-der-familienbeihilfe/400329666>



Hence, Austria took matters into its own hands and introduced a law that was in breach of Art 7 of Reg 883/04: “Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.”

The law entered into force on 1st January 2019. Soon after, the Commission opened an infringement mechanism starting with a formal note of concern on the legality of these measures. It informed the Austrian government that their policy was, in the Commission’s view, infringing on EU law on the basis of unjustified discrimination of EU citizens. A deadline of two months was set to remedy the law and create accordance with EU rules. In a statement to the Commission in March 2019, Austria insisted on the legality of the reform. Upon Austria’s refusal to change the law, the Commission concluded that Austria was failing to comply with its obligations under EU law as laid down in the treaties and sent another reasoned opinion on the issue in July 2019.

Marianne Thyssen, Commissioner for Employment, Social Affairs, Skills and Labour mobility, remarked the following: “Equal treatment is a fundamental principle of the EU. EU citizens, who work in another Member State than their own and pay taxes and social security contributions, have a right to the same family benefits.”<sup>30</sup>

As the two months following the Commission’s letter passed without corresponding measures taken, the next step in the infringement procedure would have been to forward the infringement complaint to the European Court of Justice, whose decision on the matter would be final. While most of the Commission’s interventions lead to agreements or solutions before the infringement cases are consigned to the Court – which represents the highest escalation of an infringement procedure – from the beginning, the Austrian government expected the matter to be forwarded to the Court. The Austrian government even made clear that it was willing to take the

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<sup>30</sup> European Commission. (2019, January 24). *Indexation of family benefits: Commission opens infringement procedure against Austria*. Retrieved from [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_463](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_463)

risk of a possible conviction that could lead to high penalty payments on the matter. The Court's ultimate decision will unfold supranational effects and is binding on the member state.<sup>31</sup> If in breach, Austria will not only be obliged to pay a penalty but also to reimburse those who were wrongfully denied the benefit up to 5 years retroactively.

In addition to the reaction of European Union stakeholders, affected EU citizens in Austria have taken to the courts as well. A Slovakian care worker living in Styria, as well as many Czechs working in Austria while still living over the border in their home country, have brought claims against the country in front of the administrative court. According to these claims, Austria, in breach of the EU treaties, was failing to implement EU law and was therefore unfairly penalizing the respective claimants directly. Finally, it was the national financial court that presented the case to the ECJ on 29th of April 2020, by way of a preliminary request. The Commission soon followed and announced that it was pressing charges against Austria by 14th May 2020.

## 2.2 Legal Nexus

Child benefits in Austria are paid irrespective of the applicant's employment situation. All Austrian parents are entitled to it. EU citizens are entitled to the benefit in the case that they reside legally in Austria. While the legal residence test will be further explained later, put simply, this means that EU citizens must either work in Austria or prove they have sufficient funds and insurance. EU citizens whose children live abroad can claim the benefit if one parent is working in Austria.<sup>32</sup> While usually the child's member state of residence is responsible for the child care benefit, the parent's host state is required to pay the difference between its own provided sum of benefits and the one provided by the child's state of residence.<sup>33</sup>

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<sup>31</sup> European Commission. (2019). *Infringement procedure*. Retrieved 3 February 2020, from [https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure\\_en](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en).

<sup>32</sup> Austrian Federal Economic Chamber (WKO). (2020). *Kinderbetreuungsgeld und Familienbeihilfe für EU-Bürger (Geburten bis 28.2.2017)*. Retrieved 3 January 2020, from <https://www.wko.at/service/arbeitsrecht-sozialrecht/Kinderbetreuungsgeld-und-Familienbeihilfe-fuer-EU-Buerger.html>

<sup>33</sup> Frauen-familien-jugend.bka.gv.at. (2019). *Anspruch für Bürger aus dem EU/EWR-Raum und der Schweiz: Frauen, Familien und Jugend im Bundeskanzleramt*. Retrieved 4 February 2020, from <https://www.frauen-familien-jugend.bka.gv.at/familie/finanzielle-unterstuetzungen/familienbeihilfe0/anspruch-fuer-buerger-aus-dem-eu-ewr-raum-und-der-schweiz.html>

What we can conclude from this is that for EU citizens without sufficient means, a job, adequate health insurance, it is not possible to receive the child benefit. While the benefit itself is not accessory to the economic activity of Austrian parents, it is - at least in many cases - to that of EU citizens. They are only allowed to claim benefits if they legally reside in Austria for more than three months or have the status of permanent residence after five years of legal residence. Legal residence is contingent on several conditions, such as the correct registration in the host state and the ability to provide for themselves so as not to become a burden to the host state, or proven economic activity in the host state.

The vast majority of workers in Austria, migrant or otherwise, are dependent on gainful employment in order to provide for themselves, a reality addressed by the Austrian social welfare state in providing for different kinds of benefits – one of them the child care benefit aimed at supporting citizens with the economic burdens raising a child entails.

The law regulating EU citizens' access to family-related benefits is laid down in EP Regulation 883/2004. It covers family benefits as a branch of social security. In Article 4 of the Regulation the principle of equal treatment is laid down: "Equality of treatment: Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."<sup>34</sup>

Article 67 of Reg. 883/2004 provides that the beneficiary's payments must not be cut on the grounds of a family member residing in another Member State. The Regulation does not foresee any exemptions from equal treatment. However, in order to be able to invoke the regulation, EU citizens must move across borders and reside in a host state. Residence is governed by the Citizenship Directive 2004/38 encompassing the right to reside rules for EU citizens. It enshrines the right to equal treatment as well. However, reservations are made on the ground of economic activity. Article 7 of the Citizenship Directive reads as follows:

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<sup>34</sup> *REGULATION (EC) No 883/2004*. Retrieved 18 Nov 2019 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A02004R0883-20140101>

“1. All Union **citizens shall have the right of residence** on the territory of another Member State for a period of longer than three months if they:

- (a) are **workers or self-employed persons** in the host Member State; or
- (b) have **sufficient resources for themselves and their family members** not to become a **burden on the social assistance system** of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c) – are **enrolled at a private or public establishment**, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have **comprehensive sickness insurance** cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence;[...]

The Directive is clear in that it calls for equal treatment of EU citizens who are working or self-employed. We established that in practical terms, family benefits can only be claimed by people who are working or provide sufficient funds.

An infringement on the freedom of movement can be defined as an infringement on equal treatment, meaning any policy that is discriminatory. But the Court extended this criterion in Gebhard, determining that any unjustified hurdle Member States impose upon EU citizens that might discourage or prevent them from moving freely between Member States can represent an infringement of free movement. According to the European Commission, the indexing policy is such a hurdle, because it is “[...] discriminatory as it leads to a reduction of the family benefits and tax reductions **granted to workers in Austria only because their children happen to reside in another Member State**. The fact that such a Member State has a lower cost of living

than Austria is of no relevance for a **benefit paid out as a lump sum** and not linked to the actual expenses for maintaining a child.”<sup>35</sup>

As clear as both Regulation 883/04 and the Commission might seem on the issue of indexing, in recent years the European Court of Justice has held an increasingly restrictive course on issues surrounding the freedom of movement of persons. A key observation when it comes to different citizenship rights is that Member States with restrictive welfare access policies for EU citizens in host states were quite successful at changing the law by challenging it openly. This is possible, because of the gaps left open by seemingly contradictory legislation in dire need of interpretation.

A suited example in this context is the Court’s judgement in **C-308/14 Commission v UK**. It was the CJEU’s decision that an additional ‘right to reside’ test for claimants of Child Benefit and Child Tax Credit was lawful. The Court held that the purpose of the regulation was the coordination of different social welfare systems, rather than the creation of a common system of social security.<sup>36</sup> In order to fulfil the right to reside, the beneficiary has to prove their access to sufficient funds in order to sustain themselves so as not to become a burden on the host state. This test was applied indiscriminately to all EU citizens, whereas UK citizens fulfilled the conditions automatically. Another detail to the restriction was that the burden of proof was reversed so that the citizens did not get social benefits until they proved their lawful residence. This led to a situation whereby the UK’s refusal to pay benefits for EU citizens in general was made the practice as long as they could not provide the additional paperwork. The Court also held that the Commission failed to prove that the policy was disproportionate, not adequate to fulfil the objective of protecting public finances and that it was not excessive.<sup>37</sup> This is remarkable in that the Court overturned its former decision in *Martinez Sala*, where it outlawed

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<sup>35</sup> European Commission. (2019, January 24). *Indexation of family benefits: Commission opens infringement procedure against Austria*. Retrieved from [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_463](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_463)

<sup>36</sup> ECJ 14.06.2016 Rs C-308/14, *European Commission v United Kingdom of Great Britain and Northern Ireland*, ECLI: EU:C:2016:436 (para 65,66,67)

<sup>37</sup> Kirchmair, S. (2018). *Die Indexierung der Familienbeihilfe im Lichte des europäischen Rechts und der Judikatur des EuGH* [Master’s Thesis, University of Linz]. p. 26. Retrieved 19 February 2020, from <http://epub.jku.at/obvulihs/content/titleinfo/3588824>

right-to-reside tests as discriminatory, as national citizens did not have to fulfil them in order to claim benefits.<sup>38</sup>

This judgement from 2016 can be seen as another manifestation of the CJEU's increasingly restrictive stance on free movement rights. In Brey (2013) the Court ruled that EU migrants claiming social benefits were only to be allowed residence if they did not represent an unreasonable burden to the host state, in Dano (2014) it reiterated this line of argument and held that Citizens who were inclined to move only to claim social benefits were in no case entitled to claim these benefits which could be denied without an individual weighing of the application. This approach was expanded to a jobseeker in Alimanovic (2016). Against this backdrop the decision seems as a natural progression of restrictive judgements. Just a few years earlier however, the Court acted as a main proponent for the right to free movement, and as an advocate of EU citizenship. The Court's former decisions were more lenient, if not encouraging for the prospect of expanding EU citizenship.<sup>39</sup> Just in 2001, the Court's ruling in Grzelczyk sounded very different:

“Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”<sup>40</sup>

The reason why the right-to-reside test is integral is because where Reg. 883/2004 foresees equal treatment for all EU citizens, the citizenship directive restricts this right. By applying the residency test, more progressive pieces of legislation expanding citizenship rights can therefore be once more toned down. The ECJ plays a decisive role in the definition of EU citizenship, as its ability to interpret EU law combined with the right to formulate binding supranational decisions in accordance with EU treaties gives it characteristics of a legislative

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<sup>38</sup> ECJ 12.05.1998 Rs C- 85/96, *Martinez Sala vs Freistaat Bayern*, ECLI: EU: C:1998

<sup>39</sup> O'Brien, C. (2016, June 16). Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 *Commission v UK*. *EU Law Analysis*. <http://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html>

<sup>40</sup> Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001). ECR I-06193. Retrieved 13 Feb 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61999CJ0184&from=EN>

body. An assessment of the legislative dynamics that unfolded in the “politicization of free movement” can contribute a foundation for understanding the development of free movement that extends into the legal sphere.

A more restrictive approach towards citizenship by the ECJ as reflected in the mentioned decisions also coincided with the Brexit campaign, as will be elaborated upon at a later point. Now, the issue has arisen yet again with Austria following British footsteps post-Brexit in demanding the indexation policy and with it restricted welfare access for EU citizens. It remains to be seen how the CJEU will decide on the issue.

### 2.2.1 Legality of the Indexing policy?

However, Austria is going one step further with the indexing policy. Firstly, because it is negatively impacting workers and self-employed people who were given equal treatment rights even in the more restrictive citizenship directive. Secondly, Austria is not merely applying a residency test, but selectively cuts social spending on citizens whose children reside in poorer EU countries.

In *Pinna I*, the ECJ was confronted with a similar situation. Pietro Pinna, an Italian citizen was denied the full sum of French family benefits for his children who remained in Italy. The French administration claimed that the children were no longer residents of France and were therefore only entitled to family benefits equal to those in Italy (which were lower). The ECJ decided that this practice amounted to a double discrimination. Firstly, because it was in direct breach of the Italian citizen’s free movement rights, amounting to a discrimination in comparison to French nationals. Secondly, because as a migrant labourer who went to France he would be discriminated against in comparison to similar workers migrating between other EU countries.<sup>41</sup>

Most Austrian experts were of the opinion that the indexation was not in line with EU law because it was in direct breach to both, Reg 883/2004 on the coordination of social security

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<sup>41</sup> Kühbacher T. (2018). Die geplante Indexierung der Familienbeihilfe aus unionsrechtlicher Sicht. *Linde. Asok* 2018 (1), p 85.

systems as well as Reg. 492/2011 on the freedom of movement for workers within the Union.<sup>42</sup> Some scholars conclude that this leaves Austrian institutions with the duty not to apply the indexing law as it is in breach of supranational EU provisions ranking higher than the indexing law itself.<sup>43</sup> More specifically, the way in which the current law regulating family benefits (Familienlastenausgleichgesetz) requires double residence for both the parent and the child for full payment is not in line with the so-called residence-fiction that the two regulations create for labour migrant parents and their children. Others even doubt whether a change of Reg. 883/2004 would be enough to introduce an indexation since primary EU law, so the founding treaties foresee the principle of equal treatment and with it the obligatory export of social benefits. Felten argues that this has not come to pass by mistake, but was an active choice of the EU legislator as it underpins a move towards integration.<sup>44</sup> However, the author also concludes that a change towards more social welfare access restriction in ECJ jurisdiction is all but impossible in times of heightened political pressure.<sup>45</sup>

### 3. Methodology

With the concepts, both theoretical and legal, in place, it is time to move on to the political part of this thesis. In the following, I will conduct a discourse analysis of Kurz I's legitimacy claims related to the indexing policy, focusing on both their validity and soundness. To do so, I will apply Reus-Smits' concept of the inherent logic of such claims to the justifications set out by Kurz I. The main arguments are all inductive and can therefore be weighed as either weak or strong. They will be separated into their premises and conclusions. If the conclusion necessarily follows from the premises, the argument is valid. If, in addition to that, the premises are true – as in factually accurate – then the argument is sound. As most arguments surrounding the policy were made on the claim of their logical appeal, this analysis will put their logical and factual qualities to the test, in order to identify the nature of the discussion.

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<sup>42</sup> Ibid. p. 90

<sup>43</sup> Marhold, F. & Ludvik, C. (2018). Dürfen Behörden die Indexierung der Familienleistungen anwenden? *ASok* (2018:2). p.209.

<sup>44</sup> Felten E. (2017). Export von Sozialleistungen. Hauptverband d. Ö. Sozialversicherungsträger. *SozSi* 2017, 130, p 138

<sup>45</sup> Ibid.



I will divide the arguments made into the categories suggested by Reus-Smit: **justice** will be considered under the ÖVP's justification claim of "**new fairness**". **Legality** will be reviewed in light of the government's legal claims. However, this chapter will need further contextualization as a judgement of the policy's actual compliance with EU law is not the objective of this thesis. Therefore this chapter will review the legality claims made on the basis of **political dynamics with the European Commission**, as the institutional legislator of the EU as well as the CJEU as the judiciary arm of the EU. The Austrian Conservatives' (ÖVP) **morality** claim will be discussed with a view to the stipulations of welfare tourism and the reality of 24-hour care work in Austria. Finally, **rationality** will be discussed in light of the pro-EU agenda the ÖVP claimed to achieve with the policy.

As words like 'reason', 'rational' and 'logical' were very often employed in the political discourse surrounding the policy, I will not only look at and introduce the legitimacy claims themselves. Their adherence to their own inner logic will be the parameter of their rationality. To conduct this "test of reason", I have chosen the instrument of Discourse Analysis as it allows not only for the representation of language and framing but also for the critical weighing of communicated tropes. My discourse analysis draws on James March and Johan Olsen's definition of discourse as a reflection of democratic governance leading to the consolidation of political identity, the definition of political action and the interpretation of political events.<sup>46</sup> As stated before, my focus will be on the written and spoken comments of the ÖVP's arguments, sometimes comparing them to the opposition's reaction. In line with Schmidt's version of discourse analysis, I too will view discourse as a means to "frame a complex reality by providing guideposts to "knowing, analyzing, persuading, and acting".<sup>47</sup> The material used will correspondingly consist of public speeches, interviews, parliamentary debates, party programs and ECJ judgements.

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<sup>46</sup> Schmidt, V. A. (2001). Discourse and legitimation of economic and social policy change in Europe. S. Weber (Ed.), *Globalization and the European Political Economy*. Columbia University Press.

<sup>47</sup> Ibid. p. 4.

## 4. Discourse Analysis

### 4.1. How to claim Justice, reshaped as “New Fairness”

“An actor might plausibly describe his or her actions as **just**, regardless of the level of social endorsement.”<sup>48</sup>

It is noteworthy that this public justification or legitimacy claim consists of two separate arguments presented as one. It combines nationalist thinking with neoliberal groundwork. The nationalistic element goes like this: export of social benefits is unfair, as it puts Austrians (netpayers) in a worse position than foreigners (netreceivers) - hence foreigners should not be entitled to social benefits. The neoliberal argument however, focuses entirely on the question of fair distribution of income and wealth, and comes to the conclusion that it should not benefit the poor. Rather, poverty should make them willing to accept hard and precarious working conditions. In essence, everyone already gets what they deserve. The nationalistic aspect of this argument will reoccur in the next chapter which tackles morality, as it falls under the umbrella of what I call “the tale of social welfare tourism” and will therefore not be looked at in this chapter.

#### A. Presented Arguments

In his speech to the European People’s Party in 2018, Sebastian Kurz defined his brand of “new fairness” firstly and most importantly as “**a matter of maintaining the ability to compete against other economies**” by cutting red tape.<sup>49</sup> What Kurz later emphasized was the necessity to uphold competition with low-wage countries by means of deregulation. The reduction of state imposed rules and the unleashing of market potential however, often consists of cutting social spending. The ensuing Austrian social reforms did just that. One of the measures introduced was the indexing policy.

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<sup>48</sup> Reus-Smit, C. (2007). International Crises of Legitimacy. *International Politics*, 44, 157–174.  
<https://doi.org/10.1057/palgrave.ip.8800182>

<sup>49</sup> EPP Group (2018, Sept 6). *New Fairness for Europe - Speech Sebastian Kurz - DE*. [Video]. YouTube.  
<https://youtu.be/kgN7BjCPUas>

In an interview with Austrian health policy blog *Pflege-Professionell* during the lead up to the 2017 general election, Kurz was asked about a specific case of an Austrian mother in need of better state support for the care of her two disabled children. He said that what he envisages for Austria is “new fairness”. He defined this as follows: **“Those who work and perform should not be fools. Those who want benefits, must perform. Those who are entitled to benefits should get them. Those who cannot help themselves, should be helped. [...]”**<sup>50</sup>

Later, in a press conference in January 2019, Kurz said that the steps to introduce the indexing policy had been well thought out, putting Brussels under massive pressure to explain its actions, as it was considering the initiation of the treaty violation proceedings. He pointed out that **“to Austrian families and everyone who is working” these policies (among them the indexation) would mean a tax relief of €1.5 billion.** His then Vice Chancellor, Heinz-Christian Strache (FPÖ) reiterated and added that the government was **“responsible for Austrian families and the indexing along with another policy will create more fairness and justice”**.<sup>51</sup> Even though the second statement came from a member of the FPÖ, it can be viewed as an extension to what had already been said (similar statements had been made by ÖVP politicians before, and this press conference was a joint affair between coalition partners with statements prearranged and coordinated).

B. The legitimacy claim can therefore be defined as follows:

Premise 1: Fairness is when those who work get more than those who don’t.

Premise 2: 24-hour care workers get less as their social benefits are cut.

**Conclusion: 24-hour care workers don’t work.**

C. Contextualization and Analysis

In the governmental Austrian “Indexing” discourse, social justice and fairness are used interchangeably. Whereas the “social” in social justice is often cut from the term, the strong nexus to issues related to social policies and governance remains, justifying the premise that

<sup>50</sup> Markus, G. (2017, October 9). „Es braucht eine neue Gerechtigkeit“ – Interview mit Sebastian Kurz (ÖVP). *Pflege-Professionell.at*. from [https://pflege-professionell.at/sebastian\\_kurz](https://pflege-professionell.at/sebastian_kurz)

<sup>51</sup> news.ORF.AT. (2019, January 26). *Regierung fordert von EU „fairere Regeln“*. <https://orf.at/stories/3109199/>

social justice is the referred term. It is no accident that these two words have been made synonymous with each other even though their original meanings may divert quite heavily.

Social justice refers to the concept of fair and just relations between the individual and society, as measured by the distribution of wealth and income, opportunities for personal achievement, and social privileges and unequal freedoms. Its underlying premise is that in order to fulfil society's potential, inequalities need to be diminished so as to create equal opportunity and the possibility for all people to thrive and contribute.

It is no accident however, that conservatives all over the world have rejected the term, as it does not comply with neoliberal views of the free market as self regulating towards the best outcomes for society with no need for state interference. One of the fathers of neoliberalism, Friedrich Hayek described the term social justice as a “dishonest insinuation...intellectually disreputable, the mark of demagoguery and cheap journalism which responsible thinkers ought to be ashamed to use because, once its vacuity is recognized, its use is dishonest”.<sup>52</sup> The proximity to current conservative thinking is remarkable. Lister describes that after Margaret Thatcher became head of the British Conservative party, she had a conversation with Hayek. Later that year while holding up his Constitution of Liberty she proclaimed: “This is what we believe in.”<sup>53</sup>

The Oxford English Dictionary defines ‘fairness’ as “the quality of treating people equally or in a way that is right or reasonable”.<sup>54</sup> It seems to have a more transactional character. You get what you earn; input equals output. At the core of fairness is equal treatment on a level playing field. Where social justice embraces the idea of a necessarily tilted playing field as a foundational premise to its theory, fairness does nothing to address the profound inequalities among individuals stemming from nature, nurture or structure. The latter is therefore better

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<sup>52</sup> Hayek, F. A. (1979). *Social Justice, Socialism and Democracy*. Sydney, Australia: The Centre for Independent Studies. P. 3.

<sup>53</sup> Lister, A. (2011). *The ‘Mirage’ of Social Justice: Hayek Against (and For) Rawls*, p. 2. CSSJ Working Papers Series, SJ017. Oxford: Oxford University Press. [https://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ017\\_Lister\\_MirageofSocialJustice.pdf](https://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ017_Lister_MirageofSocialJustice.pdf).

<sup>54</sup> Fairness. (n.d.). In *Oxford Learner's Dictionary*. Retrieved on 4 February 2020, from [https://www.oxfordlearnersdictionaries.com/definition/american\\_english/fairness](https://www.oxfordlearnersdictionaries.com/definition/american_english/fairness)

equipped to communicate a neoliberal belief system. Hayek views fairness as impartiality of the state in merely observing, not intervening in the distribution the free market foresees.

Peculiarly, he also stipulated that his and John Rawls views on social justice differ more verbally than substantially.<sup>55</sup> In 1971's "A Theory of Justice", John Rawls in a fusion of Kantian philosophy and social contract theory discusses the process of finding a just redistributive system creating equal opportunities and counteracting standing disparities. In it he distinguishes "[t]he principles of justice I shall call justice as fairness" and "[...]a conception of social justice".<sup>56</sup> Here, fairness is the principle guaranteeing equal individual participation in the formal process of deciding on the societal contract – to create rules that are agreed upon and adopted by everyone.<sup>57</sup> Social justice, on the other hand, is put in place as a principle to provide "a standard whereby the distributive aspects of the basic structure of society are to be assessed." Rawls points out that in a rational creation process of a just world, given inequalities must be discerned before one is able to diminish them. "In order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into less favorable social positions."<sup>58</sup>

A social justice perspective lays bare the deficiencies of structures created by culture, ability and distribution, and therefore calls for institutional guarantees to remedy the hitherto attached inequalities in some shape or form. This is the case in Austria, where institutions furthering the impact of workers are constitutionally set in place and income redistribution through welfare state means is relatively high. The fairness approach however, has been on the rise in recent decades accompanying neoliberalism as the dominant ideology of the new millenium. It is a rather perfect liaison in that neoliberalism believes in the ordering function of free market economy. Supply and demand being two equal forces that create the world around them efficiently. The state hereby is considered a force to upset the "natural" equilibrium that is reached when market powers come into play. As such, the notion of fairness *as* justice helps to

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<sup>55</sup> Lister, A. (2011). *The 'Mirage' of Social Justice: Hayek Against (and For) Rawls*, p. 3. CSSJ Working Papers Series, SJ017. Oxford: Oxford University Press. [https://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ017\\_Lister\\_MirageofSocialJustice.pdf](https://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ017_Lister_MirageofSocialJustice.pdf)

<sup>56</sup> Rawls, P. (2009). *A Theory of Justice* (pp. 10-11). Belknap Press.

<sup>57</sup> Ibid. p. 8.

<sup>58</sup> Ibid. p. 86.

remedy this problem by creating equal contenders in a world of competition. Fairness, in this model, is best achieved by diminishing institutions that restrict the market, such institutions often having been those founded on the idea of social justice.

In light of this, the correlation between Hayek and Rawls seems spurious. While Rawls does not easily lend his philosophy to the new fairness concept of the ÖVP, Hayek could.

#### D. Evaluation of the Argument

The first premise, “fairness is when those who work get more than those who don’t”, was the basis for many social cuts – both enacted and planned – under Kurz I. The implication here is that people wilfully choose to stay out of work and live off benefits leading comfortable lives on the backs of those who rightfully earn their livings. This is a classical neoliberal argument as it envisages a market that is able to strike an equilibrium at any time. Therefore, unemployment can only arise if it is voluntary in nature or the market dynamics are distorted by state aid.<sup>59</sup> As social services are one way to interfere with the market, the new ÖVP views them as counterproductive to employment. Another problem is that, according to the party, people who receive benefits end up with higher monthly income than many people who are gainfully employed creating a moral hazard to choose benefits over employment. Fairness, in turn, means remedying this injustice by eliminating the moral hazard that is state interference.

This approach can of course be critiqued, but is in itself a popular and often well argued point in the discussion on social welfare states. For a critique, one might for example suggest that it ignores those who are discriminated against on the job market, such as foreigners, women and elderly people, whose unemployment is in no shape or form voluntary. Sometimes state aid is their only option to sustain themselves and secure their existence. (Ironically, an OECD report additionally shows that Austria ranks among those countries who give a higher percentage of

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<sup>59</sup> Albo, G. (1998). ‘The Cult of Training’; Unemployment and Capitalist Employment Policy. In J. Wheelock & J. Vail (Eds.), *Work and Idleness: The Political Economy of Full Employment*. (pp. 183-205). Kluwer Academic Publishers.

their social benefits to the richest fifth than to the poorest fifth.<sup>60</sup>) It also fails to address the larger problem of stagnating wages.

Discursively, the adoption of this logic represents a reframing of social justice as fairness based on direct transaction and void of any distributional character. One should only be able to access social benefits to the amount that one has previously paid taxes - a thought running contrary in principle to welfare state concepts. Definition-wise, this would not include people who are gainfully employed but earn below taxable income. However, this group is instrumentalized against those who live off the state imposed social minimum. Their precarious, low wage forms of employment should still leave them better off than if they opted against this form of employment. This way, workers' collective bargaining power is dramatically lowered.

Under Kurz I, instead of raising incomes of those working by providing more power for workers in public wage negotiations or improving their legal standing with employers, a historic array of social transfers were cut, benefits frozen and labour laws suspended. The expansion of daily working hours from 8 to 12, the cessation of "Aktion 20.000", a policy providing jobs for the long-term unemployed, social security cuts for families with many children and a reform to health insurance are just a few examples for the austerity policies introduced under this legislature.<sup>61</sup> The indexation policy can be understood as another social benefit cut, albeit with ethno-national and gendered side-effects targeting EU citizens rather than Austrians.

This way, the conversation was shifted from a structural to an individual level. Instead of asking, "What is in the interest of people who are dependent on gainful employment?," the conversation is diverted to "Why should I fund those who live off the social welfare state?" The implication hereby made, is that any form of unemployment, underemployment and poverty is voluntary in nature and a problem that can easily be fixed by individual action – and conversely therefore only persists due to inaction. The promise itself furthermore points to a second principle: those dependent on state benefits are most likely among those who do not work and therefore they shouldn't be entitled to obtain them. This then creates circular logic. If the people

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<sup>60</sup> Bruton, J. (2014, December 08). Who benefits from government social spending? *Wilfried Martens Centre for European Studies*. [Blog] <https://www.martenscentre.eu/blog/who-benefits-government-social-spending>

<sup>61</sup> Mum, D. (2019, July 29). Das war Türkis-Blau. *A&W Blog*. <https://awblog.at/das-war-tuerkis-blau/>

who are most in need of social benefits are no longer considered worthy of them and the benefits themselves are considered a mere moral hazard, then why have benefits at all?

Kurz's own definition of new fairness represents this logical dissonance well: "Those who work and perform should not be fools. Those who want benefits, must perform. Those who are entitled to benefits should get them. Those who cannot help themselves, should be helped." There is a divide between the first two sentences and the second two. If those who want benefits must perform – just as those who work should be better situated than those who don't – then those who are entitled to benefits and cannot help themselves *must not* be helped. This dissonance also became evident in the discussion on the minimum collateral, lowered under Kurz I. People who were entitled to these benefits were presented as either put into everlasting dependency by the state (who was stifling their chances of gainful employment due to the moral hazard) or whose self-inflicted behaviour of laziness put them into this position. In 2018, one third of the recipients of this benefit were children and 70% of recipients were working poor.<sup>62</sup>

While all of these opposing views would not taunt the argument's inner logic, the problem arises with the second premise and in turn, the conclusion. If those who work, should not be fooled, then why cut social benefits that will unfairly impact 24-hour care workers?

24-hour care work is a form of at-home care that is usually not done by qualified nurses, but self-employed personnel that are mostly connected with households via firms acting as brokers. Additionally, almost all of them come from Eastern European EU Member States. As this form of care requires the carer to live with their client, it is mostly divided up into shifts of two weeks working time for the respective worker. During such lengthy shifts, workers do not have the possibility to be with their family, putting additional strain on the working conditions. To suggest however, that 24-hour care workers are not working, or are voluntarily unemployed is neither valid nor sound, but rather an oxymoron.

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<sup>62</sup> Madner, M. (2018, September 06). Daten, die Mythen zur Mindestsicherung entkräften. *Wiener Zeitung*. <https://www.wienerzeitung.at/nachrichten/politik/oesterreich/987646-Daten-die-Mythen-zur-Mindestsicherung-entkraefen.html>



Additionally, this applies to more EU citizens than just 24-hour carers. 36% of those Eastern EU citizens affected by the indexing policy work in the low-wage sector and earn less than €9.24 per hour (before-tax) with women earning even less than that.<sup>63</sup> Their access to social benefits was cut in the name of fairness while the policy did not apply to diplomats and economic delegates operating in countries with lower price indexes representing a higher wage group.<sup>64</sup>

## E. Wider Implications

At this point, it is noteworthy that the examined legitimization claim to social welfare cuts is not new but rather within the long tradition of many conservative parties. It seems only fitting however, to compare the argument with the conservatives whose lobbying with the EU brought the indexing policy to the table in the first place: the British.

In his election speech to the Tory Conference in 2010, David Cameron proclaimed: “Taking more money from the man who goes out to work long hours each single day so the family next door can go on living a life on benefits without working - is that fair? No. Fairness means giving people what they deserve - and what people deserve can depend on how they behave.”<sup>65</sup>

The striking similarity with Kurz’s “People who work, must not be fools” cannot be denied. Here, too, the word fairness was used in order to invoke an image of social justice as a transaction that must be earned rather than a basic right. Steve Garner shows how David Cameron’s dividing the worthy from the unworthy, removes term fairness increasingly further from equality. “Fairness is about moral obligation and perceived respectability. In effect fairness pits people against the poor because the latter receive particular types of benefits and suggests

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<sup>63</sup> Redl, J. & Horaczek, N. (2018, July, 24). Heimlich, still und leise. *Falter.at*.  
<https://www.falter.at/zeitung/20180724/heimlich-still-und-leise>

<sup>64</sup> Ibid.

<sup>65</sup> BBC.Com. (2010, October 06). *David Cameron's speech in full*. <https://www.bbc.com/news/uk-politics-11485397>

they do not share the values of respectable, hardworking “us”.”<sup>66</sup> As fairness becomes a way to rebrand socio-economic inequalities as results of individual choices and decisions, it takes the form of a Foucauldian “technology” of austerity creating justifications for the abandonment of state influence and responsibility to shape social relations and paves the way towards unleashing the full power of the free market.<sup>67</sup>

“[T]he distinction between the deserving and the undeserving poor[...]” does not only come in the form of socioeconomics as was described in the context of minimum collateral however.<sup>68</sup> For 24-hour carers their access to family benefits was cut not on the basis of the special benefit they received, as it is a lump sum paid out to all Austrians and EU citizens who pass the residence test, irrespective of their income. Instead, the distinction was made by dividing the deserving from the undeserving on the basis of their national identity. By ascribing certain attributes to the “out-group”, such as laziness or greed, the “in-group” is signified as a different economic class when, based on their economic reality, this does not always apply. The division hereby achieved is thus racialized or nationalized to distract from the commonly shared economic marginalization. It is this dynamic that can also be observed in Austria. The binary understanding of who the beneficiaries and who the netpayers to the welfare system are, is invoked ceaselessly, blurring the nuanced reality of interdependence and societal composition within Austria itself, the European Union and the rest of the world. A point that becomes abundantly clear when looking at the systematic relevance of 24-hour carers as opposed to their implicit branding as migrants who take something out of the system. It is this dependency that will be looked at further in the next chapter. Lastly however, it is important to point out that this dependency creates losses on the side of marginalized Austrians as well if stretched out to the breaking point by nationalist policies.

To Tronto, the spillover of market-based thinking into every aspect of social life created a market-foremost citizen who is required to care for themselves first and foremost. This however, is no sustainable strategy when it comes to care. Because, as she points out: “Gender still

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<sup>66</sup> Garner, S. (2018). Fairness and Entitlement in Neoliberal England, 2005-2015. In K. Loftsdóttir, A. L. Smith, and B. Hipfl (Eds.), *Messy Europe: Crisis, Race, and Nation-State in a Postcolonial World*, Berghan Books. p. 96.

<sup>67</sup> Ibid. p. 92.

<sup>68</sup> Ibid. p. 78.

predicts who does most of the professional care work in society, and race and socioeconomic background still predict who is most likely to get stuck doing the dirty work of care.”<sup>69</sup> Gender also predicts who does unprofessional, unpaid care work in Austria, where out of the 947,000 relatives doing care work, three fourths of them are women, out of which 52% are not gainfully employed.<sup>70</sup> Most of the work falls to female relatives while their possibilities of partaking in the economy via gainful employment or entrepreneurship often hinges upon the opportunity to employ professionals to take on these tasks. The moral system built on “new fairness” expects people’s utmost energy to be put into their gainful labour and will otherwise diminish their access to social benefits. To achieve this investment even just for nationals though, it has to at least take into account that this endeavour hinges upon the opportunity to find personnel to do what used to be unpaid care work. However, what Garner describes as “the moral economy in which one group judges another relationally”, created in the fairness discourse, is unable to see this dependency, as it perceives the foreign care worker as an outsider and the domestic care worker as too complacent to find a “real” job.<sup>71</sup>

## 4.2. How to claim Morality: The Tale of Welfare Tourism versus 24-Hour Care Work

“And an actor might reasonably characterize his or her actions as **moral** if they were consistent with their **favoured moral philosophy**.”<sup>72</sup>

Having elaborated on both the ÖVP’s prevalent understanding of fairness as a transaction-driven and market-based concept of personal responsibility and its broader implications for the social welfare state, this chapter will look at the national/ethnic element of the indexing argument. It

<sup>69</sup> Tronto, Joan C. *Who Cares?□: How to Reshape a Democratic Politics*. Cornell Selects, 2016. EBSCOhost, search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1508190&site=ehost-live. p. 19.

<sup>70</sup> (n.d.). Daten & Fakten. *Interessengemeinschaft pflegender Angehöriger*. Retrieved 05 March 2020, from <https://www.ig-pflege.at/hintergrund/datenundfakten.php>

<sup>71</sup> Garner, S. (2018). Fairness and Entitlement in Neoliberal England, 2005-2015. In K. Loftsdóttir, A. L. Smith, and B. Hipfl (Eds.), *Messy Europe: Crisis, Race, and Nation-State in a Postcolonial World*. Berghen Books. p. 87

<sup>72</sup> Reus-Smit, C. (2007). International Crises of Legitimacy. *International Politics*, 44(2-3), 157-174. <https://doi.org/10.1057/palgrave.ip.8800182>, p. 160

was integral in setting the tone for a centre-right coalition government marrying neoliberal ambitions with anti-migration sentiments.

## A. Presented Arguments

In an interview dating back to 2017 with Austrian tabloid, *Kronen Zeitung*, when asked about the plans to index family benefits for EU citizens, Sebastian Kurz said: **“The freedom of movement is widely being confused with the freedom to choose the best welfare system.”**<sup>73</sup>

In another interview, the Chancellor sounds more like Cameron in stating that **“there must be an end to the export of social benefits”** altogether.<sup>74</sup>

A local newspaper conducted another interview with the Chancellor, asking him about his stance on the pension system. His answer was the following: **“If we let migration into our welfare system happen, if we watch as less and less people pay into the system, then the system is of course in danger. If however, we conduct decent politics and protect the system against too much migration, then the pensions will be secure.”**<sup>75</sup>

When, in turn, the question came up as to what the effects on labour migration would be in the field of 24-hour carers if their family benefits were cut, the ÖVP women’s and family minister was confronted with surveys stipulating that a third of carers would consider working elsewhere, she said: **“Because only 25 percent of carers are affected, we do not expect any significant change in the care situation.”**<sup>76</sup> Additionally, the minister proclaimed the **money**

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<sup>73</sup> Thurnher, A., Narodoslawsky, B., Breitegger, B., Heinrich, C. Redl, J., Brnada, N., and Horacek, N. (2017, February 28). Österreich zuerst. *Falter.at*. <https://www.falter.at/zeitung/20170228/oesterreich-zuerst>

<sup>74</sup> Benz, M. (2018, October 24). Mit der Kürzung des Kindergeldes geht Österreichs Regierung auf Konfrontationskurs in Europa. *Neue Zürcher Zeitung*. <https://www.nzz.ch/wirtschaft/mit-der-kuerzung-des-kindergeldes-geht-oesterreichs-regierung-auf-konfrontationskurs-in-europa-ld.1430661>

<sup>75</sup> Unterhuber, W. (2019, September 15). Sebastian Kurz im Interview: "Wir müssen die Zuwanderung in unser Sozialsystem beenden." *meinbezirk.at*. [https://www.meinbezirk.at/c-politik/sebastian-kurz-im-interview-wir-muessen-die-zuwanderung-in-unser-sozialsystem-beenden-mit-video\\_a2232196](https://www.meinbezirk.at/c-politik/sebastian-kurz-im-interview-wir-muessen-die-zuwanderung-in-unser-sozialsystem-beenden-mit-video_a2232196)

<sup>76</sup> news.ORF.AT. (2018, June 12). *Familienbeihilfe: Pflegekräfte könnten Österreich verlassen*. <https://orf.at/v2/stories/2442550/>

saved by this policy – which was estimated at around €100 million a year – was to be invested in Austrian families instead.<sup>77</sup>

B. The legitimacy claim can therefore be defined as follows:

Premise 1: EU migrants take more money out of the system than they put in.

Premise 2: We stop this by employing more restrictions on access to the social welfare system.

Premise 3: 24-hour care workers are EU migrants.

**Conclusion 1: 24-hour care workers take more money out of the system than they put in and we stop this by employing more restrictions on access to social welfare.**

Premise 1: The number of EU migrants coming to Austria is a function of their access to our social welfare system. (The more access, the more migrants. The less access, the fewer migrants.)

Premise 2: 24-hour care workers are EU migrants and they will get restricted access to social welfare benefits.

**Conclusion 2: The number of 24-hour care workers coming to Austria will remain the same.**

## C. Contextualization and Analysis

### C.1 Welfare Tourism: Fact or Fiction?

Both arguments are based on the concept of welfare tourism. The first argument is directed at the necessity of restricting access to social benefits, while the second argument is directed at lowering the numbers of migrants by doing so. Therefore an explanation of the term seems to be underway.

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<sup>77</sup> n.d. (2018, October 24). Nationalrat stimmt Indexierung der Familienbeihilfe zu. *Parlamentskorrespondenz Nr. 1160*. Retrieved from [https://www.parlament.gv.at/PAKT/PR/JAHR\\_2018/PK1160/index.shtml](https://www.parlament.gv.at/PAKT/PR/JAHR_2018/PK1160/index.shtml)

Founded on the idea that social welfare standards act as “pull factors” motivating migration, it is often used to either advocate for welfare spending cuts or for an active limitation of access to benefits based on national and ethnic grounds. Statements such as the quoted show that this line of reasoning does not only apply to migrants from other continents, currently more in focus after the 2015 “migration crisis” but rather has long been employed in the context of inner-European migration.

Where does this leave free movement? Mantou and Minderhod point out the obvious in clarifying: “The contestation of mobility is very much linked to cries of welfare tourism and the portrayal of mobile citizens as ‘abusers’ who move in order to benefit from the better welfare provisions of their host states.”<sup>78</sup> Fóti in analysing the origins of this idea, contests the novelty of welfare-tourism claiming that it dates back to the EU eastern enlargement in 2004 and that it was further fueled in the wake of the financial crisis of 2008 followed by the suspension of free movement restrictions on Romanians and Bulgarians in January 2014.<sup>79</sup>

The European Citizen Action Service commissioned a study on the impact of labour migration into Austria, Germany, the Netherlands and the UK among others in 2013 that showed that throughout all four, labour migrants from poorer EU countries were contributing more to the welfare systems of their host state than they were taking out of it.<sup>80</sup> Based on this study, the ECAS also conducted a campaign aimed at educating citizens and decision makers on the inaccuracy and on the danger of this trope - to little avail.

In Austria specifically the study revealed that the number of Eastern European migrants almost doubled between 2007 and 2013, with the share of EU migrants receiving social benefits going up accordingly. The authors to the study pointed out however, that this was most likely due to the post crisis developments that lead to an increase of social spending and the benefits

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<sup>78</sup> Mantu, S., & Minderhoud, P. (2016). Exploring the limits of social solidarity: welfare tourism and EU citizenship. *UNIO – EU Law Journal*, 2, 4-19. doi: 10.21814/unio.2.2

<sup>79</sup> Fóti, K. (2015, December 04). ‘Welfare Tourism’ – An Unproven Case. *Social Europe*  
<https://www.socialeurope.eu/welfare-tourism-unproven-case>

<sup>80</sup> European Citizen Action Service (2014). *Fiscal Impact of EU Migrants in Austria, Germany, the Netherlands and the UK*. [https://www.ecas.org/wp-content/uploads/2014/11/Fiscal-Impact-of-EU-Migrants-in-Austria-Germany-the-Netherlands-and-the-UK\\_ECAS-2.pdf](https://www.ecas.org/wp-content/uploads/2014/11/Fiscal-Impact-of-EU-Migrants-in-Austria-Germany-the-Netherlands-and-the-UK_ECAS-2.pdf)

themselves in Austria. They also noted that EU migrants obtained relatively smaller benefits compared to the typical Austrian household. While EU migrants received 2.5% of total benefits, even though they represented 4.9% of the total population.<sup>81</sup> According to the study, EU citizens received fewer sickness and health, disability, old-age and survivors' benefits than the average Austrian.<sup>82</sup> But as EU migrants wages were on average 15% lower than those of Austrians, they tended to receive relatively more family/children, housing and social inclusion benefits.<sup>83</sup> This is interesting insofar as it shows that EU migrants' lower wages were mitigated by the Austrian social welfare state, not because they were out of work, but because their work was remunerated significantly more poorly.

When it came to family benefits, the study showed that there was an increase in the share of these benefits allocated to EU migrants stemming from the "[...]rising share of children from other EU countries, which reached 4.4% in 2013. Nevertheless, the typical migrant family still has fewer children than the average Austrian household."<sup>84</sup> In the end, the study evaluated how these numbers compared to the net contribution of EU migrants revealing a positive net fiscal contribution, as total taxes paid (€4.95 billion) were more than double of the total benefits received (€2.36 billion) in 2013."<sup>85</sup>

Heindlmaier and Blauberger offer an empirical exploration of social welfare access of EU citizens in Austria and Germany. They conclude that in Austria, EU migrants enter mostly at their own risk, unable to claim social assistance. While physical residence alone is not policed, the residence test bars access to social welfare for EU citizens. However, the dynamic between residence and social access takes a Kafkaesque turn, as residence is a prerequisite for social access, but residence can be lost, if certain social benefits are claimed. The risk here lies with the EU citizen. "Austrian social legislation enables welfare authorities to largely exclude EU citizens from minimum benefits. EU citizens who are not workers and reside legally (but not yet

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<sup>81</sup> Ibid. p. 42.

<sup>82</sup> European Citizen Action Service (2014). *Fiscal Impact of EU Migrants in Austria, Germany, the Netherlands and the UK*. [https://www.ecas.org/wp-content/uploads/2014/11/Fiscal-Impact-of-EU-Migrants-in-Austria-Germany-the-Netherlands-and-the-UK\\_ECAS-2.pdf](https://www.ecas.org/wp-content/uploads/2014/11/Fiscal-Impact-of-EU-Migrants-in-Austria-Germany-the-Netherlands-and-the-UK_ECAS-2.pdf)

<sup>83</sup> Ibid. p. 42.

<sup>84</sup> Ibid. p. 41

<sup>85</sup> Ibid. p. 78.

permanently) in Austria are only eligible ‘as long as they would not lose their right of residence by claiming those benefits. [...]They (EU citizens) are warned that by applying for the Mindestsicherung, they may risk their right of residence.’<sup>8687</sup>

The ECAS study revealed that the term welfare tourism was not only problematic, but factually wrong. Heindlmayer and Blauburger showed that EU-migrants have less access to social welfare systems even if they are entitled to benefits.

Kurz’s statement that freedom to move should not mean freedom to choose is therefore redundant. The freedom to choose welfare systems at a whim with no intention to work in the respective country has been deemed non-existent by the ECJ in its decision on Dano where it permitted the right of national administrations to tie benefits to the residence test. It is even more unlikely to happen in Austria, as Heindlmayer points out because Austrian legislation establishes a very restrictive link between social benefit access and residence permit which hinges entirely on the prerequisite not to become a burden to the host state. On a larger scale the problem also seems microscopic: “Economically inactive mobile EU citizens account for a very low proportion – between 0.7% and 1% of the total population of the EU, according to the study commissioned by the European Commission. The study also concludes that, out of these inactive citizens, around 80% reside in a household in which at least one member is employed. In addition, the proportion of inactive citizens is lower among mobile EU citizens than among nationals (39% versus 48% respectively)”.<sup>88</sup>

As a result of this policy, 250,000 children living abroad are subject to cuts according to the Ministry for Families, while a mere 400 children are among the beneficiaries that will get more money in the future.<sup>89</sup> The association between 24-hour care workers and family benefits

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<sup>86</sup> Heindlmaier A. & Blauburger M. (2017) Enter at your own risk: free movement of EU citizens in practice, *West European Politics*, 40:6, 1198-1217, DOI: 10.1080/01402382.2017.1294383, p. 1208

<sup>87</sup> ‘Mindestsicherung’ is the Austrian state provided social minimum

<sup>88</sup> Fernandes, S. (2016). ACCESS TO SOCIAL BENEFITS FOR EU MOBILE CITIZENS: “TOURISM” OR MYTH?. Retrieved 10 June 2020, from <http://www.institutdelors.eu/wp-content/uploads/2018/01/socialbenefitseumobilecitizens-fernandes-jdi-june16.pdf?pdf=ok>. p.7.

<sup>89</sup> Benz, M. (2018, October 24). Mit der Kürzung des Kindergeldes geht Österreichs Regierung auf Konfrontationskurs in Europa. *Neue Zürcher Zeitung*. <https://www.nzz.ch/wirtschaft/mit-der-kuerzung-des-kindergeldes-geht-oesterreichs-regierung-auf-konfrontationskurs-in-europa-ld.1430661>



might be more understandable once an analysis of the most affected countries is made. In 2016, before indexing began, the countries with the highest amount of transferred benefits were Hungary, Slovakia, Poland, Slovenia, and Romania.<sup>90</sup> At the same time, these are the countries subjected to the most substantial cuts, as their living standards are significantly below those of Austria. The government set out a plan to increase benefits for countries with higher living standards as was mentioned above.

The overall goal of the policy however, was to make good on the promise of consolidating the budget and hence to cut social spending by €100 million a year in this specific case. This corresponds to the fact that 90% of all exported family benefits went to Eastern European countries with lower living standards.<sup>91</sup> It remains at least questionable, as to whether or not the indexing would have been put forward, had its pursuit of fairness meant an increase in government spending. However, this export dynamic amounted to yet another important government argument. Since the EU enlargements of 2004 and 2007, Austria had seen childcare benefit exports increase a hundred fold.<sup>92</sup> Between 2013 and 2017 the number of Eastern European workers grew from 180,000 to 300,000, including 90,000 from Hungary, 52,000 from Romania, 40,000 from Poland and 34,000 from Slovakia.<sup>93</sup> The 24-hour care sector directly reflects this dynamic and is disproportionately run by Eastern European labour migrants from these countries. According to a report by the Ministry for Social and Labour affairs Slovakia (40%) and Romania (42%) were their most common countries of origin.<sup>94</sup> This shows the need for a functioning internal market regime that encompasses the possibility to counter labour shortages where they occur.<sup>95</sup> With this in mind, it is understandable that one of the opposition's first concerns was for the attractiveness of Austria to these EU-care workers.

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<sup>90</sup> Ibid.

<sup>91</sup> news.ORF.AT. (2018, Oct 22). *Pflege kommt nicht ohne Osteuropa aus*. <https://orf.at/stories/3073921/>

<sup>92</sup> Österreichischer Rechnungshof. (2018). *Bericht des Rechnungshofes, Familienbeihilfe – Ziele und Zielerreichung*.

*Kosten und Kontrollsystem*. Retrieved 10 May 2020, from <https://www.rechnungshof.gv.at/rh/home/home/Familienbeihilfe.pdf>

<sup>93</sup> Spöri, T. (2018, April 26). Austria and the golden east? *ERSTE Stiftung*. <http://www.erstestiftung.org/en/austria-golden-east/>

<sup>94</sup> Der Standard. (2017, July 11). *Pflege: Über 80 Prozent der Betreuer aus Slowakei und Rumänien* - *derStandard.at*. <https://www.derstandard.at/story/2000061124324/pflege-ueber-achtzig-prozent-der-betreuer-aus-slowakei-und-rumaenien>

<sup>95</sup> Der Standard. (2018, October 22). *24-Stunden-Pflege: Nur 96 Betreuerinnen aus Österreich*. <https://www.derstandard.at/story/2000089857463/24-stunden-pflege-nur-96-betreuerinnen-aus-oesterreich>

## C.2 The Reality of 24-Hour Care Work

The parliamentary as well as public debate surrounding the Austrian indexing policy quickly turned to the country's care situation. This is due to the imminent shortage of care personnel Austria faces. In a care demand prognosis by the Austrian Ministry for Social Affairs, it is estimated that by 2030 the number of over 85-year olds, who have the highest propensity of care demand, will increase by 45% and the number of 85 to 89-year olds will increase by over 50%. At the same time, the number of people between 20 and 65 will shrink from 62% to 57%, draining the Austrian labour market of potential workers. This will ultimately require an additional 75,700 care personnel by 2030.<sup>96</sup>

Given these numbers and the important role of Eastern European labour migration in the care sector, the Austrian opposition parties' focus on labour migration becomes more understandable. In 2018, according to a study conducted by *Hilfswerk* – an intermediary agency for care workers closely associated with the ÖVP – 24-hour care was being used by 25,000 people in Austria, representing 5.2 % of care-beneficiaries.<sup>97</sup> Other estimates for 2020 see 24-hour care clients at 33,000.<sup>98</sup> Since 2010 the demand for care workers has doubled.<sup>99</sup>

An official report dating back to 2007 on care demand and supply in Austria published by the Ministry for Social Affairs and Health acknowledges the fact that care work from Eastern Europeans is especially popular due to “affordable prices”. It reads as follows: “ The reason for the employment of eastern European care workers is the limited availability of mobile care workers and the high cost of stationary care. In the care sector more and more mostly eastern

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<sup>96</sup> Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz (2019). *Pflegepersonal Bedarfsprognose für Österreich*, p. 6. <https://www.sozialministerium.at/dam/jcr:2cae51d2-2ee9-48af-84b9-f72266f56f28/Pflegepersonalprognose%202030%20-%20Langfassung.pdf>

<sup>97</sup> Hilfswerk.at (2018). *Empirie statt Emotion: Neue Daten zur 24-Stunden-Betreuung in Österreich*. Retrieved from <https://www.hilfswerk.at/oesterreich/artikel-detail/news/empirie-statt-emotion-neue-daten-zur-24-stunden-betreuung-in-oesterreich/>

<sup>98</sup> Madner, M. (2020, March 30). 24-Stunden-Betreuung: ein Modell auf tönernen Beinen. *Wiener Zeitung*. <https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2056080-24-Stunden-Betreuung-ein-Modell-auf-toenernen-Beinen.html>

<sup>99</sup> Der Standard. (2017, July 11). *Pflege: Über 80 Prozent der Betreuer aus Slowakei und Rumänien* - *derStandard.at*. <https://www.derstandard.at/story/2000061124324/pflege-ueber-achtzig-prozent-der-betreuer-aus-slowakei-und-rumaenien>

European care workers are offering their help for very affordable prices, because they do not submit to Austrian labour- and social law standards.”<sup>100</sup>

The year this report was published, 24-hour care work was legalized through the foreigner’s occupation act (Ausländerbeschäftigungsgesetz). This however, did not improve carers’ working conditions to be on par with Austrian standards. With 99.8% of them self-employed, they have to provide for their own insurance as well as tax payments, and do not enjoy many of the favourable labour law protections employees have such as resting periods and working time restrictions.<sup>101</sup> The chamber of employers (WKO) counts about 62,000 care workers and over 600 intermediary firms. Both, the WKO as well as the intermediary agencies demand additional fees from the care workers employed in such a fashion.

The Ministry for Social Affairs describes the field of activities for the prevalent self-employed care worker as follows: “Independent Care workers are allowed to support their clients according to the Gewerbeordnung 1994 in the following ways: • services close to home (cooking meals, running errands, cleaning, house work, airing flats, caring for plants and animals and sew clothes, wash and iron clothes ); • support in conduct of life (coordination of daily routines, helping in everyday tasks); • spending time together, having conversations, helping to keep social contacts up, accompanying persons to all activities; • helping clients who physically move around (pack bags and more); • Organising for future care .”<sup>102</sup>

In practice, many live-ins report that they are tasked with medical treatments they are not licensed to do or are put in charge of clients so heavily disabled that they would actually need medical personnel.<sup>103</sup> Firms are offering this expansive assistance for €4.80 per hour (before-

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<sup>100</sup> Quantum Institut für betriebswirtschaftliche Beratung GmbH. (2007). *Studie Über Die Organisation Und Finanzierung Der Pflegevorsorge In Österreich*.

<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=62>

<sup>101</sup> APA-OTS. (2019). *Ankündigung der AMS-Neuorganisation beschäftigt Nationalrat*.

[https://www.ots.at/presseaussendung/OTS\\_20190130\\_OTS0220/ankuendigung-der-ams-neuorganisation-beschaeftigt-nationalrat](https://www.ots.at/presseaussendung/OTS_20190130_OTS0220/ankuendigung-der-ams-neuorganisation-beschaeftigt-nationalrat)

<sup>102</sup> Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (BMSGPK). (n.d.). *24-Stunden-Betreuung zu Hause: Ein Überblick*, p. 7.

<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=175>

<sup>103</sup> Schmidt, A., & Leichsenring, K. (2016). *Der österreichische Weg der 24-Stunden-Betreuung*, p. 19.

<https://www.sozialversicherung.at/cdscontent/load?contentid=10008.714344&version=1454405894>

tax).<sup>104</sup> And as a cheaper form of care supply, agencies compete over the smallest prices rather than the highest quality.<sup>105</sup> All of these factors taken into account, it can be assumed that 24-hour care work is mostly done under precarious circumstances. The combination of their freelance work with little labour rights, their dependence on intermediary agencies and their low wages contribute to a widely unregulated room for exploitation and little protection.

When it comes to details surrounding 24-hour care work the data is rather thin. The care worker's level of education, living conditions, family status and many other important factors have not yet been put into official numbers and parliamentary requests could not be answered by representatives. The NEOS, Austria's liberal party, submitted a parliamentary request on the economic effects a future downturn of care workers would have on Austria. Michael Bernhard (NEOS) asked on the parliament floor on the 17th of May 2018 whether the planned indexing policy would influence Eastern European 24-hour care workers' decision to come to Austria. In addition to this question, he inquired why there were no official projections concerning the effect of a possible decline in movement of 24-hour care workers.<sup>106</sup> ÖVP Culture Minister, Gernot Blümel answered that there were in fact no statistics whatsoever on how many foreign care workers were employed in Austria, which is why it was simply not possible to make any projections.<sup>107</sup>

This not only shows the intrinsic connection between the two issues but also their novelty amid Austrian political discourse and the extent to which these workers have been ignored by politics. Two years after a public debate had been conducted on the issue, a lot of information remains inaccessible. Just how many children of 24-hour care workers are affected is one of these figures, as an answer by the responsible ministry to a parliamentary request concerning this

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<sup>104</sup> Madner, M. (2020, March 30). 24-Stunden-Betreuung: ein Modell auf tönernen Beinen. *Wiener Zeitung*. <https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2056080-24-Stunden-Betreuung-ein-Modell-auf-toenernen-Beinen.html>

<sup>105</sup> Schmidt, A., & Leichsenring, K. (2016). *Der österreichische Weg der 24-Stunden-Betreuung*, p. 18. <https://www.sozialversicherung.at/cdscontent/load?contentid=10008.714344&version=1454405894>

<sup>106</sup> The Parliament of the Republic of Austria. (2018). 25. *Sitzung des Nationalrates der Republik Österreich XXVI. Gesetzgebungsperiode Donnerstag, 17. Mai 2018*, p. 21. Vienna.

<sup>107</sup> Ibid.

issue shows.<sup>108</sup> The ministry also couldn't provide information regarding 24-hour-care workers' rate of salary – neither in general, nor respective of the care worker's origins.<sup>109</sup> Furthermore, it couldn't provide any data on in-house-care workers who were working as non self-employed.<sup>110</sup>

However, a study conducted in 2018 by *Hilfswerk* questioned 860 of the 1,653 care workers they employed. Their numbers could work as a general indicator for care workers in Austria. The questioned workers were mostly female (88.7%) and about two thirds (66.3 %) were from Slovakia, 18.2% from Croatia and 12.5% were from Bulgaria. 68.3% of the questioned carers had a child above 15 or older, 12.8% had a child below 15.<sup>111</sup>

*Altern in Würde* – another intermediary organisation for care workers – estimated that in 2018 about 50% of their Slovakian live-ins were recipients of child care benefits for children living abroad.<sup>112</sup> They clarified that due to the time spent abroad, mothers had to rely on partners, family members or care workers at home to take care of their children which often lead to decreased availability and the lack of opportunity to perform full time jobs for partners and family members or additional expenses for other care personnel. In all cases however, it led to a reduction in income. Thus, child benefits, despite legal classifications, were always seen as an important part of the wage.

With higher income than in their respective home states named as the main motivating factor for these labour migrants to come to Austria, the platform attempted to identify possible effects of a reduction in income. A poll initiated by *Altern in Würde* saw over 59% of 24-hour carers declining to continue working in Austria under the condition that their benefits were cut as remuneration would no longer warrant the tremendous effort – even after considering the

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<sup>108</sup> Zarfl, B. (2019, November 22). 4159/AB XXVI. GP - Anfragebeantwortung. [Letter – Received by President of the National Council], p.7. Retrieved 10 June 2020, from [https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB\\_04159/imfname\\_772991.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB_04159/imfname_772991.pdf)

<sup>109</sup> Ibid. p. 6.

<sup>110</sup> Ibid. p.5.

<sup>111</sup> Hilfswerk.at (2018). *Empirie statt Emotion: Neue Daten zur 24-Stunden-Betreuung in Österreich*. Retrieved from <https://www.hilfswerk.at/oesterreich/artikel-detail/news/empirie-statt-emotion-neue-daten-zur-24-stunden-betreuung-in-oesterreich/>

<sup>112</sup> Altern in Würde(2020). 24-STUNDEN-BETREUUNG: PersonenbetreuerInnen reagieren auf die geplante Kürzung der Familienbeihilfe. Retrieved 10 June 2020, from [https://www.ots.at/presseaussendung/OTS\\_20180612\\_OTS0177/24-stunden-betreuung-personenbetreuerinnen-reagieren-auf-die-geplante-kuerzung-der-familienbeihilfe](https://www.ots.at/presseaussendung/OTS_20180612_OTS0177/24-stunden-betreuung-personenbetreuerinnen-reagieren-auf-die-geplante-kuerzung-der-familienbeihilfe)

difference in living standards.<sup>113</sup> According to the same poll, 26% felt pressured to ask for higher wages from their patients/customers and over 50% either wanted to do the same work in a different EU country or quit the job altogether.<sup>114</sup>

Just how important 24-hour care work as a branch of the Austrian care system is, was revealed in the immediate wake of the Covid-19 crisis. Due to the closing of borders, Romanian carers in particular were no longer able to come into the country. Some of Austria's federal states reacted by buying flight tickets for care workers to make sure supply get somewhat satisfied. Following their arrival in Austria, they were quarantined in hotels for two weeks, expenses that were also paid for by federal states. However, wages or working conditions did not improve in turn. The two additional weeks, which most care workers didn't know about beforehand, were not remunerated and provisions for their intermediary agencies still had to be disbursed. Even though 24-hour care work only makes up 5% of the total care supply, it is integral in relieving other branches of a fragile system that is not yet up to the challenges it inevitably will encounter.

## D. Evaluation of the Arguments

### D.1. Argument 1

After elaborating on the wider background and the underlying facts of the first argument, it can be stated that:

Premise 1: "EU Migrants take more money out of the system than they put in." is false as it does not comply with the facts - migrants are net payers into the system.

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<sup>113</sup> Altern in Würde(2020). 24-STUNDEN-BETREUUNG: PersonenbetreuerInnen reagieren auf die geplante Kürzung der Familienbeihilfe. Retrieved 10 June 2020, from [https://www.ots.at/presseaussendung/OTS\\_20180612\\_OT50177/24-stunden-betreuung-personenbetreuerinnen-reagieren-auf-die-geplante-kuerzung-der-familienbeihilfe](https://www.ots.at/presseaussendung/OTS_20180612_OT50177/24-stunden-betreuung-personenbetreuerinnen-reagieren-auf-die-geplante-kuerzung-der-familienbeihilfe)

<sup>114</sup> Markus, G. (2018, June 12). 24-STUNDEN-BETREUUNG: PersonenbetreuerInnen reagieren auf die geplante Kürzung der Familienbeihilfe. *Pflege-Professionell.at*. <https://pflege-professionell.at/at-24-stunden-betreuung-personenbetreuerinnen-reagieren-auf-die-geplante-kuerzung-der-familienbeihilfe>

Premise 2: “We stop this by employing more restrictions to social welfare state access.” is in accordance with premise one, because if there is no access to social welfare systems, money also cannot be taken out.

Premise 3: “24-hour care workers are EU migrants” is a question of definition, as most of them are labour migrants going back and forth between their home and host states, however, in this debate they were clearly viewed as migrants as they were put in opposition with Austrians.

**Conclusion 1:** “24-hour care workers take more money out of the system than they put in and we stop this by employing more restrictions to their social welfare state access” can therefore be seen as a valid statement within its own system of belief. It is not however, a sound statement as it is built on the false premise that migrants, especially 24-hour care workers take out more than they pay into the system. As such, it can be viewed as a flawed, yet possibly effective legitimacy claim according to Reus-Smit.

## D.2 Argument 2:

Premise 1: “The number of EU migrants coming to Austria is a function of their access to our social welfare system. (The more access , the more migrants. The less access, the less migrants.)” There is significant disagreement in science whether this form of pull-factor thesis is true. However, disagreement does warrant a position that supposes that Premise 1 is true.

Premise 2: “24-hour care workers are migrants and they will get restricted access to social welfare benefits” This is true and does not need to be further commented on.

**Conclusion 2:** “The number of 24-hour care workers coming to Austria will remain the same” Conclusion 2 does not correspond with Premise 1 and is therefore invalid.

## E. Wider Implications

Again, a comparison to the rhetoric employed by David Cameron's government comes to mind. As Morris points out, in 2015, Cameron described welfare reform and migration as two sides of the same coin: "Migrants are filling gaps in the labour market left wide open by a welfare system that for years has paid British people not to work ... we will never control immigration properly until we tackle welfare dependency."<sup>115</sup> In her paper, Morris goes on to describe that this line of argument did not only open up a lane for restricted access to welfare for migrants, but also for the UK's own citizens. In an interesting discussion of the connection between citizenship and inclusion in social safety nets, Morris goes back to Marshall's conception of citizenship " [...]as guaranteed inclusion in society, based on the chronological unfolding of rights in Britain, which placed particular emphasis on the delivery of social rights as a means to offset class inequality."<sup>116</sup> The author in turn identifies a citizenship-gap developing in post-national systems, where residence is supposed to replace nationality but factually does not tend to come with the same rights. It is this gap we can also discern with regard to Eastern European migrants in Austria, as the cited study shows.

### 4.3. How to claim Rationality: What about Europe?

"An actor might plausibly describe his or her actions as rational if they are a logical means to realize their interests within prevailing environmental constraints, and the veracity of this claim does not depend upon it being socially recognized (although what an actor decides is a 'logical means' may well depend upon intersubjective understandings about rightful action)."<sup>117</sup>

In contrast to the British conservatives, the Austrian ÖVP has always been viewed as pro-European in its core. So much so, that proof of their positive stance on Europe became a condition for the coalition with the far-right FPÖ. Especially after Brexit, Austrians' perception of the EU were very positive and overt euroscepticism was viewed as extreme. This way, the ÖVP's own stance on Europe became an important part of their image-building and an important

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<sup>115</sup> Morris, L. (2016). Squaring the circle: domestic welfare, migrants rights, and human rights, *Citizenship Studies*, 20:6-7, 693-709, DOI: 10.1080/13621025.2015.1122741

<sup>116</sup> Ibid.

<sup>117</sup> Reus-Smit, C. (2007). International Crises of Legitimacy. *International Politics*, 44, 157–174. <https://doi.org/10.1057/palgrave.ip.8800182>. p. 160.



contrasting technique in relation to its coalition partner. Therefore the ÖVP's rationality justification claim will be reviewed in light of its EU-contextualization.

### A. Presented Arguments

In an interview with another regional newspaper, Kurz defended his plans to reduce several social benefits for EU citizens in Austria, among them, the Indexation policy. When he was asked whether he wanted to do away with freedom of movement, he said: **“Not at all, I am protecting it.”**<sup>118</sup>

In the parliamentary session the law was adopted, the ÖVP family speaker remarked: **“We stand for fairness and justice in the system, which is why especially Eastern European care workers are very well paid. There will be no shortage of personnel. All members of the conservative party are enthusiastic Europeans and this is why they will make sure that every child, irrespective of their origin will be paid the same.”**<sup>119</sup>

Another ÖVP representative for women's issues, Gudrun Kugler, added: **“There will in no case be a discrimination of persons on the base of their nationality. [...] By introducing sensible laws such as the indexing policy, a measure is taken to reduce EU scepticism among the Austrian population.”**<sup>120</sup>

### B. The Legitimacy Claim therefore has to be:

Premise 1: The EU treaties define free movement as entailing equal treatment.

Premise 2: The ÖVP's indexing policy restricts equal treatment.

Premise 3: People would be eurosceptic, if we didn't restrict equal treatment.

**Conclusion: We are protecting free movement.**

<sup>118</sup> BVZ.at. (2017, March 19). *Kurz will Sozialhilfe für fünf Jahre verweigern*. Retrieved from <https://m.bvz.at/burgenland/politik/eu-auslaendern-kurz-will-sozialhilfe-fuer-fuenf-jahre-verweigern-asyl-eu-fluechtlinge-illegale-migration-migration-oesterreich-sebastian-kurz-41521372>

<sup>119</sup> Parlamentskorrespondenz Nr. 1160. (2018, October 24). *Nationalrat stimmt Indexierung der Familienbeihilfe zu*. Retrieved from [https://www.parlament.gv.at/PAKT/PR/JAHR\\_2018/PK1160/index.shtml](https://www.parlament.gv.at/PAKT/PR/JAHR_2018/PK1160/index.shtml)

<sup>120</sup> Parlamentskorrespondenz Nr. 1160. (2018, October 24). *Nationalrat stimmt Indexierung der Familienbeihilfe zu*. Retrieved from [https://www.parlament.gv.at/PAKT/PR/JAHR\\_2018/PK1160/index.shtml](https://www.parlament.gv.at/PAKT/PR/JAHR_2018/PK1160/index.shtml)

## C. Contextualization and Analysis:

### C.1 The difficulties of combining nationalism and “Europeanness”

Despite being in line with broad restrictions on the EU’s reach and diminishment of citizen’s rights in the name of fairness, the ÖVP reinterpreted the definition of what it means to “be an enthusiastic European”.<sup>121</sup> If a healthy Europe is one consisting of ever more independent nations, then enhanced nationalism is pro-European. Nationalism, in its most prevalent form, consists of actions taken by the member states (and/or nations) when seeking to achieve (or sustain) self-determination.<sup>122</sup> This is hardly compatible with a multilateral organization such as the EU which lays down supra-national law binding on all member states. Therefore, the idea of subsidiarity is important to incorporate the push for less Europe into an argument for a better Europe. Subsidiarity - a theme often evoked to shield national interests - must be understood as a central thought accompanying the family indexation policy. Coinciding with Austria’s 2018 council presidency under the banner “subsidiarity as a building principle of the European Union”, the indexing made for a perfect overture to the general call for “less, but more efficient European interference”.<sup>123</sup>

The indexing policy can be viewed as a nationalist overture, because the core of this policy is unequal treatment on the basis of nationality and citizenship. If the indexing was just there to adjust benefits to price indexes, then the ÖVP’s clear refusal to ever apply this standard within Austria’s borders where prices also differ in certain regions is not understandable.<sup>124</sup> Even more notably, the indexing does also not apply to Austrian officials with children living in lower-price index countries. The factor at play here is most definitely based on the thought that Austrians should feel privileged over citizens from other EU member states. This way, family

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<sup>121</sup> Ibid.

<sup>122</sup> Stanford Encyclopedia of Philosophy. (2014). Nationalism. Retrieved 11 June 2020, from <https://plato.stanford.edu/entries/nationalism/#MorClaCenNat>.

<sup>123</sup> European Commission (2018). *Report on the Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”*. [https://ec.europa.eu/commission/files/report-task-force-subsidiarity-proportionality-and-doing-less-more-efficiently\\_de](https://ec.europa.eu/commission/files/report-task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_de)

<sup>124</sup> news.ORF.AT. (2018, January 16). *ÖVP gegen regionale Indexierung der Familienbeihilfe*. <https://orf.at/v2/stories/2422761>

benefits do not even have to be increased as the privilege stems from exclusion of others, not from real personal improvements.

In its core, the tendency of national governments to scorn exports of social benefits to other EU states stems from the fact that it is one of their most exclusive rights to distribute their tax income and grant special benefit conditions to their citizens. While it is “the essence of a sovereign state [...] that it has a polity (citizens who belong to it and participate in its governance) and a geography (national borders) within which it exercises control over political, legal, economic, and social affairs,[...]”, the privileges awarded to said polity are what constitutes citizenship.<sup>125</sup>

Abiding by the equal treatment rule however, curtails that right of sovereign states in that it commands governments to expand beneficiaries irrespective of national sentiments or current discourse and therefore granting them a form of citizenship. By employing a legal analysis of the ECJ’s decision genesis, Muir argues that the “deinstitutionalization” of EU citizenship rights in recent ECJ judgements opened up necessary room for political decision on the nation state level. Corresponding to the problem of nation states’ evasion of ECJ rulings, this article concludes that it is the nation states’ political rationales that ought to shape citizenship. Hence, progressive judgements of the ECJ are not supposed to change the status quo - the impulse has to come from the Member States themselves.<sup>126</sup> This runs against the Austrian government’s strategy, as it skipped the long and winding decision making process on reforms of Regulation 883/2004 by openly banking on a favourable decision by the ECJ.

While the discord in the fabric of European integration has always been the divergence between supranationalism and national sovereignty, member states as well as the ECJ in the past were willing to invest in an ever closer union in order to see the process of EU integration through. As the question of sovereignty has increasingly taken up more room in national

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<sup>125</sup> S&P Global (2016). *Brexit's Wake-Up Call To The EU: Selectively Sharing Sovereignty Is Unsustainable*.

Retrieved from

<https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/senior.fellows/BrexitEUJuly2016.pdf>. p. 3.

<sup>126</sup> Muir, E. (2018). EU Citizenship, Access to “Social Benefits” and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit. *European Papers*, 3(3), 1353-1378.

discourses, the tide turned. Even though Muir sees important room for sovereign decision-making, recent judgements by the ECJ have invigorated nation states in their attempt to single-handedly remove parts of international solidarity that were loosely included in the treaties but interpreted in a casuistic manner.

This also represents another problematic contradiction to the ÖVP's claim that the presented policy was pro-European. A similar legislation proposal was formed in the renewal procedure of regulation 883/2004 which was set into motion before the Brexit referendum in 2016. The Commission's proposal however was made with gritted teeth to court the UK into remaining in the EU. When this did not happen, the Commission's approval of the policy faded. The European Parliament voted against the proposal 75% to 20% and in the Council of the European Union most member states were also leaning towards rejecting it.<sup>127</sup> Austria's last chance to realize the policy therefore was to adopt it single handedly while expecting proceedings at the ECJ. This kind of singular lawmaking is in stark opposition to the multilateral character of the European Union and could pit EU institutions against each other in case of a positive judgement. It is at least questionable if this conduct can be viewed as pro-European.

Sheard points out that, as Brexit has revealed, the EU's survival ultimately hinges upon the solution of the question whether European integration means more sharing of sovereignty or less thereof.<sup>128</sup> When put into context however, the notion that "less Europe" could create "more Europe", or that increased sovereignty and decreased supranationality could save EU cohesion seems unlikely. To assume that the current situation is one with an over institutionalization of citizenship rights hides the fact that EU citizens in host countries have less access to the respective social welfare systems, as the ECA study has shown. It also does not account for the development that led up to Brexit. It was this phase when the ECJ ceded integral EU citizenship rights to nation states, as Muir admits. This was done in order to court the UK, where a strong sovereignty discourse was underway – however, to little avail. While the answer to an increasingly dominant sovereignty discourse was European in that a leading EU institution

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<sup>127</sup> Kopeinig, M. (2018, November 20). EU–Abgeordnete stimmen gegen Indexierung der Familienbeihilfe. *Kurier.at*. <https://kurier.at/politik/inland/eu-parlament-ist-gegen-indexierung-der-familienbeihilfe/400329666>

<sup>128</sup> S&P Global (2016). *Brexit's Wake-Up Call To The EU: Selectively Sharing Sovereignty Is Unsustainable*, p. 7. Retrieved from <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/senior.fellows/BrexitEUJuly2016.pdf>

accommodated some of Cameron's demands, the perceived loss of national solidarity remained embedded within the same populist discourse that had invoked it in the first place.

While many scholars assert deeply ingrained contradictions in the stress field of EU integration versus sovereignty, the plea for more sovereignty ignores that more concessions to nation states will not remove the public perception of a diminishment of sovereignty. Only national governments' concessions to the EU along with their positive perception in the media will do that. Because as the British example teaches, even profound concessions made to nations, to the electorate will still look like concessions in favour of their nation and at the cost of the EU- proving their initial euroscepticism right.

## C.2 Instrumentalizing National Sentiments

On an EU level, the ÖVP's argument used public opinion as a potential threat to the EU - instrumentalizing the dire experience of Brexit and foreshadowing a possible leave dynamic in Austria, too. This is ironic, as even the ÖVP's then coalition partner, the far-right FPÖ had to abandon its old 'Öxit' stance because approval rates of the EU were at 62% in Austria and at their highest rates EU-wide since 1986.<sup>129130</sup> For Austria specifically, *Eurobarometer* found that 64% were feeling confident or hopeful about the EU in 2019.<sup>131</sup> An acute plummeting of public opinion concerning the EU could therefore not be discerned. However, for the EU parliamentary elections in 2019, Austrians' preferred topics for the campaign were migration and social security of EU citizens.<sup>132</sup> In which context this preference was voiced remains unclear however, especially in light of the fact that the same study found that Austrians wanted European solidarity to be advocated for more passionately in the EU context.<sup>133</sup>

<sup>129</sup> European Parliament. (2019). Näher An Den Bürgern, Näher Vor Der Wahl. *Eurobarometer Frühjahr 2019*. <https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2019/closer-to-the-citizens-closer-to-the-ballot/executive-summary/de-eurobarometer-2019-executive-summary.pdf>

<sup>130</sup> European Parliament. (2019). Emotions and political engagement towards the EU. *FLASH EUROBAROMETER 4021*. <https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2019/emotions-and-political-engagement-towards-the-eu/national-factsheets/at-en-flash-2019.pdf>

<sup>131</sup> Ibid.

<sup>132</sup> European Parliament. (2019). PARLAMETER 2018 – Österreich. *FLASH EUROBAROMETER 4021*. [https://www.europarl.europa.eu/austria/resource/static/files/eb901\\_parlemeter\\_fact\\_at-de-.pdf](https://www.europarl.europa.eu/austria/resource/static/files/eb901_parlemeter_fact_at-de-.pdf)

<sup>133</sup> Ibid.

Also concerning free movement, an assumption of an especially eurosceptic stance of Austria is not fully understandable. A 2016 *Eurobarometer* analysis shows that the free movement of people, goods and services ranks first among EU citizens' favourite developments the EU has brought.<sup>134</sup> Not only does it fare best when all populations are combined, but it also ranks first place in 16 Member States. There are however, significant differences between EU countries: free movement is mentioned most often as the single most positive outcome of the EU in Lithuania (77%) and the least often in France and the United Kingdom (44% in both countries). Austria ranks 6<sup>th</sup> to last with 51%. Nevertheless, an absolute majority of Austrians remain enthusiastic about these freedoms, viewing them as their favourite effect of being a member of the EU.

In Austria, the enthusiasm for one's own free movement coincided with a dire domestic demand for foreign labourers from mostly Eastern European countries paramount in upholding, among others, the care sector. But as free movement of fellow EU citizens was turned into free movement of migrants, at a time when approval of migration in general was historically low, Kurz felt safe to identify it as a concern for Austrians.

In true form, the ÖVP could reapply its fairness frame to the topic at hand declaring redistributive equality as profoundly unfair. The directorate for EU Law in the German Bundestag analysed Austria's legal claims in favour of the indexation policy and came to the conclusion that all of them were rather weak.<sup>135</sup> However, most notably in this regard, it dedicated a section to the thought of unlawful redistribution within the EU created by the export of social benefits. According to the ÖVP expert's opinion this represented an unwanted effect running contrary to EU law. The German experts contested this notion in stipulating that a given redistribution stemming from the provisions (laid down in Reg. 883/2004) concerning family benefits must generally be seen as a necessary consequence of the fundamental freedom of

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<sup>134</sup> European Commission, Directorate-General for Communication (2016). European Union's Political Priorities: 4, Internal Market: free movement . *Standard Eurobarometer 85, Spring 2016*. p. 31.

<sup>135</sup> Deutscher Bundestag – Unterabteilung Europa. (2018). *Ausarbeitung – Zur Vereinbarkeit der in Österreich geplanten Indexierung der Familienbeihilfe für im EU-Ausland lebende Kinder mit Unionsrecht*. Retrieved from <https://www.bundestag.de/resource/blob/567914/9d39985e942842bf2c31548dbaf64a3b/PE-6-077-18-pdf-data.pdf>

movement. The European Union legislator wanted these exports to take place even in light of unequal living conditions in the name of European integration.<sup>136</sup>

#### D. Evaluation of the Argument

Concerning the argument made, Premise 1 (The EU treaties define free movement as entailing equal treatment.) stands for itself and does not require much explanation. The European Union is the body that has the power to define its own laws and policies undergoing a nuanced process of decision making. And while the opinion that these laws are unfair is permissible, it is not possible to simply interpret them into their opposite. If free movement consists of equal treatment, and equal treatment is curtailed then the claim that this amounts to protection of equal treatment is nonsensical. Premise 3 (People would be eurosceptic, if we didn't restrict free movement.) does not change this logical disconnect as the Austrian people's unhappiness with free movement rights would not necessarily touch upon their wish to be members of the EU. Premise 3 does not correlate to the other premises in a meaningful way. Additionally, changing a policy means the abolishment of the policy in its old form, not its protection. Especially in the case of EU citizenship, albeit the fact that Austria cannot decide over the definition of this term unilaterally, equal treatment represents a large part of its meaning, without it, citizenship demotes to mobility alone and can no longer fall under the same definition. This argument is therefore invalid.

### 4.4. How to claim legality: If the British are allowed, we are too.

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<sup>136</sup> Ibid. p.10.

“An actor might reasonably describe his or her actions as **legal** if they conform to a relevant body of legal doctrine, and widespread hostility to these actions would not necessarily invalidate this claim.”<sup>137</sup>

Legal arguments took an important part in the presentation of the policy and an even greater part in its justification. Even though this was tougher than expected. The Chancellor’s own Bureau for constitution (Verfassungsdienst) voiced serious concerns about the legality of the measure in light of Reg. 883/2004 and the prohibition of discrimination of EU Citizens. The Austrian society of EU politics consisting of EU law specialists, along with many well known EU law professors agreed, that the indexing endeavour was doomed to fail at the European Court of Justice.<sup>138</sup> In light of these events, the ÖVP often pointed to a commissioned expert opinion in order to claim juristic integrity.<sup>139</sup> Now, the ECJ will ultimately have the last word on the matter.

This chapter does not seek to analyse the legal arguments brought forward. Instead, it will shine a light on the way the seed of the indexing policy - the negotiations with David Cameron in the wake of Brexit - were utilized to interpret them as a precedent for the whole EU. It will also evaluate how this unique dynamic between a member state and the Union institutions as was underway in Cameron’s renegotiation led to concessions in the field of free movement that are now reactivated by others. Additionally, it will be discussed how the Austrian government estimated its own power in opposition to the Commission in light of Britain's leverage before Brexit.

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<sup>137</sup> Reus-Smit, C. (2007). International Crises of Legitimacy. *International Politics*, 44, 157–174.  
<https://doi.org/10.1057/palgrave.ip.8800182>

<sup>138</sup> Oswald, G. (2018, February 20). Neuer türkis-blauer Stil: Wie kritische Stimmen plötzlich verschwinden. *Der Standard*. <https://www.derstandard.at/story/2000074655239/neuer-stil-am-beispiel-familienbeihilfe-wie-kritische-stimmen-ploetzlich-verschwinden>

<sup>139</sup> Ettinger, K. (2019, January 09). "Indexierung der Familienbeihilfe ist klar vertretbar". *Wiener Zeitung*.  
<https://www.wienerzeitung.at/nachrichten/politik/oesterreich/1011434-Indexierung-der-Familienbeihilfe-ist-klar-vertretbar.html>



## A. Presented Arguments

Nikolaus Prinz (ÖVP) said in the same parliamentary session that the indexing policy was adopted: “If the EU offered an indexing to Great Britain it is not to be discerned why it should not offer the same to Austria.”<sup>140</sup>

Norbert Sieber, Gudrun Kugler, Martina Kaufmann and Nikolaus Prinz (all ÖVP) claimed that they had no doubt that there was legal conformity with EU law, as the European Commission already had adopted a proposal for Indexing to prevent Brexit.<sup>141</sup>

Gernot Blümel, one of Kurz’s most trusted advisers and then minister for culture remarked in a parliamentary debate: “Firstly, we are basing our actions on a commissioned advisory opinion, secondly we thought very very hard about this way of preceding and thirdly I do not understand, why something that we do should be less lawful than something the European Commission has done.”<sup>142</sup>

## B. The Legitimacy Claim must therefore be:

Premise 1: The current EU legislation does not foresee an indexing possibility.

Premise 2: The European Commission and the Council offered the indexing policy to Britain before the Brexit referendum.

**Conclusion: The Indexing policy is legal.**

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<sup>140</sup> APA-OTS. (2019). *Nationalrat stimmt Indexierung der Familienbeihilfe zu*.  
[https://www.ots.at/presseaussendung/OTS\\_20181024\\_OTS0319/nationalrat-stimmt-indexierung-der-familienbeihilfe-zu](https://www.ots.at/presseaussendung/OTS_20181024_OTS0319/nationalrat-stimmt-indexierung-der-familienbeihilfe-zu)

<sup>141</sup> Ibid.

<sup>142</sup> The Parliament of the Republic of Austria. (2018). 25. *Sitzung des Nationalrates der Republik Österreich XXVI. Gesetzgebungsperiode Donnerstag, 17. Mai 2018*. Vienna. p. 23.

## C. Discussion and Analysis:

### C.1 How it all began: The winding roads of Brexit

At this point, a recap of Cameron's renegotiation process is underway as it is the foundation for this claim. In an attempt to outmaneuver the anti-EU wing of his own Conservative Party, David Cameron made the UK's position in the European Union a prominent topic from early on. In 2011, he introduced a law laying down that every change of EU treaties would have to be agreed on by the British public by way of a referendum.<sup>143</sup> In his speeches to the public in the wake of 2013's general election in the UK, he promised a referendum on UK membership in the UK and called for a renewal of Britain's terms as an EU member.<sup>144</sup> On November 10th 2015, he finally put these insinuations into real demands that he forwarded to the European Council President, Donald Tusk, in the form of a letter. At this point, the Eurosceptics were invigorated and Cameron saw a referendum as inevitable. As referenda had been quite a helpful tool to his governing style thus far, e.g. the Scottish independence referendum, the strategy was to once and for all silence anti-EU sentiments.

As promised from the beginning in 2013, the then Prime Minister campaigned for Remain. But in an attempt to strengthen his position with the "Leave" block before the referendum took place, he started a process of renegotiation for Britain's membership conditions with the European Union. The demands posed were also in line with Cameron's idea of transactional neoliberal fairness, as it was calling for harsh cuts to social benefits exports. The strategy of simultaneous appeasement of the leave block and the remodeling of the European Union as more intergovernmental and less integrated in nature, historically failed. The referendum was lost and Cameron had to step down as prime minister. However, along the way there, interesting dynamics unfolded allowing for a deep look into the relationship of the EU institutions with the British and their willingness to compromise basic EU citizenship rights.

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<sup>143</sup> Duff, A. (2016, January 26). *David Cameron's EU reform claims: If not 'ever closer union', what?* Verfassungsblog. <https://verfassungsblog.de/david-camérons-eu-reform-claims-if-not-ever-closer-union-what/>

<sup>144</sup> Rásonyi, P. (2013, May 15). Cameron kündigt Gesetzesentwurf für ein EU-Referendum an. *Neue Zürcher Zeitung*. <https://www.nzz.ch/cameron-kuendigt-gesetzesentwurf-fuer-ein-eu-referendum-an-1.18081060?reduced=true>

In the following, two thematic blocks of Cameron's demands will be looked at: demands concerning sovereignty and those concerning the free movement of persons and their access to welfare benefits. The former are important because of their inherent connection with the latter. As pointed out above, in the sovereignty discourse, definitions of in- and outgroups are made. The power to decide on the beneficiaries of the budget and social rights, the power to decide who constitutes the *politie* is among the most important privileges of sovereign nation states.

As foreshadowed in 2013 long before the referendum, Cameron wanted Britain to opt out of the principle of an "ever closer Union" as laid down in the treaty of Rome. In the 1983 Solemn Declaration on the European Community, signed by then 10 Member States, including the UK, the principle was laid down as well, creating a pathway for the later introduction of the European Single Market. Its Article 1.1 states: "The Heads of State or Government, on the basis of an awareness of a common destiny and the wish to affirm the European identity, confirm their commitment to progress towards an ever closer union among the peoples and Member States of the European Community."<sup>145</sup>

This statement is remarkable in that it proudly refers to the awareness of a common destiny, the affirmation of the European identity but most importantly, it distinguishes between the closer union of the peoples and the member states. By openly calling for a Union of the peoples, this document also foreshadows citizenship as a vital answer to a shared identity and destiny. David Cameron's letter to Donald Tusk in which he lays the conditions for his pro-remain campaign contrasts these ideas starkly. "First, I want to end Britain's obligation to work towards an "ever closer union" as set out in the Treaty."<sup>146</sup>

Gone is the awareness of a shared identity and common destiny. Instead, Cameron uses conversations with other heads of EU Member States' government to build up pressure between

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<sup>145</sup> CVCE.eu (2013). *Solemn Declaration on European Union (Stuttgart, 19 June 1983)*. [https://www.cvce.eu/en/obj/solemn\\_declaration\\_on\\_european\\_union\\_stuttgart\\_19\\_june\\_1983-en-a2e74239-a12b-4efc-b4ce-cd3dee9cf71d.html](https://www.cvce.eu/en/obj/solemn_declaration_on_european_union_stuttgart_19_june_1983-en-a2e74239-a12b-4efc-b4ce-cd3dee9cf71d.html)

<sup>146</sup> Taylor, R. (2015, November 10). "Dear Donald..." The text of David Cameron's letter to Donald Tusk. *LSE Blog*. <https://blogs.lse.ac.uk/brexit/2015/11/10/dear-donald-the-text-of-david-camerons-letter-to-donald-tusk/>

the EU institutions and EU nations to disenfranchise EU citizens. “As the Dutch have said, the ambition should be “Europe where necessary, national where possible”.<sup>147</sup>

He sets the scene for this endeavour by reinforcing the UK's interest in three of the four fundamental freedoms: “The EU should also do more to fulfil its commitment to the free flow of capital, goods and services.”<sup>148</sup> After that follow the tropes of deregulation and competitiveness as vital circumstances for businesses. As William Davies describes: “The competitiveness paradigm simultaneously narrows the scope of political action (by stressing the lack of alternatives to competitiveness) while heightening the urgency to act in specific areas[...].”<sup>149</sup> This is exactly what is about to follow. Competitiveness compels the EU to deregulate and to set up more restrictive citizenship laws at the same time.

Cameron finishes off with the welfare tourism myth referring to the “draw” of the British welfare system on migrants which needs to come to an end.<sup>150</sup> The demand for an end to European integration was in fact met by the Council who promised both the UK’s exemption from the treaty’s ever closer union..<sup>151</sup>

When it came to the issue of family benefits and tax credits, Cameron vowing to introduce fairness into the system, demanded a four-year waiting period of constant residence in the UK, before EU citizens were given access to any social benefits whatsoever. The specific case of child benefits was captured in the Conservative manifesto: “If an EU migrant's child is living abroad, then they should receive no child benefit or child tax credit, no matter how long they have worked in the UK and no matter how much tax they have paid.”<sup>152</sup>

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<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Davies, W. (2017). *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (2nd ed., p. 114). London: SAGE.

<sup>150</sup> Taylor, R. (2015, November 10). “Dear Donald...” The text of David Cameron’s letter to Donald Tusk. *LSE Blog*. <https://blogs.lse.ac.uk/brexit/2015/11/10/dear-donald-the-text-of-david-camerons-letter-to-donald-tusk/>

<sup>151</sup> BBC.Com. (2016, February 20). *EU reform deal: What Cameron wanted and what he got*. <https://www.bbc.com/news/uk-politics-eu-referendum-35622105>

<sup>152</sup> Ibid.

This represents a decisive departure from EU solidarity. In effect, the policy laid out would be equivalent to cutting free movement from the list of fundamental freedoms. It also represents a consistent neoliberal view on fairness. Under Cameron's government, child poverty levels were lowered by striking the term relative poverty, disabled people's benefits, housing benefits for the poor were cut as well and once universal child benefits were now reintroduced as means-tested - all in the name of fairness.<sup>153</sup> And as Britain decided to barr access on basic social rights, the distribution of politie was questioned even more. So the decrease in rights for an out-group was a necessary means to reestablish national citizens' privileges. In fact, the cuts were so dramatic and the rebranding so successful, to some, the angle of social citizenship came under pressure: "Reflecting upon the current state of social citizenship in the UK where social rights are being increasingly reconceptualised as conditional privileges and citizenship duty narrowly equated with paid employment, it is sometimes difficult to see what -if any- egalitarian potential social citizenship still holds."<sup>154</sup> Patrick, under the prevailing circumstances rather sees it as a tool to control behaviour and marginalize deviant populations.<sup>155</sup>

## C.2 Responses by the Council and the Commission

Under these circumstances the Council all but mitigated the UK's terms of membership. The end to further British integration into the EU was set in stone, national parliamentary powers were expanded. The Council President furthermore agreed to a four year residency requirement for EU citizens' access to the UK's non-contributory welfare benefits. But the Council limited this practice to a period of seven years while providing the promise that the rule would be effective immediately after a positive Brexit referendum.

In the case of child benefits the final agreement between Cameron and the Council, the attempts to mitigate the fall out from a sharp end of exported social benefits birthed the indexation of child benefits: "A proposal to amend Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems in order to give Member States, with regard to the exportation of child benefits to a Member State other

<sup>153</sup> Power, M. (2015, June 25). Cameron's cuts target Britain's poor. *DW.Com*. <https://www.dw.com/en/camerons-cuts-target-britains-poor/a-18540345>

<sup>154</sup> Patrick, R. (2017). *For whose benefit?* (1st ed.). Bristol: Policy Press. p. 209

<sup>155</sup> Ibid.

than that where the worker resides, an option to index such benefits to the conditions of the Member State where the child resides.”<sup>156</sup>

This concession was limited to newly arriving workers. “However, as from 1 January 2020, all Member States may extend indexation to existing claims to child benefits already exported by EU workers. The Commission does not intend to propose that the future system of optional indexation of child benefits be extended to other types of exportable benefits, such as old-age pensions”<sup>157</sup>

It is noteworthy that the Council tried to avert the prospect of all payments being stopped by proposing the indexing policy. And while the continental EU countries expected Cameron to double down on out-of-work benefits for EU citizens in coherence with his welfare tourism rhetoric, they finally agreed to in-work benefits being lifted - a concession even less in line with the existing treaties. The EU’s concerted effort to accommodate the UK resulted in three different legislative proposals, all dealing with the free movement of EU citizens including the indexation policy, the emergency brake on benefits and a policy regarding EU citizen’s family members residing outside of the EU.<sup>158</sup> Together, these results posed existential threat to citizenship by completely abandoning the principle of equal treatment, excluding citizens off social benefits who had contributed to the UK’s tax budget and lent it their labour force.

At the time of negotiation the payment of child care benefits to children living abroad was commonly described as “benefit abuse”, even in academic weighings of the issue.<sup>159</sup> It was believed that among all of his demands, the child care benefit abolishment had the highest prospect of being accepted as many major EU players such as Germany agreed on the issue.<sup>160</sup> However, the authors underestimated the vast effects these exports had on Eastern European countries.

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<sup>156</sup> European Council. (2016). *European Council meeting (18 and 19 February 2016) – Conclusions*. p. 22 <http://docs.dpaq.de/10395-0216-euco-conclusions.pdf>

<sup>157</sup> Ibid.

<sup>158</sup> De Witte, F. (2015, November 10). Cameron’s EU reforms: political feasibility and legal implications. *Verfassungsblog*. <https://verfassungsblog.de/camerons-eu-reforms-political-feasibility-and-legal-implications/>

<sup>159</sup> Policy Network. (2015). *Britain’s EU Renegotiation: The view from our partners*. <https://policynetwork.org/wp-content/uploads/2017/08/Britains-EU-renegotiation.pdf>

<sup>160</sup> Ibid.

The scope of these proposals encompassed the heads of state and government, the Council and the Commission. Correspondingly, the answer to British demands came in many forms: “[...]a Decision of the EU Member States’ Heads of State and Government (the ‘draft Decision’); a Statement of the Heads of State and Government (which consists of a draft Council Decision); a Declaration by the European Council; and four declarations by the Commission.”<sup>161</sup>

While the European Parliament had always been seen as a wild card, with many members tending towards a more progressive vision of the Union, the European’s People Party and its majority in the parliament would probably have secured the vote.

### C.3 The Role of the European Court of Justice

As has already been described above, the European Court of Justice has established itself as a stakeholder in the discussion on citizenship rights. David Cameron openly addressed the Courts’ former progressive decision-making in the field of citizenship rights in his initial letter to Donald Tusk. Referring to his many demands on citizenship rights restrictions, Cameron adds: “And it means addressing ECJ judgments that have widened the scope of free movement in a way that has made it more difficult to tackle this kind of abuse.”<sup>162</sup>

The authors of the LSE policy network paper, too, foreshadowed the important role the Court could play and the necessity to prevent its interference: “One option is that member states might agree to a statement that they do not regard British measures [regarding cuts in social benefits and reservations on equal treatment] on in work benefits as discriminatory. This would discourage intervention by the European court of justice.”<sup>163</sup>

The Court however, adapted to rather than interfered with Britain’s demands in its decision making since 2014, making “welfare tourism” factually legally impossible. Blauburger

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<sup>161</sup> Peers, S. (2016, February 20). The final UK renegotiation deal: immigration issues. *EU Law Analysis*. <http://eulawanalysis.blogspot.com/2016/02/the-final-uk-renegotiation-deal.html>

<sup>162</sup> Taylor, R. (2015, November 10). “Dear Donald...” The text of David Cameron’s letter to Donald Tusk. *LSE Blog*. <https://blogs.lse.ac.uk/brexit/2015/11/10/dear-donald-the-text-of-david-camerons-letter-to-donald-tusk/>

<sup>163</sup> Policy Network. (2015). *Britain’s EU Renegotiation: The view from our partners*. <https://policynetwork.org/wp-content/uploads/2017/08/Britains-EU-renegotiation.pdf>. p. 27.

and others described the ECJ's turnaround in decision-making on citizenship cases as a function of public opinion on the issue. This is remarkable as the notion of independent judiciaries often disregards the fact that – as previously mentioned – judges live within the same discourse dynamics as the general public as well as the outstanding role the ECJ plays in the EU legal process.<sup>164</sup> Taking up the political science lesson on the “bounded influence” member states wield over the Court, the authors turn their attention to migration and social welfare tourism as dominant discursive themes for member states.

The Court's role from the 1990's onwards had been one of a progressive reformer when it came to citizenship. The Grzelczyk (1999), Baumbast (2002), and Trojani & Dougan (2013) cases were milestone judgements effectively expanding citizenship beyond strict residence rules and economic activity qualifications onto EU nationals in general. Even in the following, more restrictive judgements of Brey (2012) and DeWitte (2012) social interests of EU Citizens and counteracting budgetary considerations of member states were actively weighed and considered. This took a stark change however, with the Dano (2014) judgment that excluded economically inactive EU citizens from social benefits.<sup>165</sup> In this case, social welfare access was strictly denied without a former weighing of the subject. Residential requirements, after this judgement, “no longer temper equal treatment rights; they constitute the rights’ [...].”<sup>166</sup>

The Court upheld its new line of EU law interpretation in three judgements – Alimanovic (2016) Garcia-Nieto (2016) and Commission vs. UK (2016) – putting an end to its former justice-driven extension of citizenship rights. As pointed out in the paper, the swing can be understood in light of both the Court's independence as a de-facto source of supranational EU law and its propensity to react to or cater to national governments. Exploring the linkage between public opinion on welfare tourism and the Court's decisions the authors analysed quality and tabloid media from five migrant net-recipient EU member states, among them Austria and the

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<sup>164</sup> Blauburger, M., Heindlmaier, A. Kramer, D., Sindbjerg Martinsen, D., Sampson Thierry, J., Schenk, A., & Werner, B. (2018). ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence. *Journal of European Public Policy*. 25:10, 1422-1441, DOI: 10.1080/13501763.2018.1488880. p. 1,423.

<sup>165</sup> Ibid. p. 1,425.

<sup>166</sup> Ibid.



UK. A link could be established if the respective judgement corresponded to media spins in timing and language.<sup>167</sup>

By conducting and applying this research, the authors encounter four conclusions: “First, we observe a shift in the structure of the Court’s legal reasoning from an emphasis on primary law, the status of Union citizenship, to the residence conditions formulated in secondary legislation. Second, there is a shift in the Court’s balancing act between the objectives of promoting freedom of movement and the protection of public finances in favour of the latter. Thirdly, the discourse the Court adopts in its judgments reflects the underlying concerns over welfare migration. And finally, we argue that the Court’s exposure to the public debate is reflected in the timing of its judgements.”<sup>168</sup>

Whereas member states had always been reluctant to abide by the Court’s former justice-based expansion of citizenship rights, 2014 marked the beginning of a period when their grievances were represented in judgements. The media debate surrounding “welfare tourism” had opened a window for their objective of generally restricting social welfare access. A shift in attitude can also be found in the other relevant institutions except for the European Parliament. As this chapter demonstrated, the run up to Brexit saw a Council eager to meet David Cameron’s demands for “less Europe” in questions of migration and a Commission that fell in line in most regards. The European Parliament never got the chance to decide on the issue as the Brexit referendum surprisingly did not bring positive results for the EU.

If this policy of appeasement of public opinion and national governments was designed to strengthen trust in and heighten approval of the European Union, it did not succeed. Today however, four years after the Brexit referendum, the concessions made to the UK today prove to be a focal point for other governments seeking to incrementally abandon the notion of an ever closer union such as the Netherlands as well as restrict equal treatment among EU citizens such as Austria. As it is not yet given that the Commission will seek legal action against Austria on the grounds of the childcare indexation, the government’s argument that it was the Commission

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<sup>167</sup> Ibid. p. 1,431.

<sup>168</sup> Ibid. p. 1,435.

itself that suggested the policy stands. This represents a difficult situation for the European institution as its credibility is called into question. Either the Commission will accept Austria's line of argument, further deepening the path towards a migration-sceptical approach, or Austria will find out that its voice simply does not weigh as much as the British. And then there is still the Court's decision to wait on.

#### C.4 The Austrian Perspective

After the Brexit referendum had been lost for the EU, the concessions, too, elapsed. The ideas Cameron had lobbied for however, lingered on. Already during his time as the foreign minister, Sebastian Kurz had great sympathy for the British renegotiation path. When asked at a press conference with the British Minister for External affairs in 2015, whether he would support big social reforms in Europe, he said: "I find it decisive, that freedom of movement is kept up in the EU. But to protect it, we need to prevent people from being able to pick the best welfare system." In 2016 he publicly called for cuts to the free movement rights in accordance with the British proposal.<sup>169</sup> The specific preparation of the indexing policy was especially in focus, as Kurz, a darling to Austrian tabloids, introduced the idea that a payment of family benefits to Romanians would be unfair as their living standards were so low.<sup>170</sup> In an interview with Austria's biggest tabloid, Kurz proclaimed regarding the numerous social spending cuts: "I am very glad that reason has won in the EU and I hope that the government [then still comprising social democrats with the conservatives as junior partners] will follow this path."<sup>171</sup>

Only after getting into government with the far-right FPÖ, could Kurz realize this long awaited policy. But he always made clear that his inspiration stemmed from the British proposals. Kurz then tried to gain acceptance from other migrant net receivers in the EU, whereby Ireland, Germany and the Netherlands were on Austria's side. As Kurz could not get the legislation process by the Commission back up and running, he then single handedly realized the policy hoping for the Court's good will. When the Commission announced an infringement

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<sup>169</sup> Böhmer, C. & Kopeinig, M. (2016, February 09). Sozialgelder für EU-Ausländer kürzen? *Kurier.at*. <https://kurier.at/politik/inland/kurier-faktencheck-sozialgelder-fuer-eu-auslaender-kuerzen/179.803.561>

<sup>170</sup> Kronen Zeitung. (2016, February 06). *Kurz: "Notbremse" für Kindergeld ins Ausland*. <https://www.krone.at/494793>

<sup>171</sup> Ibid.

procedure, the Austrian government expressed an air of surprise and claimed the Commission had been the institution to introduce this policy in the first place. In the leadup to the Brexit referendum however, the EU saw its second biggest economy about to leave the Union, a nuclear power with a decisive military force and a seat in the UN security council. Austria, in a great show of hubris, thought it could introduce disadvantageous policies targeting Eastern European Member States and not be held to the very same test of influence and power it deployed on others.

#### D. Evaluation of the Argument

Both, Premise 1 and 2 are factually correct. As has been stated in the introduction to this discourse analysis, Reg. 883/2004 does not foresee a possibility to index family benefits. This is exactly why a renegotiation by Cameron was necessary in the first place. The fact that the European Commission suggested the indexing policy, also stands. However, it suggested it on the basis of a positive referendum outcome. Ever since then little has happened with this 2016 piece of legislation. It has not been approved by the parliament and the trilogue between commission, council and parliament remains ongoing. The indexing policy, even if brought forward under a set of very special circumstances by the Commission, is not currently laid down in secondary law. Therefore, the conclusion must be viewed as invalid.

## 5. Findings

After having examined the different legitimization claims at play, it is time to sum up the findings of this thesis. In the previous chapters, two central tasks of this thesis have been completed. The government's legitimacy claims were identified and divided into premises and conclusion. Both the validity and the soundness of these conclusions were tested in what I formerly called "a test of reason". While soundness was desirable to make a strong argument, the conclusions were mainly tested for their validity as their cohesiveness and coherence within their own chosen systems of belief were used to define their logical appeal and therefore their rationality.

Secondly, a discourse analysis was made in order to understand the inner logic of the conservative system of belief and ideology. A determination as to whether these arguments were made in a coherent and consistent manner solely within their own realm of justification was made to verify their validity. While it is not implied that most political arguments necessarily fare well in the realm of logic tests, rationality was such an important asset to the framing of this specific policy that it seems apt to put this claim to the test.

In the previous chapters, an analysis of five arguments was conducted. Out of the five arguments, four were invalid and one was valid but not sound. These findings lead to the conclusion that the arguments employed are weak in nature. Michael Freeden analyzes the rational political argument as one that “at the very least [...] attempt[s] to convince and win over their consumers by employing the most efficient, compelling and professionally influential language required to attain impact - the rationality of means rather than of ends.”<sup>172</sup> This minimum standard has been met, insofar as an attempt was made to convince by employing a language of rationality. Antonio Reyes defines legitimization through rationality as “enacted when political actors present the legitimization process as a process where decisions have been made after a heeded, evaluated and thoughtful procedure.”<sup>173</sup> Kurz’s emphasis on the fact that the policy was long thought out and well reasoned within the law did exactly that.<sup>174</sup>

The sheer incoherence within its own system of belief however, be it legal, moral or normative leads away from expert-based technocratic policy making that might be associated with rational politics. It also does not fulfill the threshold for rationality set out in this thesis in accordance with Reus Smit. Neither does it comply with Rawls’ idea of public justification which “proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.”<sup>175</sup>

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<sup>172</sup> Freeden, M. (2013). *The political theory of political thinking* (1st ed.). Oxford: Oxford University Press. p. 287.

<sup>173</sup> Reyes, A. (2011). Strategies of legitimization in political discourse: From words to actions. *Discourse & Society*, 22(6), 781-807. doi: 10.1177/0957926511419927

<sup>174</sup> Der Standard. (2019, January 26). *Kurz und Strache halten an Indexierung der Familienbeihilfe fest.*

<https://www.derstandard.at/story/2000097059323/kurz-und-strache-halten-an-indexierung-der-familienbeihilfe-fest>

<sup>175</sup> Rawls, J. (1997). *The Idea of Public Reason Revisited*. Retrieved 11 June 2020, from <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5633&context=uclrev>. p. 786.

Rather, this approach to rationality can be viewed as one of common sense neoliberalism as described by O'Shea and Hall. In their paper, the authors explain how the British Conservatives under David Cameron aimed to marry common-sense and rationality over the claim that what everybody feels and knows cannot be radical and must be true. This strategy represents a way to create popular legitimacy but is built on feeble arguments and legitimization claims that benefit more from their sheer repetition than from their compelling nature.<sup>176</sup> By inserting common beliefs with the power of political frames into the media discourse and from there back into public discussion, these beliefs are amplified or reinforced inside a closed system thereby creating echo chambers. Drawing from pre-existing sets of social and moral views, such as neoliberalism and nationalism, individuals who hold these beliefs find confirmation of them in the political and journalistic realm. Their own readiness to spread and share this information, in turn, will spur media coverage of it as well as political reaction, thereby creating a perpetuum mobile of opinion.

Common-sense sentiments are rather unreliable in their conciseness, sometimes casuistic and contradictory, sometimes merely built on shared perceptions and or singular experiences. Commonsense thinking “[...] is a form of ‘everyday thinking’ which offers us frameworks to make sense of the world. It is a form of popular, easily-available knowledge which contains no complicated ideas, requires no sophisticated argument and does not depend on deep thought or wide reading. It works intuitively, without forethought or reflection.”<sup>177</sup>

Now, the question remains, why the ÖVP would want to mask this common-sense approach with the instruments of the rational argument. The conservatives had moved dramatically to the right in the wake of the 2017 general election, to an extent that the Austrian party program assessment platform “wahlkabine.at” discerned 80% congruence in the party programs of the conservative ÖVP and further-right FPÖ.<sup>178</sup> It was therefore no surprise when

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<sup>176</sup> Hall, S., & O'Shea, A. (2013). Common-sense neoliberalism. *Soundings*, 55(55), 9-25. doi: 10.3898/136266213809450194

<sup>177</sup> Ibid.

<sup>178</sup> Renner, G. (2019, August 19). Wahlkabine ÖVP: Über 80 Prozent Übereinstimmung mit FPÖ, nur 19 Prozent mit Grünen. *Kleine Zeitung*. [https://www.kleinezeitung.at/politik/innenpolitik/5675926/Wahlkabine\\_OeVP\\_Ueber-80-Prozent-Uebereinstimmung-mit-FPOe-nur-19](https://www.kleinezeitung.at/politik/innenpolitik/5675926/Wahlkabine_OeVP_Ueber-80-Prozent-Uebereinstimmung-mit-FPOe-nur-19)

the new centre-right coalition published a government program that mentioned the word ‘migration’ in every chapter of the document including the introduction: **“Even though Austria is generally on a good path, we have lost our position at the top of Europe. We have a strong social system, but it is neither unerring nor efficient. We retain high levels of location attractiveness for businesses but we are no longer competitive with our neighbouring countries. We live in a free and united society but it is being increasingly put to the test due to failures in the past migration policy.”**<sup>179</sup> The program hereby creates a strong nexus between migration reform and socio-economic justice. It interconnects the fate of Europe with the theme of migration: **“One of the biggest challenges will be the solution to the migration-question. Just as important is the end of superfluous regulation on an EU-level by enforcing the thought of subsidiarity.”**<sup>180</sup> For the conservatives, this integrated right-wing populist reasoning with classical neoliberal themes of deregulation. At the same time, the ÖVP seized the opportunity to contrast itself to its far-right counterpart on the theme of Europe.

To meet the perceived expectations of its traditional clientele, the ÖVP had to balance its stark move to the right with an air of rationality and reason. This was to create a contrast to its coalition partners, who were strong in voter turnout but generally perceived as extreme, fear-mongering and emotional. In this light, the indexation policy has to be seen as a prestige project by the conservatives fulfilling three distinct communication and policy goals: a conservative contribution to a restrictive anti-migration government, a way to enact the subsidiarity thought of as a guiding principle for Austria’s council presidency and a representation of the conservatives’ level-headed approach to these things in contrast to what many called a nationalist agenda.

This way, the ÖVP was simultaneously claiming a pro-European agenda imbued with rationality while implicitly threatening EU institutions with the coalition partner’s unhinged “Öxit” fantasies. This reminds the attentive observer of the Cameron strategy, but with less hard power to realize said plans. This amounts to yet another finding. The strategies employed by both David Cameron and Sebastian Kurz are similar in nature as they appeal to the same ideals,

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<sup>179</sup> Neuen Volkspartei & Freiheitlichen Partei Österreichs (2017). *Zusammen Für unser Österreich – Regierungsprogramm 2017–2022*. Retrieved from [https://www.wienerzeitung.at/\\_em\\_daten/\\_wzo/2017/12/16/171216\\_1614\\_regierungsprogramm.pdf](https://www.wienerzeitung.at/_em_daten/_wzo/2017/12/16/171216_1614_regierungsprogramm.pdf). p. 4.

<sup>180</sup> Ibid. p. 4.

but differ in language. David Cameron's approach to common-sense logic is borne from inspirational speeches, conveyed with strong rhetoric skills. Sebastian Kurz's presentation is not. His language reconnects to the average Austrian with plain words and simple examples and is therefore even more in line with O'Shea and Hall's concept of common-sense neoliberalism.

O'Shea and Hall uphold however, that common sense cannot be disregarded completely by highlighting Antonio Gramsci's take on the issue: "However, as well as being conservative in outlook, common sense also contains critical or utopian elements, which Gramsci calls 'the healthy nucleus ... which deserves to be made more unitary and coherent'."<sup>181</sup>

It is the question regarding this "healthy nucleus" that will form the basis of the following discussion. It will examine the deeper reason for and meaning of EU citizenship and whether European institutions should accommodate member states' increasing nationalism in this regard.

## 6. Discussion

The four fundamental freedoms, enshrined in the Treaty of Rome in 1957, are among the most prominent founding ideas of the Union. Free movement of persons was considered decisive in the rebuilding of national relationships. Trust was to be achieved by mutually increasing diversity at home and thus creating more encounters with citizens previously perceived as enemies.<sup>182</sup> The ties built in human relationships were the best glue for the Union, so the founding fathers thought. However, there were also deep economic necessities that led to the creation of this concept. With free movement in place, shortages of labour in the aftermath of the Second World War could be countered and economies could be boosted. Nowadays, the OECD estimated that free movement lowered the average unemployment rate by 6%, a percentage that

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<sup>181</sup> Hall, S., & O'Shea, A. (2013). Common-sense neoliberalism. *Soundings*, 55(55), 9-25. doi: 10.3898/136266213809450194

<sup>182</sup> WEF (2016). *The free movement of people: what it is and why it matters*. Retrieved 01.03.2020, from <https://www.weforum.org/agenda/2016/09/free-movement-of-people-explainer/>

will only increase in light of many European countries' dwindling working-age population, resulting in shortages of system relevant labour.<sup>183</sup>

The creation of the single market only further underpins the need for free movement. If free movement of capital and services creates traction of businesses to the most popular business locations, then workers must have the possibility to follow. Especially in light of EU-imposed national austerity measures that created high levels of unemployment, the possibility to move abroad to work was an important relief for many citizens. However, free movement has been a major asset to net receiving countries as well. 21 out of 29 countries in the European Economic Area saw positive net fiscal impacts since 2004.<sup>184</sup> According to the European Commission, free movement increased old member states' GDPs by 1% following the Eastern expansions of 2004 and 2007.<sup>185</sup> They received more in taxes and other contributions from EU migrants than they spent in services for EU migrants (such as education, healthcare, infrastructure costs, welfare benefits and other costs).<sup>186</sup> Free movement of capital, services, goods and persons have thus led to great success for enterprises and increased GDPs all over Europe.<sup>187</sup>

As discussed above, the Citizenship Directive foresees large reservations on social rights of European citizens laying down the requirement to prove sufficient funds to sustain oneself to be able to access the social welfare system of the host state. This represents both a limit to redistribution in an unequal union – limiting poverty migration as it does – and creates the peculiar situation that those who need the welfare state most, lack access to it.

It is however indisputable that the treaties clearly foresaw equal treatment of EU migrant workers and nationals. This stems from the thought that societal and tax contribution must earn equal rights in a European Union of member states that were to see each other as equals too. The indexing policy however, represents one of many recent attempts to incrementally abolish this idea. In this context the encroachment has to be seen as especially impactful, as economic activity of EU citizens is not even denied, but just deemed irrelevant. The indexation of Austrian

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<sup>183</sup> Ibid.

<sup>184</sup> Nyman, P. & Ahlskog, R. (2018). The fiscal effects of intra-EEA migration. *REMINDER project*. Uppsala: Uppsala University. <https://www.reminder-project.eu/publications/working-papers/fiscal-effects-migration/>

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.



family benefits represents a dynamic transcending this singular policy. It tells the story of consequential concessions made by the EU institutions in the wake of Brexit. It tells the story of a strand of moral philosophy that perceives equality as unfair if it is centred around redistribution which is viewed as invasive. It also tells the story of the vision for a more nation-based future of the European continent.

Where does this leave European citizenship? Bruzelius asserts that citizenship rights necessarily include social rights. This is due to the fact that classical civil rights such as access to legal council, freedom and safety depend to a large degree on socio-economic standards. She argues that the privilege of EU citizenship as set up in the Maastricht treaty hinges heavily upon the portability of social rights.<sup>188</sup> If these rights can no longer be earned through labour, then migration, remittances, and foreign labour demand are no longer a way to break up existing disparities within the Union. Rather, this perpetuates existing socio-economic differences among the member states and cements what she calls “second-class EU citizenship” for economically disadvantaged Europeans within the union.<sup>189</sup>

Blauberger and Heindlmeier examined the practical implications of citizenship without social rights. They assessed EU citizens’ positions in Germany and Austria and came to the conclusion that, while physical entry to these countries is usually not policed, access to social welfare is. This creates a situation whereby insufficient resources are not a hurdle to crossing borders but lead to the creation of a new, mobile underclass.<sup>190</sup> Additionally, member states’ reluctance to follow previous ECJ rulings that expanded citizenship rights, lead to a weakening of the ECJ’s influence.<sup>191</sup>

Corresponding to these findings, the EU’s research on welfare tourism saw EU citizens in host states often unable to even claim benefits they were entitled to due to a lack of information, a lack of time and/or hurdles put in place by member states. If the last ECJ judgements added

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<sup>188</sup> Bruzelius, C. (2018). Freedom of movement, social rights and residence-based conditionality in the European Union. *Journal of European Social Policy*. 10.1177/0958928718756262, 29, 1, (70-83). p. 1240.

<sup>189</sup> Ibid. p. 1251.

<sup>190</sup> Heindlmaier, A. & Blauberger, M. (2017). Enter at your own risk: free movement of EU citizens in practice. *West European Politics*. 40:6, 1198-1217, DOI: 10.1080/01402382.2017.1294383. p. 1214.

<sup>191</sup> Ibid. p. 1214.

restrictions of welfare access for economically inactive citizens, as was the case in *Dano*, or those seeking a job, as was the case in *Alimanovic*, the proposal of family indexation can be seen as a further escalation in the restriction practice. Now, not only the Court's progressive judgements of the past are remedied, but founding ideas of the EU, namely free movement of workers as was proclaimed in the treaty of Rome are called into question. If EU member states along with institutions follow this path, it could represent a regression in EU integration to before its founding.

The departure from the European social state - an achievement once a source of distinct pride to EU citizens - thus further emphasises an ever growing asymmetry between the EU's market and social integration as Likic-Brboric put it. While an increasing free movement of companies, goods and capital could be observed in the age of globalization, free movement of persons moved into the opposite direction. Due, in part, to the politicization and securitization of free movement and migration, this dynamic has unfolded far-reaching effects of disenfranchisement amongst citizens. "The new, often irregular, migration flows of men and women, lacking basic human, labour, and migrants' rights, have become one of the important processes forging a (re)commodification of labour, marked by increasing informalization of employment and the creation of precarious working conditions."<sup>192</sup> The cruel irony of this system is that it creates the cheap and unprotected labour force needed to keep up social standards in wealthier countries while denying them access to the social benefits designed to remedy their situation. This feeds into a loop of socially disenfranchised, yet essential workers in European countries being treated as migrants, rather than citizens.

Furthermore, the gendered effect of crumbling access to social welfare systems for migrant labourers must not be overlooked. As social norms create higher propensity for women to take on unpaid labour hence a higher propensity for them to be un(der)employed, they are more likely to be excluded from EU citizenship privileges. Askola specifically addresses the gendered effects of infringements of free movement for female care workers, pointing to the fact that they especially often suffer from unformalized work and precarious contracts: "Care remains

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<sup>192</sup> Branka Likic-Brboric (2011). EU Enlargement, Migration, and Asymmetric Citizenship: Political Economy of Inequality and the Demise of the European Social Model?. *Globalizations*. 8:3, 277-294, DOI: 10.1080/14747731.2011.576844. O. 290.

a vague women's issue, a private problem, and care and domestic work partly informalised 'women's work', even when paid.”<sup>193</sup> This thesis looked at care workers who are gainfully employed. As about 90% of them are women and the family indexation is a family based benefit, the policy is not only discriminatory on grounds of nationality, but also on grounds of gender. As women live-in carers spend 2 week turns in their respective clients' homes, during which time they are not able to care for their own children creating the need to rely on other women to fulfil this task at home- sometimes in paid, sometimes in unpaid forms. This leads to the development of care chains whereby more affluent women employ economically weaker women to take over their care work often across national borders. A cut in family benefits thus also represents a cut of funds to gainfully employ the carers at home, running contrary to the European Commission's gender equality strategy vowing to lay the path for more women to enter the labour force.<sup>194</sup>

To sum up, the effects of increased curtailing of citizenship are dire. Not only do they question European integration with freedom of movement being a central part of the internal market, but they also represent a stark regression of EU solidarity even in spite of the EU's founding treaties. These effects create precarious conditions for labour migrants without sufficient means and impact women in particular. What's more, further developments in this direction will create political incentives to further worsen precarious working conditions for labour migrants. While both labour and tax payments can thus be extracted, social welfare inclusion can be denied more easily as precarious forms of employment – such as care work – do not offer job stability but more vulnerability. To put it in the words of Roxana Barbulescu, this would be “[...] a defeat for the normative, egalitarian, post-national and cosmopolitan notion of membership implied by the “fourth freedom”.”<sup>195</sup>

Mobility alone does not suffice to create a status amounting to “citizenship” as it lacks the basic characteristic of citizenship as a status of full and equal membership in a democratic

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<sup>193</sup> Heli Askola (2012). *Tale of Two Citizenships? Citizenship, Migration and Care in the European Union*. Retrieved 23 January 2020, from <https://journals.sagepub.com/doi/abs/10.1177/0964663912440817>. p. 150.

<sup>194</sup> European Commission. (2020, March 05). *Gender Equality Strategy: Striving for a Union of equality*. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_358](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_358)

<sup>195</sup> Barbulescu, R., & Favell, A. (2020). Commentary: A Citizenship without Social Rights? EU Freedom of Movement and Changing Access to Welfare Rights. *International Migration*, 58(1), 151-165. doi: 10.1111/imig.12607

polity that involves both rights and duties.<sup>196</sup> While citizenship within modern democratic nation states has been the subject of many movements and revolutions leaving behind a trail of shared history and accomplishment, the dynamics of European citizenship seem to move in an opposite direction. The fundamental freedom of free movement encompasses the permission for citizens to live good lives beyond their own member states and to enjoy equality with nationals built on the non-discrimination principle. But if these rights are promised and laid down in EU legislation, they can well be demanded. As Gramsci describes the healthy nucleus of common sense thinking as the spark of potential resistance, the healthy nucleus of the citizenship debate might be the acknowledgement of its inequality and the fight to change this. In an age where paradigms of in- and out-groups are increasingly questioned and subject to progressive societal demands, it is not unthinkable that voices of marginalized EU citizens will unite in the call for EU solidarity and an expansion rather than restriction of rights.

## 7. Conclusion

This thesis looked at the legitimization claims of Kurz I concerning the indexing of family benefits for 24-hour care workers while embedding them in the broader context of the EU debate on freedom of movement of persons. It tested whether the arguments presented were valid and sound and found that 4 out of 5 were invalid while the only valid one was unsound. This led to the conclusion that the legitimization discourse led by Kurz I employed rational language that could not be warranted by its content. Built on weak arguments, mostly the ÖVP's claims concerning the indexation of family benefits were not coherent to their own set of beliefs. Instead, the frames chosen represented an array of tropes employed in common-sense neoliberalism.

The broader context of this thesis was the development of EU citizenship rights and the dynamics surrounding their increasing curtailment. A contextualization of the interplay between member states, the Council, the Commission and the CJEU was made in order to better understand the trend towards abolishment of equal treatment in the European Union.

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<sup>196</sup> Seubert, S. (2019). Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship. *Eur Law J.* 1–13. <https://doi.org/10.1111/eulj.12346>. p. 2.

More research could be aimed at examining other national discourses invested in restricting free movement and whether they follow similar patterns as the one portrayed in this thesis. Further research could be conducted on the precise nature and longer-term effects of the indexation policy in Austria, specifically on whether the restriction acted as a deterrence to labour migration, especially of 24-hour care workers.

# Appendices

## 1. Abstract

### a. English

The Austrian “indexing of child care benefits” introduced under the coalition government of the centre-right Austrian People’s Party (ÖVP) and the far-right FPÖ provides a hands-on example of policies restricting EU citizens’ access to social welfare. For children who do not live in Austria but whose parents are working and paying taxes in Austria, the country only pays a sum determined by the price index of the child’s place of residence. Amounting to dire income loss for EU labour migrants, one group that has been in special focus were 24-hour care workers. As Austria’s dependence on foreign labour grows, the indexing policy risks to deter them from coming. The indexing policy has been heavily criticized by the opposition, Eastern European representatives and by different EU institutions - most notably the European Commission. It has led to an active charge against Austria at the ECJ and saved less money than expected. Nevertheless proponents of the concept of indexation have relentlessly claimed its rationality. This thesis seeks to identify and test the different legitimization claims employed by the government of Kurz I. In analysing the discourse surrounding the indexation policy, the claims will be tested for their coherence with their own respective system of belief which is the bare minimum for a rational argument. Since this policy represents another push in the incremental curtailment of citizenship rights the indexation of family benefits will be contextualized within the EU-wide debate on free movement. As a remnant of David Cameron’s EU renegotiation, the indexation stands for a peculiar dynamic unfolding between nation states pushing for less European solidarity and EU institutions who made far-reaching concessions to the UK.

### b. Deutsch

Diese Masterarbeit beschäftigt sich mit den Legitimacy Claims der Regierung Kurz I zur Indexierung der Familienbeihilfe. Wie sich am Beispiel der Auswirkungen auf dringend nachgefragte 24-Stunden Betreuerinnen zeigt, ist Österreich von EU WanderarbeitnehmerInnen

im großen Maße abhängig. Dennoch beteuern Befürworter der Policy ihre außerordentliche Rationalität und Sinnhaftigkeit. Diese Arbeit untersucht diese Strategie in dem sie einerseits die wichtigsten rechtfertigenden Argumente identifiziert und sie andererseits einem Logiktest unterzieht, der die Kohärenz mit ihren eigenen, ihnen zugrunde liegenden Denkgebäuden überprüft. Zusätzlich wird zu den verschiedenen kommunizierten Legitimacy Claims eine Diskursanalyse angestellt. Dabei wird spezielles Augenmerk auf die Verwendung einer Sprache der Rationalität gelegt werden. Die Indexierung der Familienbeihilfe steht exemplarisch für eine Politik des Abbaus von EU Bürgerrechten. Als Idee entstammt sie direkt David Camerons Neuverhandlung der britischen EU Mitgliedschaft mit der Europäischen Union. Als solche wird sie auch in der europäischen Debatte kontextualisiert werden.

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