

**BUILDING BRIDGES: TOWARDS COHESION THROUGH THE
EUROPEAN UNIVERSITY SYSTEM**

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**Antonia BARAGGIA, Monica DELSIGNORE, Luca GALLI, Beatrice
RABAI¹**

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INTRODUCTION

¹ Specifically Antonia Baraggia wrote paragraph 2, Monica Delsignore the Introduction, paragraph 1 and 5, Luca Galli paragraph 3 and Beatrice Rabai paragraph 4. The article collects the work of a panel presented at the Annual Conference of ICON Society on "[Borders, Otherness, and Public Law](#)", which took place in Berlin, on June 17-19, 2016.

Today the University suggests the idea of an oasis of intellectual discovery or of learning laboratories that are welcoming and inclusive without borders. Nevertheless, Universities have only begun to base admission on “merit” during the last 50 years. For most of their histories, as paragraph one will explain, they were exclusive, based on high-class and elite provenience. The exclusionary of the past left space to the inclusionary of the present ensuring that each individual will have equal standing as a member of the university community.

In the United States there is an open debate about the role of University in forming a common identity. Justice Sonia Sotomayor² has written the recipe for a robust college and students community “*depends not only on the diversity itself but on promoting a sense of belonging among those who formerly would have been considered and felt themselves outsiders*”.

The article will develop those suggestions in the European context, where the University plays a fundamental role and does have an integrative mission, aiming at spreading a culture of legality and engaged citizenship, claiming the importance of such basic values as freedom, justice and respect for the human being, which are rooted in the democracy. The article especially considers how much the administration and the law are allowed to intervene in the functioning of Universities to reach those goals of cohesion and international orientation without diminishing research autonomy and independence of academic world. The analysis will be take in consideration the European law and its constraints.

Notwithstanding the absence of any specific reference to education in the Rome treaty, the freedom of movement of workers had enabled the European institutions to consider jointly “general educational, apprenticeship and vocational training course” and the European

² In the book *My Beloved World*, Knopf, 2014.

judgements have a considerable impact on these matters, as the second paragraph will explain.

Specifically, in the idea of students mobility, the Erasmus Programme helps the “foreigner” student to lose his negative meaning as “stranger or enemy”, starting to be evaluated as a positive resource of human, social and scientific progress for the whole hosting community. The third paragraph will reason on those implications.

Furthermore, the Union citizenship³ refers to the possibility of studying within the territory of the Community without limitation of borders and discrimination based on nationality. The Luxembourg Court has contributed to the area of education, removing discriminatory university fees or obstacles to freedom of movement in situation borderline between working and learning activities. This concerns a progressive wider right of mobility for study purpose, which consists in obligations of removing those obstacles based on nationality impeding its effective exercise.

In such an international context the ideals of university – its search for knowledge and truth unrestrained by utilitarian urges and demands – are bedrocks⁴. Appropriate public law

³ See S. O’ LEARY, *The evolving concept of community citizenship*, Kluwer 1996, especially 188.

⁴⁴ A. T. KRONMAN, *Education’s End, Why our Colleges and Universities Have Given Up on the Meaning of Life*, 2007, Yale University Press, 79.

instruments⁵ can transform boundaries and national diversity from a limit into a starting point for this international development of University and democracy⁶.

1. THE UNIVERSITY AS A SOCIETY

Today, in most European Countries, the University is not conceived as a society.

Nevertheless a different perspective can suggest inspiring new starting points in order to rethink Universities and their role in the European research area, as provided in article 179 TFEU.

Furthermore, this different approach responds to the many who look at universities as mere transmitters of accumulated knowledge and expertise or as centers where students are trained to acquire vocations⁷. These definitions fail to describe the proper role of the University.

Looking at Member States, we can see that, because of their collective character and social meaning, the University can claim to belong to the concept of “education”, which is

⁵ Recently the OFT (Office of Fair Trading) in England embarked a Call for Information in order to gain better understanding of how choice and competition were working in the higher education sector. For interesting remarks seek K. STEPHENSON and L. H. GLODKOWSKI, *An effective regulatory framework for higher education: background and developments*, in Ed. L. J. (2015), 137.

⁶ G. FALLIS, *Multiversities, Ideas and Democracy*, 2007, forcibly argues that, in the contemporary world multiversities need to be concetuplized in a new way, that is, not just as a place of teaching and research, but also as fundamental institutions of democracy.

⁷ M. DIXON (*Legal education: where next?* in *The Conveyancer and property law*, 2015, Editorial) uses remarkable words, writing about “critics with megaphones telling us that universities are not producing graduates fit for the workplace”.

traditionally an area of public interest⁸. The form of supervision or direction carried out from the State is justified in the light of the wider public interest in the effectiveness of the educational service as a whole⁹. The educational system is considered in ideal connection to a presumed collective identity, which the public authority may wish to enhance or even force¹⁰.

The result is the idea of University as a public institution, supplying a service. In such a view, the group, referring to all members with whatever role in the system, does not assume any relevance. Indeed, what could matter are just individual positions, rights or expectations of distinguished members: the freedom of teaching and research, for the academics¹¹, and the right of education, for the students¹².

The society perspective, instead, helps in conceiving the University as a group, a cohesive community with a common vision and a sense of belonging where diversity is valued.

⁸ C. S. BREMBECK, *Social factors of education*, in C. S. BREMBECK and J. VAIZEY, *Social and Economic Aspects of Education, The New enciclopedia Britannica*, (1987), vol. 18, 101.

⁹ C. L. GLENN, *State and Schools: an historical view and Teaching of values in Schools*, in *Balancing Freedom, Autonomy, and Accountability in Education*, C. L. GLENN, I. DE GROOF (eds), WLP 2012, Vol.1, 3 and 239.

¹⁰ See A. MARRA, R. MOSCATI, *Ministries and Bureaucrats with particular reference to the Humboldtian-Napoleonic systems*, forthcoming in *Encyclopedia of International Higher Education Systems and Institutions*, edited by P. NUNOTEXEIRA JUNG-CHEOL SHIN.

¹¹ The analysis of the different academic recruitment models in Europe can be found in *Il reclutamento universitario in Europa The academic recruitment in Europe*, edited by R. CAVALLO PERIN, G. M. RACCA, C. BARBATI, Napoli 2016.

¹² See in this perspective U. POTOTSCHNIG, *L'Università come società*, in *Riv. giur. scuola* 1976, 269 and in *Scritti scelti*, Padova 1999, 817.

In this way University would be one of the “series of organizations and societies, thriving and flourishing with an actual power, which may pursue the most diverse objectives, but share a common feature: that is to group the individuals ...”, as Santi Romano¹³ taught.

There is a society whenever the members of a social body share a particular identity, or a purpose to achieve, which distinguishes them from subjects placed outside the body, and when such a body adopts effective rules that are not attributable to any of its members (or any multiplicity thereof) but rather to the body itself, as a separate entity. The distinction between the members and the entity is important, since the latter purports to achieve permanence despite the potential changes in its means, its interests, its composition and its rules. Every society is governed by law and arranged into a legal order, insofar as the law sets the societal values and objectives, and prevents recourse to force and arbitrariness. This social order does not depend on norms only: it presupposes, and is based upon, an organization, a structure. Law ensures the unity of the structure and its persistence, and is not limited to legal rules.

The idea of University as a society harkens back to the original concept of the medieval universities understood both as *studium generalis* (which means an open place of learning) and as *universitas studiorum*, namely as a corporation for those managing teaching and research¹⁴.

In order to construct university as a society, four elements are essential¹⁵: first, the origin of the community; second, the rules of the group as expression of its autonomy, third the

¹³ A. SANDULLI, *Santi Romano and the Perception of the Public Complexity*, in *Italian Journal of Public Law* (2009), vol. 1, 1, specifically 20.

¹⁴ In that sense U. POTOTSCHNIG, *L'Università come società*, cit., 819.

¹⁵ See U. POTOTSCHING, cit.

freedom of University as a social organization, and, finally, the natural and peculiar tasks of this society.

Starting from the origin, certainly the University is not the mere consequence of an authoritative law imposed by the State. The interests and concerns of the participants are relevant. If the University represents a social group, it responds to collective and shared issues and addresses specific needs, so regions, counties, municipalities or similar bodies do have a role in the life of the University.

Because they are situated within communities, these institutions are in the best position to carry out and highlight the demands of University members as they came up in the cultural and social context.

The second constituent refers to the rules each University applies to the members of the community. The redaction of the University statute and regulations expresses the autonomy of this peculiar society: regulations need to take into account the peculiar needs and specific concerns about the organization, teaching and financial resources¹⁶, which can be very different from one community to the other.

¹⁶ Those are empirically simplified by ESTERMANN and NOKKALA in the following categories: organisational autonomy, concerning the ability “to establish their structures and governing bodies, and to define the modalities of its leadership model”; financial autonomy, both in terms of “procedural framework of public funding” and “universities’ financial capacity”; academic autonomy, addressing “the universities’ ability to determine their own institutional strategy” and their “academic profile”, including the introduction and determination of contents of degree programmes and students admissions to courses; and staffing autonomy, being this “integrally related to [its] financial and academic autonomy”.

A system based on strong institutional autonomy, where most of the regulations are drafted by Universities, would offer a proper solution to dissimilar issues, emerging in each organized group¹⁷.

Autonomy means differentiation.

The gradual massification of higher education has often been connected to democratization of higher education, in the sense that the doors of academia got open wider and that the student population was starting to be less different from the population in general. However the diversification of the student population also means a diversification of students' interests and motivations for studying¹⁸.

The need to address such a high number of learners calls for the University to enact a robust organizational structure¹⁹. This structure and the regulation for its functioning are often the most evident element of cohesion, the one creating the sense of belonging to a single community but can have different impact and content regarding the specific community. Therefore the autonomy issues become even more central as Universities can express and gather very different interests.

¹⁷ P. D. CARRINGTON, *The Many Mansions of a University*, in 17 *Am. J. Comp. L.* 331, 1969, already insisted on maximum autonomy which must be given to each research oriented unit of the American multiversity. About Multiversity see W. R. GREINER, *Speech In, For and By (?) the "Multiversity": Reflections of a Recovering President*, in 54 *Buff. L. Rev.* 863 (2006-2007) and the deep analysis of G. FALLIS, *Multiversities, Ideas and Democracy*, cit.

¹⁸ In that sense see M. VUKASOVIC, *Institutional autonomy and academic Freedom in Light of new Conditions under which Higher Education Operates*, in *Contemporary Threats and Opportunities*, Proceedings of the Conference of the Magna Charta Observatory, 15-16 September 2011, Bologna, 173.

¹⁹ See A. MARRA, R. MOSCATI, *Ministries and Bureaucrats with particular reference to the Humboldtian-Napoleonic systems*, cit., especially par. 4.

Richter and Birch conclude, from a wide comparative analysis, noticing the “growing number of legal rules” dealing with education, in contrast with the general trend toward deregulation in public sectors.²⁰ State law is directly relevant to the content of University regulation, in that it establishes the limits of their autonomy, and can even impose certain requirements as to the content of the rules they adopt, in this way undermining the autonomy and independence of the academic world.

The functioning of an educational institution is so unique, and responding to such specific dynamics, that cannot be usefully harnessed by specific rules, especially if they are fixed by somebody not aware of those dynamics. More extensively, this underpins the view that educational institutions actually operate with regard to a balance of interests, internal to the educational community, rather than in conformity with general law. That is the reason why decisions adopted therein could not be appreciated with respect to legal parameters.²¹ This balance of interest has to be largely pursued through informal decisions or agreements, or reciprocal understanding between the involved parties.²²

Furthermore States are much more conditioned in the redactions of law by a set of interventions from the outside.

The outside world - in the form of different collective subjects that take on the characteristics of users and supporters (stakeholders) - thus exerts a growing influence on

²⁰ I. RICHTER and I. BIRCH *Law and Education – Education and Law, Law* in Ian Birch and Ingo Richter (eds.), *Comparative School Law* (Pergamon Press 1990) 350, 350-351.

²¹ DE GROOF, cit., quotes W. A. KAPLIN and B. A. LEE, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (Jossey-Bass 1995). Even though Kaplin and Lee refer to higher education contexts and to the U.S. situation, their description is arguably valid for the European area as well as for schools, where the sensation of working, studying and living in a narrow and somehow sheltered community is possibly even stronger.

universities and tends to force them to contradictory choices. Requests to provide an education that makes sense (that is, socially and professionally usable), being an institution that operates fairly, egalitarian and widely accessible require to simultaneously pursue aims of efficacy (effectiveness, practical usefulness of studies), accessibility and cost control.

In some countries the government attempts to intervene in the construction of curricula, encouraging the involvement of companies in the construction of paths and offering work experience which increase the vocational component. On the other hand, it is spreading the pressure for the introduction of external audits of the quality of performance, only partly based on peer evaluation (peer review). The distribution of resources for research tends to depend on the quality of the results previously obtained. The research activities are therefore increasingly aimed to meet the needs of those who will use the results.

The European context certainly influences national legislators. No longer can universities see themselves as only part of a national system. In Europe the Bologna process – as it will be better described in the following paragraphs - illustrates very much this reality²³. The Bologna process was not limited to a new structure of study plans and of the corresponding academic qualifications. In many countries it has also called for a reform of university teaching methods with the incorporation of class schedules and the reduction of the duration of the courses²⁴.

As the borders between European States become more fluid, as monetary systems become uniform, as commerce and industry increasingly become multi-national, and as Europe is regarded as a single entity on the international stage it makes sense to develop a

²³ S. GARBEN, *The Bologna Process: From a European Law Perspective*, in *E. L. Rev.* vol. 16, no.2, March 2010, 186.

²⁴ Critics on this point A. DE LA OLIVA SANTOS, *La scienza giuridica e l'Università a un bivio fondamentale* A. DE LA OLIVA SANTOS, *La scienza giuridica e l'Università a un bivio fondamentale*, cit.

uniform educational system²⁵, a common space of research as ERA (European research area). However this fascinating idea of a community of researchers and students stands together with the last Framework program on research and innovation, the well-known Horizon 2020, which is said to be “a key component of Europe's strategy to create economic growth and to reinforce its global competitiveness”. The competition for EU funding among researchers suggests an analogy to competition in the internal market²⁶ as the clearly stated intent of the FP is to increase Europe authority and dominance in the global context. Nevertheless Horizon 2020, with its budget of €77 billion, represents an incentive in the midst of economic crisis and, as for Italy but even other Member States, public policies are conforming much more research, by guidelines or internal directive of the quality auditing agency, to the European market goals.

Certainly universities are international, because they are “linked across all international borders through a common historical tradition and a knowledge network, communicating worldwide about research in journals, books, organizations, meetings and data files”²⁷. This assumption would place them far away from an exclusively national horizon: higher education institutions should be in such a condition to adequately develop their international orientation in a way that goes beyond the specificities of the State where they have been established. This does not necessarily mean a complete independence from the central national authority, such as the ministry of education. Arguably it means that these universities enjoy enough freedom to leave aside considerations regarding exclusively national priorities, as well as European competition programs.

²⁵ See A. BÜCKER W. A. WOODRUFF German L.J. 575, (2008), *The Bologna Process and German legal education: developing professional competence through clinical experiences*.

²⁶ Critically on this point A. VON BOGDANDY and D. WESTPHAL *The legal framework for an autonomous European Research Council*, in *Eur. L. Rev.* 2004, 788.

²⁷ J. HOORNAERT A. OOSTERLINCK, 'Universities from the Perspective of Internationalization' in [2005] *Int. J.Ed. Law and Policy* 244.

A reflection on the status of the university in the ERA should therefore start with their autonomy, which means, as far as it is present, freedom from external constraints in exercising its functions and, to some extent, to determine their own functions, too. It is not by accident that the concept of university autonomy is often interlinked to the one of University or academic freedom.

So we now turn to the third point.

From the early beginnings of the university in the middle Ages, down to the present century, autonomy or self-governance has been a key ingredient in the ideology of institutions of higher education. However, this autonomy is rooted in the traditional character of universities as institutes of research, elaboration and high cultural production. This activity often has taken place apart from tensions of the outer world. As a result, it seems very likely that the notion of autonomy will be seriously called into question in the post-industrial world since society tends, as it progresses in that direction, to integrate its various functions more closely; that being so, the university will no longer be able to claim that it lives confined in an ivory tower.

If the literal meaning of the concept of autonomy is self-governance, it is possible to distinguish a number of aspects where the autonomy afforded to the single academic institutions and the accountability control operated by national ministries on those institutions find a specific balance. In any case, the general paradigm is not in terms of how much the single universities are allowed to distance themselves from the direction of the national administration, but, on the contrary, in terms of how much the central administration is allowed to intervene in the functioning of universities, as separate bodies.

As for Italy, it happens that specific provisions, having constitutional rank²⁸, should guarantee the universities' right to autonomously define a broad range of matters regarding their own functioning, within the limits of statutory law.

It is therefore hard to effectively determine the balance between institutional freedom and ministerial constraint.

The result is typically a framework where the role of the national administration should be a supervisory rather than a directive one. Visible exceptions can be found, however, in a range of administrative procedures of qualified importance, where the preliminary or subsequent consent of the ministry is necessary, as it will be better explained in paragraph four. Furthermore recent Italian legislative developments, with the law 240/2010, widespread standardization of multiple rating criteria in the research assessment and in the general functioning of Universities²⁹, representing a major obstacle to the respect of freedom of science in terms of prohibition of political interference³⁰.

As we said, Universities are living in paradoxical times. Never before were the expectations of their contributions so high; never before were the doubts on their quality and performance so severe and widespread. As a consequence of increasing pressures on the state budgets, the allocation to universities are under strict scrutiny and budget cuts have become

²⁸ Art. 33 Cost.

²⁹ Critically S. BATINI, *La nuova governance delle università*, in *Riv. Trim. dir. pubbl.* 2011, 359 and F. MERUSI, *Legge e autonomia nelle Università*, in *Dir. amm.* 2008, 739. Even before the last developments disapprovingly S. CASSESE, *L'autonomia delle università nel rinnovamento delle istituzioni*, in *Foro it.* 1993, V, 82.

³⁰ See C. PINELLI, *Autonomia universitaria, libertà della scienza e valutazione dell'attività scientifica*, in *Munus* 2011, 567 and critically on the research assessment and the power of ANVUR (an agency whose members are appointed by the Ministry) M. RAMAJOLI, *Stato valutatore, autonomia universitaria e libertà di ricerca*, in *Giorn. Dir. Amm.* 2014, 313.

a fact of life. Even more so in countries where ageing, economic crisis and bank failures have a major impact on available state finances. All the public universities ³¹are increasingly intended by public law and progressively becoming instruments for the state to achieve specific policy goals.

Financial matters have been identified by the majority of national rectors conferences as the most pressing challenges faced by universities today. The impact of the economic crisis on the current state of university autonomy was universally recognised as a major challenge. In a number of countries, new regulations following austerity measures were also perceived as reducing autonomy³². While it was readily acknowledged that universities should be held accountable to society and towards their funders, it was stated that the introduction of overly resource- and time-intensive bureaucratic measures is also preventing universities from achieving their full potential. Rather than setting long-term targets and taking a strategic lead, some governments have displayed a growing tendency to micro-manage university affairs. Quality assurance processes also raised concern. Strict programme accreditation and, in some cases, a new legal status of quality assurance agencies were considered as limiting autonomy³³. Furthermore, it has been remarked³⁴ that reforms encounter different difficulties in being implemented. In various countries, there is no clear definition of the relations between governing bodies and bureaucracy, and there is often much uncertainty about the administration's managerial competences and likewise the tasks and functions of the teaching

³¹ H. VAN GINKEL, Keynote Address of the Conference, *Contemporary Threats and Opportunities*, Proceedings of the Conference of the Magna Charta Observatory, 15-16 September 2011, Bologna.

³² See *University Autonomy in Europe II, The scorecard*, T. ESTERMANN, T. NOKKALA M. STEINEL (eds), 2011 European University Association, 65-66.

³³ Id., 68.

³⁴ See A. MARRA, R. MOSCATI, *Ministries and Bureaucrats with particular reference to the Humboldtian-Napoleonic systems*, cit., par.3.

staff. Inadequate and untrained administrative structures mean that a part of the managerial functions have fallen to the teaching staff, which is more and more called up to take on organizational and bureaucratic responsibilities, thus increasing uncertainty on roles and tasks.

Looking at University as a society change the perspective, asking national legislators and European policymakers to modify their current point of view.

As Drew Gilpin Faust (the president of Harvard) said, we should remember that universities are about a great deal more than measurable utility.

The different interest of the group members, of the University society as a whole, are not just competitive goals to be achieved.

It is to deplore the growing dominance of economic justifications for universities: universities do serve not just as a source of economic growth, but as society's critic and conscience³⁵. Universities are meant to be producers not just of knowledge but also of (often inconvenient) doubts as human beings need meaning, understanding and perspective as well as jobs.

Universities can be closer to realizing their mission as independent guardians of the values of democracy.

In the Bucharest Declaration in 2004 it is stated "However important universities have become for the generation of economic wealth, they cannot be regarded simply as "factories" of science and technology, and of technical experts, within a global knowledge economy.

³⁵ In this sense A. DE LA OLIVA SANTOS, *La scienza giuridica e l'Università a un bivio fondamentale*, in *Riv. Trim. dir. proc. civ.* 2015, 1171.

They have key intellectual and cultural responsibilities that are more, not less, important in a knowledge-based society.”

Accordingly, universities cannot be regarded as value-free institutions. The values and the ethical standards they espouse will not only have a crucial influence over academic, cultural and political development of their academics, students and staff, but also help to shape the moral contours of society-at-large and address the question of the global promotion of democracy³⁶.

University as a society embodies the idea it represents not just a place of teaching and research, but also a fundamental institutions of democracy and self-realization of its members.

Through Universities, society may seek selflessly and teach critically democratic values that form the basis for building bridges and instilling a common feeling, especially in the present days when private interests, affecting in the most different way in everyone's life, are becoming stronger and tougher.

2. OVERSTEPPING THE BOUNDARIES OF NATIONAL HIGHER EDUCATION SYSTEM: THE ROLE OF THE CJEU CASE LAW

³⁶ S. CASSESE, *A proposito di “The law of global governance” di Eyal Benvenisti. Diritto globale o “polity” globale?* in *Riv. trim. dir. pubbl.* 2014, 911 focusing on the role of global institutions as sponsors of democratic processes and institutions vis-à-vis national communities.

The CJEU case law – through an evolutionary and dynamic interpretation of the Treaties - played a prominent role in fostering the Europeanization of higher education, even within the - at least textual - “frigidity”³⁷ of the Treaties with regard to higher education policies.

The CJEU case law, in particular, contributed to shed light on the double-sided nature of higher education: on the one hand, higher education is a competence which falls within the autonomy of Member States, on the other it is strictly intertwined with internal market and free movement issues, and therefore it cannot be completely excluded from the scope of application of EU law. Ruling within the grey area in-between member States’ autonomy and EU law, the CJEU has pushed the educational integration in Europe, even beyond its boundaries³⁸.

The first breach open by the CJEU in the national sphere of education systems occurred in 1974 with the landmark Casagrande³⁹ case. In Casagrande, an Italian citizen, who was living since his birth in Germany, asked to be admitted to the educational grants issued by the Bavarian government. However, the Bavarian law on educational grants admitted German nationals, stateless persons and aliens granted asylum only. The ECJ, in a preliminary ruling, declared the German provision in contrast with art. 12 of the Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, which affirmed that “the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

³⁷ F. MANCINI defined the EU attitude toward social rights as “social frigidity”, see F. MANCINI 1998, *Europe: The Case for Statehood*, ELJ, 1998, 29.

³⁸ S. GARBEN, *EU Higher education law*, Wolters Kluwer, 2011, 101.

³⁹ C-9/74 Donato Casagrande v. Landeshauptstadt Munchen 1974, ECR 773.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions”.

Joseph Weiler distinguished two different phases⁴⁰ in the Court legal reasoning, corresponding to different strategies. In the first one the Court interpreted widely the provisions of the Council regulation at stake, asserting that “it follows from the provision in the second paragraph of Article 12, ... that the Article is intended to encourage special efforts, to ensure that the children may take advantage on an equal footing of the education and training facilities available. It must be concluded that in providing that the children in question shall be admitted to educational courses under the same conditions as the nationals of the host State, Article 12 refers not only to rules relating to admission, but also to general measures intended to facilitate educational attendance”⁴¹. As J. H.H. Weiler sharply pointed out, here the Courts seems to move in an “empty jurisdictional space with no limitations on the reach of Community”⁴².

Even more interesting is the second phase of the Court’s reasoning, where it asserts that, “although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training”⁴³.

⁴⁰ J. H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, vol. 100 n. 8, 1991, p. 2438.

⁴¹ C-9/74, par. 3-4.

⁴² J. H. H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, *cit.*, 2439.

⁴³ C-9/74, para. 12.

Following the logic of the “*implied powers*”, the Court legitimized the EU intervention in a sphere out of the scope of application of EU law⁴⁴ producing the ultimate effect of adsorbing the national prerogatives on education into the EU legal realm⁴⁵.

If in *Casagrande* the Court opens the era of the Community’s action within the realm of education, it is with the subsequent *Gravier*⁴⁶ case that higher education has been included in art. 128 of the Treaty, which provides the Community competence in the area of vocational training. In this case a French student of strip comics in Belgium was asked to pay a fee called the “*minerval*” (enrolment fee) which students of Belgian nationality were not required to pay.

The court ruled that “the imposition on students who are nationals of other Member States of a charge, as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the Treaty”⁴⁷.

Moreover the Court was asked to establish whether the area of “vocational training” encompasses also “a course in strip cartoon art”. The Court interpreted vocational training widely so as to include an element of general education: “any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is

⁴⁴ *Contra*, S. GARBEN, *EU Higher education law*, cit., 58. According to the Author, “this approach is based on a sound logic. After all the EU is endowed with a number of functional powers to achieve certain policy objectives, such as the creation of the common market and therein the free movement of persons, which may require changes in all kind of sectors”.

⁴⁵ J. H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, cit., p. 2440.

⁴⁶ C-293/83, *Françoise Gravier v. City of Liège*, 1985.

⁴⁷ *Ibidem*, para. 2.

vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education⁴⁸”.

With *Gravier* the Court expanded the scope of application of art. 128 EC, especially under the specific profile of the access to higher education, while the organization of higher education still remained within the national sphere.

However, the *Gravier* case left open several issues regarding the boundaries of the vocational training and the relationship between the latter and the notion of general education⁴⁹. Such profiles have been further developed in the subsequent rich case law of the CJEU, specifically regarding higher education: *Commission v. Belgium*⁵⁰, *Lair v. Universitat Hannover*⁵¹, *Brown v. Secretary of State for Scotland*⁵², *Blaizot v. Univeristy of Liege*⁵³.

In particular, in the latter the Court clarified that also university education (in the specific case a Medicine course) could qualify as vocational training, as long as the course was intended to prepare the student for an occupation.

In this earlier case law we can clearly see the progressive attraction of higher education in the orbit of the Community law, determining a growing impact into the heart of national

⁴⁸ C-293/83, par. 30.

⁴⁹ J. FLYNN, *Gravier: suite du feuilleton*, in B. DE WITTE (a cura di), *European Community Law of Education*, Baden-Baden, 1989, p. 100.

⁵⁰ C-293/85.

⁵¹ C-38/86.

⁵² C-197/86.

⁵³ C- 24/86.

education systems. This is one of the most clear example of “creeping competence”⁵⁴, which cannot but led to critical concerns.

In particular, the Court’s developments in “the absence of an explicit competence alarmed the Member States which were hesitant to concede any national autonomy or sovereignty in this field⁵⁵”. This concern was partially fixed after the adoption of a specific provision in the Maastricht treaty (art. 126) containing a limit transfer of educational powers to the EU and underling the national autonomy paradigm in this field: “The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity”.

This provision is now art. 165 of the Treaty of Lisbon, which can be read together with art. 6 which lists education as one of the areas where the Union shall have competence to carry out actions to support coordinate and supplement the action of Member states.

Moreover, often the Court in adjudicating higher education issues relies on art. 21 TFEU on EU citizenship and on art. 18 TFEU on non-discrimination.

As it appears quite adamant, in the Treaties higher education is perceived as a complex issue involving different and competing interests.

⁵⁴ M. POLLACK, *Creeping Competence: The Expanding Agenda of the European Community*, in *Journal of Public Policy*, vol. 14, n. 2, 1994.

⁵⁵ S. GARBEN, *Confronting the Competence Conundrum - Three Proposals to Democratise the Union through an Expansion of its Legislative Powers*, www.gov.uk.

The question now is whether the CJEU “has good reasons to push further educational integration or whether it is overstepping its boundaries⁵⁶”.

I argue that while at the very beginning, even without a clear legal basis, the CJEU had good reason to push for educational integration, today where the Treaty provisions are clearer, it should exercise some restraint, in order to maintain a proper balance between the different competing issues of national autonomy and the European influence on this highly sensitive area.

The recent case law seems to confirm this approach. In the *Förster* case⁵⁷, and in particular in the *Bressol* case⁵⁸ the Court seems to be very cautious: in the latter in particular, the introduction, by decree, of a *numerus clausus* for non-residents students in some Belgian university courses was at stake, in order to prevent the massive enrolment of other nationality students.

The Court of Justice held that Articles 18 and 21 TFEU preclude national legislation, “which limits the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health⁵⁹”

The rationale of the Belgian provision was to prevent a shortage of health professionals on the national territory, which may have a deep impact on the protection of public health.

⁵⁶ S. GARBEN, *EU Higher education law*, cit., 101.

⁵⁷ C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, 18 November 2008.

⁵⁸ C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, 13 April 2010.

⁵⁹ *Ibidem*, para 82.

The Court seems to value such interpretation, stating that “the prevention of that risk requires that a sufficient number of graduates establish themselves in that territory in order to carry out there one of the medical or paramedical occupations covered by the decree at issue in the main proceedings⁶⁰”.

Therefore, if the Belgian legislation is in contrast with art. 18 and 21 TFEU, which preclude inequality in treatment between resident and non-resident students, in the end the CJEU leaves the national court, eventually, the task to find the justification to such legislation in the light of the protection of public health⁶¹.

Even in this last case, the twofold dimension – national and supranational - of higher education emerges has a leitmotiv of higher education issues in the EU. Balancing these two competing paradigms would probably allow both the EU and Member States to tackle the current challenge of our education systems: as Marta Nussbaum pointed out: “Given that economic growth is so eagerly sought by all nations, especially at this time of crisis, too few questions have been posed about the direction of education, and, with it, of the world’s democratic societies. With the rush to profitability in the global market, values precious for the future of democracy, especially in an era of religious and economic anxiety, are in danger of getting lost”⁶².

⁶⁰ Ibidem, para. 68.

⁶¹ “It must be determined whether the legislation is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it, which it is for the national court to determine”.Ibidem, para 48.

⁶² M. NUSSBAUM, *Not for Profit: Why Democracy Needs the Humanities*, Princeton University Press, 2010, 6.

The tension between national and supranational prerogatives in higher education matters, so well documented by the developments within the European space, might contribute to prevent such a risk.

3. THE ERASMUS PROGRAMME

According to tradition, Jean Monnet, one of the founding fathers of current European Union who was called to build a new international reality starting from the ashes of the Second World War, said: “If I were to start again, I would start with education”⁶³.

It is exactly during the immediate postwar period that the comprehension of the relevance of educating youths to internationalism is rooted, so that they can become better citizens of single Nations, Europe and the whole world.

Pointing our attention to the European context, first of all we should note that the topic of education was not explicitly included in the Treaties of Rome, but it was left to the exclusive competence of the member States. Nonetheless, this did not exclude the need of a more European education, especially for university students, aiming to a complete formation of the individual, both as a student and as a person, which let him perceive the rising of a new supranational reality. Starting from this background, mobility, border crossing and

⁶³ K. GRIMONPREZ, *The European dimension in citizenship education: unused potential of article 165 TFUE*, in *E.L. Rev.*, 2014, 39(1), p. 3. See also A. CORBETT, *Universities and the Europe of Knowledge: Ideas, Institutions and Policy Entrepreneurship in European Union Higher Education Policy*, London, 2005, p. XI, according to whom “He [Monnet] probably never did, but it is an aphorism which makes sense, wherever it comes from”.

studying abroad in a different European country were conceived as unique elements of personal growth.

During this first phase (1950s-1960s), single States and Universities were the only promoters of the international University cooperation, implementing national laws and rules or drawing up agreements to allow the execution and the recognition of the studies abroad⁶⁴.

In the following decades, if in the 1970s there was a first, informal admission of educations' themes inside the competences of the European Community⁶⁵, the real turning point was the Council decision of 15th June 1987.

Through this act, it was adopted the *European Community Action Scheme for the Mobility of University Students*, better known as *Erasmus Programme*, aiming to achieve a significant increase in the number of university students spending an integrated period of study in another Member State, to promote broad and intensive cooperation among Universities in all Member States and, as a result, to strengthen the interaction between citizens of the different Member States, thus consolidating the concept of a People's Europe⁶⁶.

The Articles 128 and 235 of the *Treaty establishing the European Economic Community* were recalled as legal basis for this new Programme. As already mentioned, these norms did

⁶⁴ See S. CORRADI, *Erasmus e Erasmus Plus. La mobilità internazionale degli studenti universitari*, Roma, 2015, pp. 21 ss. The Author enlightens the several contacts, during the 60s and 70s, between European Universities' rectors (specially Italian, French and German), expression of the Universities' autonomy, in order to allow the recognition of the studies made in foreign countries.

⁶⁵ See the *Resolution of the Council and of the Ministers of education, meeting within the Council of 9 February 1976*, which sets the first European action programme in the field of education. In particular, on the subject of higher education, this act explicates the EC willingness of encouraging the development of links between Universities and eliminating obstacles to the mobility of students, university teaching and research staff.

⁶⁶ Art. 2 of the Council decision of 15th June 1987.

not directly concerned education, but they disciplined the Council power to lay down general principles for implementing a common vocational training policy capable of contributing to the development both of the national economies and of the common market and the Council power to take the appropriate measures to attain one of the objectives of the Community, even if the Treaty had not provided the necessary powers⁶⁷.

Several criticisms were moved against the broad interpretation given to the mentioned articles in order to legitimate the intervention of the Community in the educational field⁶⁸, but this reading was definitively confirmed by the ECJ which showed to be favorable to the extension of the supranational sphere of competence, anticipating the following evolutions of the Treaties⁶⁹.

In effect, it was only through the Treaty of Maastricht (art. 126, today art. 165 TFUE) that the topic of education finally found its place in the fundamental Community laws, according to subsidiarity principle: the Member States have the responsibility for the content of teaching and the organization of education systems, while the Union should play a role of

⁶⁷ About the political reason of choosing both Articles 128 and 235 as Erasmus legal basis, see B. FEYEN and E. KRZAKLEWSKA, *The Erasmus Phenomenon – Symbol of a new European Generation?*, Frankfurt, 2013, pp. 29 ss.

⁶⁸ J. FIELD, *European Dimensions, Education, Training and the European Union*, London, 1998, p.56; J. LONBAY, *Education and Law: the Community Context*, in *E.L. Rev.*, 1989, 14, p. 368; M. MURPHY, *Covert Action? Education, Social Policy and Law in the European Union* in *J.Educ. Policy*, 2003, 18, p. 551.

⁶⁹ In this sense, Case 242/87 Commission v. Council, Judgment of May 30, 1989, which clearly upheld the legitimacy of the 15th June 1987 Council decision: “19...it must be held that the measures envisaged under the Erasmus programme do not exceed the limits of the powers conferred on the Council by Article 128 of the Treaty in the area of vocational training 37. It follows that inasmuch as the contested decision concerns not only the sphere of vocational training but also that of scientific research, the Council did not have the power to adopt it pursuant to Article 128 alone and thus was bound, before the Single European Act entered into force, to base the decision on Article 235 as well. The Commission's first submission that the legal basis chosen was unlawful must therefore be rejected”.

support, supplement and coordination. Over all, it's explicitly stated that Union action shall be aimed at encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study abroad⁷⁰.

This is how one of the most known European Programme started, a programme that, according to some people, is also the one which has revealed to be the closest to citizens, introducing concrete European experiences in family context of the several students⁷¹.

After almost 30 years from its birth, the Erasmus Programme has allowed more than 3 million of students to cross national borders⁷², also receiving grant during their studies abroad. Anyway, Erasmus has not only a didactic purpose, making the exchange of people also an exchange of knowledge.

The Programme's success has also helped to shape higher education in Europe and led to several achievements: the launch of the Bologna Process in 1999⁷³, which introduced comparable and compatible study degrees; the establishment of the European Credit

⁷⁰ For a critic on the unused potential of the art. 165 TFUE, due to the self-restrain of EU in education's field, see K. GRIMONPREZ, *The European dimension in citizenship education: unused potential of article 165 TFUE*, in *E.L. Rev.*, cit., p. 3 ss.

⁷¹ See M. FENNER and S. LANZILOTTA, *Project Report. 20 Years of the Erasmus Programme*, in *Erasmus Student Network*, 2007.

⁷² About Erasmus numbers: http://ec.europa.eu/education/resources/statistics_en. See also: http://ec.europa.eu/education/tools/erasmus-3-million_en, dedicated to the achievement of the 3 million students goal.

⁷³ For a synthetic overview on the Bologna Process, see *ex pluribus*, A. CORBETT, *Higher Education as a Form of European Integration: How Novel is the Bologna Process?*, in *ARENA Centre for European Studies Working paper*, 15, 2006.

Accumulation and Transfer System (ECTS)⁷⁴, which allows student to earn credits for their degree when studying abroad; the internationalization of higher education institutions.

Meanwhile the Programme has evolved, becoming a piece of wider programmes: during the 1990s, it became part of Socrates Programme⁷⁵ (which not only aimed at promoting cooperation and mobility in the education field, but also at strengthening the European dimension of education at all levels, enhancing the knowledge of foreign languages, encouraging the use of new technologies and promoting equality) and in 2007 it merged into the Lifelong Learning Programme⁷⁶ (still aiming at improving education and supranational mobility at all levels, so as to enable people, at any stage of their life, to take part in stimulating learning experiences, as well as developing education and training across Europe).

Last step was the creation of Erasmus + Programme⁷⁷, directed to bring together all the previous European actions in the field of education, training, youth and sport, including the international aspects of higher education⁷⁸. The Programme should include a strong

⁷⁴ For a synthetic overview on ECTS functioning, see the *ECTS Users' Guide*, available at the following web address: http://ec.europa.eu/dgs/education_culture/repository/education/ects/users-guide/docs/year-2009/ects-users-guide-2009_en.pdf

⁷⁵ Established by Decision n. 819/1995/EC of the European Parliament and of the Council of 14 March 1995.

⁷⁶ Established by Decision n. 1720/2006/EC of the European Parliament and of the Council of 15 November 2006.

⁷⁷ Established by the Regulation EU n. 1288/2013 of the European Parliament and of the Council of 11 December 2013.

⁷⁸ Recital (1) of the Regulation EU n. 1288/2013: "... a single programme in the field of education, training, youth and sport, including the international aspects of higher education, bringing together the action programme in the field of lifelong learning ('Lifelong Learning') established by Decision No 1720/2006/EC of the European Parliament and of the Council, the Youth in Action programme ('Youth in Action') established by Decision No 1719/2006/EC of the European Parliament and of the Council, the Erasmus Mundus action programme ('Erasmus Mundus') established by Decision No 1298/ 2008/EC of the European Parliament and of the Council, the ALFA III programme

international dimension in order not only to enhance the quality of European higher education, but also to promote understanding between people and to contribute to the sustainable development of higher education in partner countries, as well as their broader socio-economic development, inter alia by stimulating "brain circulation" through mobility actions with partner-country nationals⁷⁹. All this shall happen without any sacrifice for equality, so that the enlargement of the access to the Erasmus is an additional goal to accomplish⁸⁰.

In this new Programme, mobility⁸¹ does not involve only university students, but also university staff and professors, students of all levels of school, entrepreneurs, athletes etc⁸².

established by Regulation (EC) No 1905/2006 of the European Parliament and of the Council, and the Tempus and Edulink programmes, in order to ensure greater efficiency, a stronger strategic focus and synergies to be exploited between the various aspects of the single programme. In addition, sport is proposed as part of that single programme".

⁷⁹ See the Recitals (8) and (17) and the Article 4 of the Regulation.

⁸⁰ Recital (7) of the Regulation: "Pursuant to Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU), as well as Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, the Programme promotes inter alia equality between men and women and measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. There is a need to widen access for members of disadvantaged and vulnerable groups and actively to address the special learning needs of people with disabilities in the implementation of the Programme".

⁸¹"Learning mobility" defined by the Article 2, pt. 7), of the Regulation as "moving physically to a country other than the country of residence, in order to undertake study, training or non-formal or informal learning; it may take the form of traineeships, apprenticeships, youth exchanges, volunteering, teaching or participation in a professional development activity, and may include preparatory activities, such as training in the host language, as well as sending, hosting and follow-up activities".

⁸² Article 1 of the Regulation. About the importance of the extension of Erasmus Programme to other categories than University students ("who are already very likely to feel European"), see T. KUHN, *Why educational exchange*

Moreover, the Erasmus + adds to the physical mobility (in order to undertake study, training or non-formal or informal learning), the virtual mobility, which involves a set of activities supported by information and communications technology, including e-learning, that realize or facilitate international collaborative experiences in a context of teaching and learning⁸³.

Explicit clues of the success and the faith in the Programme are, on the one hand, the increase of the funds addressed to it (+45%, reaching the threshold of 15 billion Euros), even in a situation of economic crisis, and, on the other, the choice to expand the spatial dimension of exchanges, opening it to extra-European countries, in order to make the Erasmus a more and more international programme⁸⁴. For these reasons, it's clear that, today, the goal of the Erasmus is not only to create a European consciousness, but rather to allow the overcoming of social and cultural barriers and border-crossing so as to make students becoming “citizens of the world”⁸⁵.

programs miss their marks: Cross-border mobility, education and European identity, in *Journal of Common Market Studies*, 2012, pp. 994-1010.

⁸³ Article 2, pt. 10), of the Regulation.

⁸⁴ Article 24 of the Regulation: “Country participation 1. The Programme shall be open to the participation of the following countries (the ‘Programme countries’): (a) the Member States; (b) the acceding countries, candidate countries and potential candidates benefiting from a pre-accession strategy, in accordance with the general principles and general terms and conditions for the participation of those countries in Union programmes established in the respective framework agreements, Association Council decisions or similar agreements; (c) those EFTA countries that are party to the EEA Agreement, in accordance with the provisions of that agreement; (d) the Swiss Confederation, on the basis of a bilateral agreement to be concluded with that country; (e) those countries covered by the European neighborhood policy which have concluded agreements with the Union providing for the possibility of their participation in the Union's programmes, subject to the conclusion of a bilateral agreement with the Union on the conditions of their participation in the Programme”.

⁸⁵ See also the Council Recommendation of 28 June 2011 “*Youth on the move*” — *promoting the learning mobility of young people* 2011/C 199/01, according to which “Learning mobility, meaning transnational mobility for the purpose of acquiring new knowledge, skills and competences, is one of the fundamental ways in which young people

Along these 30 years, Public law played a primary role. First of all, we must reaffirm the influence of the Universities, which gave a fundamental contribution – as we have already enlightened – to the birth of the Erasmus Programme, recognizing the importance of students exchange and recognition of studying abroad⁸⁶. Today, every institution which want to enter in the Erasmus circuit must: ensure a cost-free attendance to the courses for foreign students (they pay taxes only to home countries Universities) and the recognition of courses and exams attended by their own students in the European Universities they have an agreement with; give all the information needed for joining the Erasmus Programme; help students in administrative duties; organize the reception and the integration of foreign students, to whom also offer the opportunity to enhance their knowledge in the local language. All these duties are described in detail in the Erasmus Charter for Higher Education (ECHE)⁸⁷, an act released by the Commission whose concession is essential for an institution to enter the Erasmus circuit, and they are reiterated in each Learning Agreement, meaning every agreement concluded by two Universities in relation to every single student doing the exchange, indicating also the courses attended and their value in ECTS.

can strengthen their future employability, as well as their intercultural awareness, personal development, creativity and active citizenship. Europeans who are mobile as young learners are more likely to be mobile as workers later in life. Learning mobility can make education and training systems and institutions more open, more European and international, more accessible and more efficient. It can also strengthen Europe's competitiveness by helping to build a knowledge-intensive society”.

⁸⁶ Crystal clear, in this sense, was the orientation upheld by the General Assembly of the European Rectors Conference, in Genève, the 3-6 September 1969.

⁸⁷ To have an example of this document, see: https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/he-charter_en.pdf. See also the *Erasmus Charter for Higher Education Annotated Guidelines* to have a more specific idea of the requirements needed to enter the Erasmus circuit: https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/charter-annotated-guidelines_en.pdf

On a Public law perspective, we must consider also that, meanwhile the implementation of the Programme on the Union level belongs to the Commission, on a State level it falls among the competences of specific National Agencies⁸⁸, supervised by National Authorities⁸⁹. In detail, National Authorities shall designate a National Agency or National Agencies. In cases where there is more than one national agency, Member States shall establish an appropriate mechanism for the coordinated management of the implementation of the Programme at a national level, particularly with a view to ensuring coherent and cost-efficient implementation and effective contact with the Commission. The National Authorities shall also monitor and supervise the management of the Programme at a national level, satisfy duties of information and consultation with the Commission, co-finance the operations of its national agency, take responsibility for the proper management of the Union funds transferred by the Commission to the national agency. On the other hand, National Agencies shall have legal personality or be part of an entity having legal personality, and be governed by the law of the Member State concerned (a ministry cannot be designated as a national agency); they shall also have adequate operational and legal means, management capacity, staff and infrastructures to fulfill their tasks satisfactorily. These tasks consist in managing specific actions of the Programme, as the one relating to learning mobility of individuals (typical assignments are: funds supply, advice and assistance to University and other institutions applying for the Erasmus Programme...).

Looking at a specific case, in Italy three national agencies have been created (Agenzia nazionale Erasmus+ INDIRE; Agenzia nazionale Erasmus+ ISFOL; Agenzia nazionale per i Giovani), one for each sector in which Erasmus + is structured (school education, higher education, adult education; education and vocational training; youth policies). About the National Authorities, they correspond with government structures in charge in the same fields (Ministry of Education, Universities, and Research; Ministry of Labor and Social Policy; The

⁸⁸ Article 28 of the Regulation EU n. 1288/2013.

⁸⁹ Article 27 of the Regulation EU n. 1288/2013.

Presidency of the Council of Ministers – Department of Youth and the National Civil Service).

Simplifying the roles of different public subject for the execution of the Erasmus Programme, the pulse function still belongs to Universities, as a consequence of their independence. They have to stipulate partnership agreements with others higher education institutions – in order to create their own mobility network – but also to apply to the European Commission for the release of ECHE, essential for the participation to the Programme. Fulfilled these requirements, Universities can apply to their National Agencies for funding, pertaining to these Agencies the managing of the resources granted by the European Commission and the National Authorities for the Organization of Mobility, the Student Mobility, the Teacher Mobility and the Introduction of the European Credit Transfer System. Finally, the National Authorities are responsible for the supervision of the implementation of the Programme at a State level and for the coordination of the national action with the European level.

From a general point of view, we must consider also the commitment of the States to take all appropriate measures to remove legal and administrative obstacles to the proper functioning of the Programme, including, where possible, measures aimed at resolving issues that give rise to difficulties in obtaining visas⁹⁰. Among the several measures taken by the States, we can recall: the recognition of the right to access to the same services the local students can access (for instance, student accommodation); the possibility to supply grants in

⁹⁰ In this sense, Recital (12) of the Regulation EU n. 1288/2013. For an analysis of the obstacles to student mobility, see *The European Higher Education Area in 2015: Bologna process implementation report*, pp. 244 ss.

addition to the European ones; the recognition of different kinds of benefits, as reductions on public transportations⁹¹.

In few words, public law has provided (and it is still providing) the concrete tools for the implementation of the Programme. From this point of view, it is crystal clear how University as public institutions has been fundamental for the beginning, the survival and the evolution of the Erasmus. On the other hand, it must be noted how Erasmus itself has been helping the University to evolve as a dynamic social structure, something more than a static public institution in charge of providing higher education. Also thanks to the Programme, Universities are included in a network of international connections, in which the dynamism flows from the exchanges of individuals, member of this society, allowing them to create and share a common identity on a supranational and international level.

In conclusion, we cannot deny the role of Erasmus Programme as an instrument for overcoming boundaries and connecting populations, able to reduce national distances and diversities. On the other hand, we cannot ignore the voices of who, rationally, deny the existence of an “Erasmus generation” able to change the world (the Programme has involved only the 4% of eligible students) and enlightens how European identity and openness to internationalization already characterize people who decide to live the Erasmus experience⁹². Nonetheless, according to the most recent studies, it is clear how cross-border interaction promotes collective identity both on an European perspective and on an international one,

⁹¹ For an analysis of students’ loans significance and their portability, see H. SKOVGAARD-PETERSEN, *There and back again: portability of student loans, grants and fee support in a free movement perspective*, in *E.L. Rev.*, 2013, 38(6), pp. 783 ss.

⁹² In this sense, *ex pluribus*, see E. SIGALAS, *Cross-border mobility and European identity: The effectiveness of intergroup contact during the ERASMUS year abroad*, in *Eur. Union Polit.*, 2010, 11(2), pp. 241 ss.; I. WILSON, *What Should We Expect of ‘Erasmus Generations’*, in *JCMS*, 2011, 49(5), pp. 1113 ss.; and partially R. KING and E. RUIZ-GELICES, *International Student Migration and the European ‘Year Abroad’: Effects on European Identity and Subsequent Migration Behaviour*, in *Int. j. Poupl. Geogr.*, 2003, 9, pp. 229 ss.

especially after the extension due to the implementation of Erasmus + Programme⁹³. Living abroad for a long term lets the student integrate and truly understand the main features of the hosting community – clear is the difference with a mere tourist who cannot really perceive them, not being included in this community –, overcoming the stereotypes and starting a constructive comparison with his own country reality.

In this way, we must recognize that Erasmus Programme is a first concrete attempt of transcultural education, in order to help the “foreigner” to lose his negative meaning as “stranger or enemy”, not only for the student who meets locals and international students, but also for the hosting community, which can start to evaluate the foreigner as a positive resource for its human, social and scientific progress.

4. UNIVERSITIES WITHOUT BORDERS?

Everybody has the right to access to a good level of education and training in order to develop his own potential and skills for an effective participation into the cultural, social and economic life of the modern world⁹⁴.

⁹³ In this sense, *ex pluribus*, see K. MITCHELL, *Rethinking the 'Erasmus Effect' on European Identity*, in *JCMS*, 2015, 53(2), pp. 330 ss.; ID., *Student mobility and European Identity: Erasmus Study as civic experience*, in *Journal of Contemporary European Research*, 2012, 8(4), pp. 491 ss. See also previous works as N. FLIGSTEIN, *Euroclash: The EU, European Identity, and the Future of Europe*, Oxford, 2008; D. GREEN, *The Europeans: Political Identity in an Emerging Polity*, Boulder, 2007; V. PAPATSIBA, *Making Higher Education More European through Student Mobility? Revising EU initiative in the Context of the Bologna Process*, in *Comparative Education*, 2006, 42(1), pp. 93 ss.; M. BRUTER, *Citizen of Europe? The Emergence of a Mass European Identity*, New York, 2005.

⁹⁴See *World Declaration on Higher Education for the Twenty-First Century: Vision and Action and Framework for Priority Action for change and Development in Higher Education*, text adopted by World Conference on Higher

In this perspective, higher education has given ample proof of its viability over the centuries and of its ability to evolve in order to induce change and progress in society.

Today, higher education institutions are crucial partners in delivering the European Union's strategy to drive forward and maintain growth⁹⁵.

We should observe, however, that the process of harmonization of the national systems of higher education has not developed within the European Union legal framework⁹⁶, although the European integration process and the free movement of persons within the European Union have been a strong incentive for bringing together the educational systems of the European Union⁹⁷.

Education, convened by UNESCO held at Paris, from 5 to 9 October 1998, in which is stated that «access to education is the *sine qua non* for effective participation in the life of the modern world at all levels. Education, to be certain, is not the whole answer to every problem. But education, in its broadest sense, must be a vital part of all efforts to imagine and create new relations among people and to foster greater respect for the needs of the environment».

⁹⁵ *The Europe 2020 strategy* (European Commission, 2010a) aims to achieving «smart, sustainable and inclusive growth. The engines driving this growth are: i) knowledge and innovation, ii) a greener and more efficient use of resources and iii) higher employment combined with social and territorial cohesion».

⁹⁶ See F. NECTOUS, *European identity and the Politics of Culture in Europe*, in D. BERGHAHN, N. HEWLETT, and B. AXFORD (2000). *Unity and Diversity in the New Europe*. Oxford, Bern: Peter Land, 149, who remembers the sentence «Si c'était à refaire, je commencerais par l'éducation» said by Jean Monnet, one of the founding fathers of the European Union, toward the end of his life about his work devoted to the unification of Europe.

⁹⁷ On this theme, see M. COCCONI, *Il diritto europeo dell'istruzione. Oltre l'integrazione dei mercati*, Milano, 2006, and the bibliography cited therein.

The Treaty of Rome did not mention the education, but took only into account the vocational education, with particular reference to the problems of employment⁹⁸.

Cooperation in the field of higher education has been a proven success within the European Union in the last twenty years, starting with the Maastricht Treaty.

In particular, Community competence in the field of education is governed by article 149 of the EC Treaty (now article 165 TFEU); pursuant to paragraph four, first indent thereof, any harmonisation of Member States' laws and regulations is excluded⁹⁹.

The introduction of a competence of the European Union in the field of education has represented a complicated transition, in which attempts have been made, on the one hand, to maintain the national cultural identity and, on the other hand, to encourage the abolition of

⁹⁸See articles 39-42,43-48, 49-55 TCE.

⁹⁹In particular, article 149 TCE (now article 165 TFEU) provides «1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. 2. Community action shall be aimed at:- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,- promoting cooperation between educational establishments,- developing exchanges of information and experience on issues common to the education systems of the Member States,- encouraging the development of youth exchanges and of exchanges of socio educational instructors,- encouraging the development of distance education. 3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education, in particular the Council of Europe. 4. In order to contribute to the achievement of the objectives referred to in this article, the Council:- acting in accordance with the procedure referred to in article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,- acting by a qualified majority on a proposal from the Commission, shall adopt recommendations».

defensive barriers, through the promotion of the transnational mobility of students and teachers.

In particular, the «*Convention on the recognition of qualifications concerning higher education in the European Region*» of 11 April 1997¹⁰⁰, also referred to as Lisbon Convention, and the «*Joint Declaration of Harmonisation of the Architecture of the European Higher Education System*» of 25 May 1998, so called Sorbonne declaration -which clarifies that «Europe is not only that of the Euro, of the banks and the economy: it must be a Europe of knowledge as well»- are crucial steps in the process of enhancing European cooperation in this field¹⁰¹.

These papers inherit the principles laid in the «*Magna Charta Universitatum*» presented in Bologna in 1998, in which is stated that «The university is an autonomous institution at the heart of societies differently organized because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching»¹⁰².

In this sense, the universities encourage mobility among teachers and students; furthermore, they consider a general policy of equivalent status, titles, examinations and award of scholarships essential to the fulfilment of their mission.

¹⁰⁰The Convention on the Recognition of Qualifications concerning Higher Education in the European Region (Council of Europe) ETS No. 165 (Date signed: 11th April 1997).

¹⁰¹ This declaration stated first of all that the «European higher education institutions had accepted the challenge and taken the lead in constructing the European Area of Higher Education by 2010, also in the wake of the fundamental principles laid down in the Bologna Magna Charta Universitatum of 1988». On this theme, see G. HAUG, «*The Sorbonne Declaration of 25 May 1998 : What it does say, what it doesn't »*, in *Trends in Learning Structures in Higher Education* (I), 1999, 57 ff.

¹⁰²Magna Charta Universitatum 1998, Bologna: Bologna University, available at www.magna-charta.org.

The importance of the role of Universities is confirmed by the Bologna Declaration of 19 June 1999¹⁰³ and, then, by the Commission Communication of 5 February 2003¹⁰⁴, which claims that the creation of a Europe of knowledge is for the universities «a source of opportunity but also of major challenges. Indeed universities go about their business in an increasingly globalised environment which is constantly changing and is characterised by increasing competition to attract and retain outstanding talent, and by the emergence of new requirements for which they have to cater».

So, the aim of the harmonization of higher education systems, to be realized through freedom of establishment and recognition of diplomas and courses of study, represents certainly a determining factor in the creation of an European area of really democratic and competitive knowledge, able to attract resources and economic investments from all around the world.

However, on the basis of the subsidiarity principle, the higher education policies in Europe are essentially decided at the level of the individual Member States.

Therefore, the role of the European Union is mainly in a supporting and partly coordinating capacity.

While any harmonisation of laws and regulations of the Member States is explicitly excluded, the European Union can take action in accordance with the ordinary legislative procedure and by means of incentive measures.

¹⁰³ The Bologna process, initiated with the Bologna Declaration (1999) and assessed every 3 years in ministerial conferences, aims to introduce a more comparable, compatible and coherent system for European higher education. On this theme, see S. GARBEN, *The Bologna Process: from a European Law perspective*, cit.

¹⁰⁴ Communication from the Commission of 5 February 2003 - The role of the universities in the Europe of knowledge [COM(2003)] 58 final.

The main goals of Union action in the field of higher education include: supporting mobility of students and staff; fostering mutual recognition of diplomas and periods of study; promotion of cooperation between higher education institutions and the development of distance (university) education.

Member States commit themselves to attain these objectives-within the framework of their institutional competences and taking full respect of the diversity of cultures, languages, national education systems and of University autonomy-to consolidate the European area of higher education.

As a preliminary point, it should be recalled that even if European Union law doesn't detract from the power of the Member States as regards the organisation of their education systems and of vocational training , the fact remains that, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States¹⁰⁵.

For admission to degree courses, for instance, the Member States are free to opt for an education system based on free access-without restriction on the number of students who may register-or for a system based on controlled access in which the students are selected.

However, both that the Member State chooses the first or the second of those systems (or a combination of them), the chosen system must be comply with European Union law and, in particular, with the right to move and reside freely within the territory of the member State as well as with the principle of non- discrimination on grounds of nationality¹⁰⁶.

¹⁰⁵ See, to that effect, for example, Case C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-6849, paragraph 70, and Joined Cases C-11/06 and C-12/06 Morgan and Bucher [2007] ECR I-9161, paragraph 24.

¹⁰⁶ So, the article 21(1) TFUE provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect. Furthermore, the Court's case-law makes clear that every citizen of the Union

These principles are reinforced by the provisions in the European Convention on Human Rights. In particular, article 2 of Protocol No. 1 to the Convention provides as follows «no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions».

The Italian Government establishes, first with the Law no. 127/1997, then with Law no. 264/1999, the *numerus clausus* to obtain access to public or private university courses in certain areas such as dentistry and medicine¹⁰⁷, on the basis of two criteria: the capacity and resource potential of universities and society's need for a particular profession¹⁰⁸.

may rely both on article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situation falling within the scope *ratione materiae* of European Union law, both of the freedom conferred by Article 21 TFEU to move and reside within the territory of the member States. See, to that effect, Case C-148/02 Garca Avello [2003] ECR I-11613, paragraph 24; Case C-209/03 Bidar [2005] ECR I-2119, paragraphs 32 and 33; Case C-158/07 Foister [2008] ECR I-8507. Paragraphs 36 and 37. See, e.g., S. GARBEN, *The Bologna Process: from a European Law perspective*, cit., 191, who remembers «As the ECJ stated in 1974, in its landmark Casagrande judgment: 'although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training'. Considering the close ties between higher education and the labour market, it is not surprising that internal market legislation can indeed also deal with educational matters. Especially the free movement of persons, which is one of the fundamental pillars underpinning the internal market, is interrelated with educational matters».

¹⁰⁷ I chose to focus my attention only on those academic courses for two main reasons: the first one connected to the need to circumscribe the research field of the present paper; the second one is referred to the relevant number of applications made by students every year for the access to those specific courses.

¹⁰⁸ See the famous case-law of the *European Court of Human Rights* (Second Section) judgment of 2 April 2013 – *applications nos. 25851/09, 29284/09 and 64090/09 - Tarantino and Others v. Italy*, in which the Court explains that the first criterion is justified by the respondent Government on the basis of the need to ensure high quality standards in university education and a high degree of professionalism in medical and dentistry classes, namely guaranteeing a balanced ratio of students-academic staff, rational use of the available material resources and

So, to be admitted, candidates are required to pass a multiple-choice examination consisting of questions on general culture (including international geography and history), biology, chemistry, mathematics and physics.

The exam has aimed to test the candidates' aptitude for the subject matter pertaining to the faculty of their choice.

In this matter, a particular problem concerns the transfer of foreign students in Italian universities: according to Italian regulations regarding access to university studies, regardless of whether attended the first year (or the following one) in foreign university, foreign students have to pass an admission test if they want to study in Italy.

Now, the fundamental question is: have the universities the power-and duty to accommodate transfer requests from foreign students who, without being submitted to admission degree or without being placed in good position to gain access to the medical and surgical treatment of the degree programs, have called for enrollment to subsequent years at Italian universities, with the recognition of periods of study undertaken in a foreign university?

Universities do not have built-in mechanism for the recognition of periods of study undertaken in the foreign universities.

controlled access to trainee posts at public hospitals and subsequently to the labour market. Instead, the second criterion is justified by the respondent Government as corresponding to the purpose of avoiding excessive public expenditure at present and in the future, since teaching and training medical doctors and dentists implies significant expenditure for the present generation and any future saturation of the labour market would imply further expenditure, given the social charges associated with unemployment. But, in the opinion of the Court, the criteria established by the respondent Government for the *numerus clausus* system have proved groundless and even arbitrary. Institutional autonomy is a necessary condition for the individual freedom to provide for higher education and the individual right to higher education, so «the interference with the applicant's right to education is disproportionate, and Article 2 of Protocol No. 1 has been breached».

For many years, the domestic courts have stated that a *numerus clausus* and the way in which is applied in the Italian legal framework are in accordance with both the Constitutional and European Union legislation. In particular, the European directives provide for the recognition of titles and degrees based on minimum standards of studies and guarantees of a real possession of the necessary knowledge to carry out a profession. However, the European directives leave to individual State of determine the instruments, means and methods to fulfil the obligations set those directives¹⁰⁹.

So, the Italian Universities have the power not to accommodate transfer requests from foreign students who don't have to pass an admission test¹¹⁰.

According to the judges, the opposite solution, namely the acceptance of the transfer requests in the absence of passing the admission test, would result in a real circumvention of the access mechanism.

¹⁰⁹See, *ex pluribus*, TAR Abruzzo, Pescara, Sez. I, 20 January 2014, n. 48; TAR Molise, Campobasso, Sez. I, 31 January 2014, n. 62; TAR Campania, Napoli, Sez. VIII, 23 April 2014, n. 2279; TAR Emilia Romagna, Bologna, Sez. I, 17 September 2014, n. 881; Cons. Stato, Sez. VI, 3 march 2014; ID., 22 April 2014, n. 2028; ID., 30 may 2014, n. 2898; ID., 15 October 2013, n. 5015; ID., 24 may 2013, n. 2866; ID., 10 April 2012, n. 2063. In these case-law the applicants argued that the restriction applicable to admission for the courses of their choice, namely the basis for applying the *numerus clausus*, violated several constitutional rights and principles. They further contended that the existence of a professional exam aiming to assess the adequate preparation of doctors and dentist following their tertiary studies made it not necessary to restrict prior access to university. Moreover, the entrance exam is based on a multiple choice questionnaire and seems therefore only adequate to assess scholastic notions and not the real preparation of the students.

¹¹⁰In this sense, see Law 11 July 2002, No. 148 and Law 30 December 2010, No. 240, on which see, G. DELLA CANANEA-C. FRANCHINI (a cura di), *Concorrenza e merito nelle università. Problemi, prospettive e proposte*, Torino, 2009; A. SANDULLI-M. COCCONI, *Istruzione. Riforma Universitaria*, in *Libro dell'anno del diritto 2012*, in *Enc. It.*, Roma, 2012, 370-375; S. BATTINI, *La nuova governance delle Università*, cit. , 368 ss.

The Supreme Administrative Court, in Plenary session, with the ruling 28 January 2015 No. 1, has stated that the entrance exam applies to the access a first year course and not also in the case of questions of access from the foreign students to years after the first one: in these cases the regulating principle is represented entirely by the comparison of the examinations and by the recognition of the formative credits¹¹¹.

So, referring to the European Court's case-law, the ruling claims that the Member States are free to opt for an education system based on free access-without restriction on the number of students who may register-or for a system based on controlled access in which the students are selected but, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States.

The European union guarantees the recognition only of the academic and professional degrees and not also of the procedures of admission, that not result harmonized.

So, the possession of the requisite of admission to an European university shall not give automatically entitlement to the transfer of the student in any other university of European union.

But a system based on controlled access in which the foreign students are selected, through an admission degree, also in the case of questions of access to years of course

¹¹¹Cons. Stato, Ad. Plen, 28 January 2015, n. 1, in *Foro it.*, 9, 2015, 446 ss. See, too, Cons. Stato, Sez. VI, 19 February 2016, n. 678; TAR Lazio, Roma, Sez. III bis, 23 February 2016, n. 2468; TAR Lombardia, Milano, Sez. III, 23 march 2016, n. 563; TAR Lazio, Roma, Sez. III bis, 10 May 2016, n. 5553; CGARS, 26 September 2016, n. 328. For a comment, see A. CARDI, *L'autonomia universitaria tra tradizione e modernità: a proposito di due recenti pronunce del Consiglio di Stato*, in *Rass. Avv. Stato*, 2015, 4, 1-37. On the same theme, see R. CIFARELLI, *Accesso all'università e numero programmato tra ordinamento italiano, comunitario e cedu: spunti di riflessione*, in *Giur. Merito*, 2013, 1, 190 ss.; A. GANDINO, *La questione del "numero chiuso universitario": il punto di vista del giudice amministrativo*, in *Foro amm.-Tar*, 2005, 6, 2072 ss.

following the first one, is in contrast with the provisions on the freedom to move and with the principles of the Lisbon Convention.

This convention imposes the duty of the Universities to provide, in the exercise of their own regulation autonomy, the recognition of periods of study undertaken in other States members through a didactic comparison of foreign courses with those national, and the evaluation of the formative run already followed by the student.

Despite the pronouncement of the Italian Court, it appears evident that the regulation of the matter will be put to the discretionary of the single universities.

In conclusion it is very important to maintain a good level of education, and preserve its own identity, but if we want to build an European identity, we must avoid attitudes of self-reference, defensive barriers, protectionist policies.

They are all factors that are likely to lead to a division of the unit, rather than a cohesion of diversity.

5. CONCLUSIVE REMARKS

The University as a place of graduate education and disinterested research motivated by pure curiosity can be a society, the home of innovative ideas and democratic values that matter to culture, economy, technology and global wellness flourishing. This new perspective ask national legislators and European policymakers to modify their current point of view.

The higher education system has experienced a transformation from elite to mass form. The massification of higher education has provided more and more access to colleges and universities, and subsequently produced a growing number of graduates and asked for a

robust organizational structure. This structure and the regulation for its functioning are often the most evident element of cohesion, the one creating the sense of belonging to a single community but can have different impact and content regarding the specific community. Therefore the autonomy issues of University become even more central. Universities can express and gather very different interests which need to be extraneous to market logic and competition policies.

The different interest of the group members, of the University society as a whole, are not just competitive goals to be achieved. For the previous illustrated reasons, it is to deplore the growing dominance of economic justifications for universities: looking at University as a society change the perspective and European institutions, especially European Research Council, need to look in this different direction.

Furthermore, the comprehension of the relevance of educating youths to internationalism needs new nourishment, as, through mobility program such as the Erasmus, students can really become better citizens of single Nations, Europe and the whole world. It is very important, though, maintaining a good level of education, and preserving national identity. This could be done just avoiding attitudes of self-reference, defensive barriers, protectionist policies, which means improving an authentic collaboration and exchange in the European research area.