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EU MIGRATION POLICY AND ITS CONSTITUTIONAL RATIONALE: A COSMOPOLITAN OUTLOOK

DANIEL THYM*

1. Introduction

There is much confusion among EU experts about the legal status of third-country nationals. This is hardly surprising, since this uncertainty reflects conceptual tensions at the heart of the European project. For half a century, European integration has been defined by the abolition of borders. Throughout Europe, borders have been erased both legally under the fundamental freedoms and physically through the creation of the Schengen area. Against this background it was no far-fetched assumption that the European Union would grant workers from Ukraine or spouses from Algeria similar rights to EU citizens living in another Member State. Yet, Europe's mission of promoting transnational freedom is not replicated in the Area of Freedom, Security and Justice. Instead of dismantling borders, EU activities re-confirm the relevance of borders towards third States – both physically through external border controls and legally under the emerging EU immigration and asylum *acquis*. This article identifies underlying motives and resolves the puzzle by proposing a positive constitutional rationale for the substantive rules of European migration policy.

Debates about the orientation of EU migration law permeate the legislative process, academic contributions and court decisions. Many controversial ECJ judgments, including *Ruiz Zambrano* and follow-up cases, concern the status of third-country nationals.[1] Academic commentators struggle to identify an appropriate legal concept for third-country nationals in the light of an ever-growing collection of EU legislation.[2] The present article responds to this

* Professor of Public, European and International Law and Co-Director of the Research Centre Immigration & Asylum Law at the University of Konstanz; I am grateful to the anonymous referees for most helpful comments on an earlier version.

1. Cf. Case C-34/09, *Ruiz Zambrano* v. *ONEm*, judgment of 8 March 2011, nyr and section 2.2.2. *infra*.

2. See e.g. Barbou des Places, "Droit communautaire de la liberté de circulation et droit des migrations" in *L'Union européenne*, *Mélanges en l'honneur de Philippe Manin* (Pedone, 2010), pp. 341–356; Morano-Foadi and Andreadakis, "The convergence of the European legal system in the treatment of third country nationals in Europe", 22 EJIL (2011), 1071–1088. Groß and Tryjanowski, "Der Status von Drittstaatsangehörigen im Migrationsrecht der EU", 48 *Der Staat* (2009), 259–277.

uncertainty with a proposal for how to rationalize migration law as a policy field in its own right with distinct rules and objectives. It takes seriously two major reforms brought about by the Lisbon Treaty: the emancipation of migration within the Area of Freedom, Security and Justice; and the binding character of the Charter of Fundamental Rights. Both changes help us to identify the constitutional rationale of EU rules governing the entry and stay of third-country nationals.

Our focus on the constitutional dimension of EU migration law has tangible advantages. Instead of concentrating on the specificities of individual directives, which often raise formidable dogmatic questions of great practical importance,[3] the constitutional analysis identifies overarching themes. Such generalized conclusions eschew insulated legal discourses among experts of specific policy fields and allow us, instead, to relate migration law to broader debates.[4] In particular, the constitutional perspective facilitates interdisciplinary dialogue, which links constitutional rules and principles to findings of political theory on the basis of what may be described as "doctrinal constructivism."[5] Such linkage between theoretical considerations and specialized issues of migration law through the prism of constitutional analysis is particularly relevant at a time when globalization raises profound conceptual questions about the adequate treatment of non-citizens.[6] We shall see that EU primary law represents a noteworthy accommodation of countervailing political and theoretical arguments.

Any attempt to identify the constitutional rationale of EU migration law must consider the free movement of EU citizens, which serves as a powerful paradigm for European rules on cross-border movements (section 2). From the perspective of the EU Treaty, the status of third-country nationals is nevertheless subject to distinct rules which have undergone profound changes during the past 20 years and establish migration law as a policy field in its own right (section 3). Europe's constitutional regime for migration law reflects current debates in constitutional and political theory about normative foundations of international migration. On this basis, we may positively describe the "cosmopolitan outlook" of EU migration law, which rejects the

3. Most literature concentrates on the detail of legislative interpretation; see e.g. Peers, *EU Justice and Home Affairs Law*, 3rd ed. (OUP, 2011) and Hailbronner (Ed.), *EU Immigration and Asylum Law. Commentary* (C.H. Beck/Hart, 2010).

4. See Koskenniemi, "The fate of public international law", 70 MLR (2007), 1, at 4–9.

5. von Bogdandy, "Founding principles of EU law: A theoretical and doctrinal sketch", 16 ELJ (2010), 95 at 98–100.

6. For political theory read Benhabib, *The Rights of Others* (Cambridge University Press, 2004) and for the US debate see Bosniak, *The Citizen and the Alien* (Princeton University Press, 2006).

traditional notion of unfettered sovereign State control, without mandating open borders (section 4).

2. A powerful paradigm: Intra-European mobility

Legal transformations in the European Union are often characterized by gradual shifts, with new policies complementing pre-existing regimes. Like in geology, earlier layers influence the outline and orientation of new sedimentation.[7] In our case, such impact of earlier policies about the free movement of workers on new initiatives about migration is particularly likely, since transnational mobility defines the single market and constitutes a backbone of the Union's constitutional identity. Why should these rules not serve as a model for migration law towards third-country nationals? One recurring theme in debates on our topic concerns this function of intra-European free movement as a model for migration (section 2.1). Moreover, the ECJ indicated that it might move in this direction in situations of overlap between citizenship rights and third-country nationals – although recent judgments demonstrate a notable willingness to take into account the constitutional specificity of migration law (section 2.2).

2.1. *Free movement of EU citizens*

The basic tenets of intra-European mobility are well known to all experts in European law: economically active EU citizens and those with sufficient resources may move and reside freely within the territory of the Member States. Since the EU legislature and the ECJ have consistently supported a generous reading of free movement rights, they effectively reject the traditional statist claim to public migration control. Union citizens decide autonomously whether they relocate their home across national borders. It's the preference of the individual, not public policy objectives, which primarily guides the mobility of Union citizens within the single market.

As a result of this orientation towards the individual, EU citizens are exempted from two core features of contemporary migration law towards third-country nationals. Firstly, Member States cannot restrict labour market access for low-skilled workers or part-time employment, once transitional periods for new Member States have elapsed.[8] Secondly, language tests and

7. Cf. Curtin, *Executive Power of the European Union: Law Practices and the Living Constitution* (OUP, 2009), p. 9.

8. See O'Leary, "Free movement of persons and services" in Craig and de Búrca (Ed.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), p. 499, at 528–533.

similar requirements for linguistic and/or cultural integration, which have been introduced by various Member States for third-country nationals in recent years, cannot be extended to EU citizens covered by free movement rules in regular circumstances.[9] In some ways, EU law even promotes the preservation of the language and culture of the country of origin.[10] A Portuguese couple may spend their life in Marseilles without speaking a single word of French – mirroring the Union's commitment to linguistic and cultural diversity.[11] In short: intra-European mobility is treated similarly to a Scotsman moving to London. EU law assumes that the social integration of citizens should be left to individual choices.

Given that the free movement regime had been in existence for decades when the EU acquired a broad legislative competence for third-country nationals during the 1990s, many commentators called upon the latter to orient itself towards the former. Experts on immigration and asylum, in particular, contended that the EU legislature and/or the ECJ should approximate legal rules governing intra- and extra-European migration.[12] This convergence hypothesis was facilitated by national immigration laws that often consider intra- and extra-European migration as complementary categories.[13] In 1999, heads of State or government lent their political support at the Tampere European Council: "The legal status of third country nationals should be approximated to that of Member States' nationals."[14] This statement, which was primarily concerned with long-term residents,[15] is regularly cited as a

9. Since Art. 6, 7, 16 Directive 2004/38/EC (O.J. 2004, L 158/77) do not make residence conditional upon language skills, such tests are prohibited *de lege lata* and the ECJ would probably qualify an amendment introducing such requirements as a violation of Art. 21, 45, 49, 56 TFEU; whether case law on the equal treatment of jobseekers and students may allow basic language skills or the obligation to attend language classes under the "real link", (see Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze*, [2009] ECR I-4585) or "certain degree of integration" criteria (Case C-209/03, *Bidar*, [2005] ECR I-2119) is another matter.

10. On access to satellite TV, Case C-17/00, *De Coster*, [2001] ECR I-9445 and, more generally, Kadelbach, "Union Citizenship" in von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law*, 2nd ed. (Hart, 2009), p. 435, at 454.

11. Cf. Art. 3(3)(3), 4(2), 55 TEU; Art. 165(1), 167(1) and (4) TFEU; and Art. 41(4) CFR.

12. See e.g. Groenendijk and Guild, "Converging criteria", 3 *European Journal Migration and Law (*EJML) (2001), 37, at 39; Kostakopoulou et al., "Doing and deserving" in Guild et al. (Eds.), *Illiberal Liberal States* (Ashgate, 2009), pp. 167–189; and Peers, "Aliens, workers, citizens or humans?" in Guild and Harlow (Eds.), *Implementing Amsterdam* (Hart, 2001), pp. 291–308.

13. Many (text-)books deal with both EU citizens and third-country nationals; Cf. Boeles et al., *European Migration Law* (Intersentia, 2009) or Guild, *The Legal Elements of European Identity* (Kluwer Law International, 2004).

14. Tampere European Council of 15/16 Oct. 1999, Presidency Conclusions, para 21. Bull. of the European Union No. 10/1999.

15. Ibid. para 21 concerned long-term residents only; statements on first admission and illegal migration (paras. 20, 22–27) are much less enthusiastic.

standard when legislation on migration diverges from the single market paradigm.[16] With the exception mainly of long-term residents, there are in fact plenty of examples where rules on third-country nationals differ markedly from citizens' rights.

2.2. *Overlap, approximation and distinction*

It has been shown that the path-dependency of European integration supported the impression that free movement would serve as a model for third-country nationals. Indeed, there are indications of a regulatory "domino effect" with the intra-European regime influencing the migration statuses of third-country nationals. Notwithstanding such tendency towards approximation, closer inspection supports a cautious reading. This will be illustrated with reference to the two most prominent situations of overlap: third-country nationals who are covered by association agreements and family members of EU citizens.

2.2.1. *Association agreements*

The European Union has concluded many association agreements. Most prominently, there is extensive case law on the 1963 EEC-Turkey Association Agreement and corresponding implementing decisions with regard to which the Court assumes, in general terms, that they shall be interpreted in analogy to EU free movement rules "so far as is possible."[17] In a series of judgments, the Court refined this assumption and approximated the legal status of Turkish nationals and Union citizens (with great practical ramifications in countries such as Germany or the Netherlands, where a substantial number of third-country nationals are Turkish nationals).[18] We should be careful, however, not to generalize this approach. The 1963 Ankara Agreement states explicitly: "The Contracting Parties agree to be guided by [Art. 45–47 TFEU] for the purpose of progressively securing freedom of movement for workers between them."[19] In addition, the preamble underlines that the agreement is meant to "facilitate the accession of Turkey" and it even takes up the famous objective of "ever closer bonds [not: union]."[20] In the case of Turkish workers,

16. See e.g. Cholewinski, "Family reunification and conditions placed on family members", 4 EJML (2002), 271–290.

17. Case C-434/93, *Bozkurt* v. *Staatssecretaris van Justitie*, [1995] ECR I-1475, para 20.

18. For an overview, see Tezcan-Idriz, "Free movement of persons between Turkey and the EU", 46 CML Rev. (2009), 1621, at 1625–1664.

19. Art. 12 Agreement Establishing an Association between the European Economic Community and Turkey of 12 Sept. 1963 (O.J. 1977, L 361/1).

20. Ibid. recitals 1 & 4 of the preamble.

the wording and objective of the agreement therefore support the Court's position.[21] In short: the approximation of legal statuses is supported by dogmatic considerations.

In comparison to the Turkish example, association agreements with other third States – with the exception of the EEA countries and Switzerland[22] – contain much less enthusiastic language and have gained much less practical relevance.[23] One reason for the diminishing impact of later agreements was generous ECJ case law, which motivated some Member States to insist upon carefully drafted provisions in future agreements specifying in detail the degree to which free movement was (not) granted.[24] This illustrates a more general point: the content and reach of association agreements is subject to political compromises between the contracting parties, which, in future, may leave less leeway to the Court. Considering rules on migration in recent agreements arguably exposes a change of direction in the EU's negotiation strategy. Instead of orientating at the internal market with its mobility paradigm, the objectives of the Area of Freedom, Security and Justice, discussed later, gain the upper hand.[25] This realignment of association policies reflects the emergence of migration law as a policy field in its own right and may limit instances of overlap with citizens' rights in the future.

2.2.2. *Family members of EU citizens*

Third-country national family members of EU citizens present a crucial situation of overlap between intra- and extra-European migration. Although the Treaties do not mention them explicitly, they have benefited for decades from specific rights in secondary legislation[26] and ECJ case law interpreting primary law privileges of their spouses by means of a legal reflex in the form

21. Remember that the wording and the objective are essential for the interpretation of international treaties in accordance with Art. 31(1) VCLT.

22. For Switzerland, differences persist with regard to economically inactive people and service recipients; cf. Case C-70/09, *Hengartner & Gasser* v. *Landesregierung Vorarlberg,* [2010] ECR I-7233.

23. For the (former) Europe Agreements and the (present) Partnership and Cooperation Agreements with Central and Eastern Europe as well as the Euromed Agreements see Hedemann-Robinson, "An overview of recent legal developments in relation to third country nationals", 38 CML Rev. (2001), 558–581, at 525.

24. Cf. e.g. Arts. 49–58 of the Stabilization and Association Agreement with Serbia, signed on 29 April 2008 (Council doc. 16005/07); members of the German delegation confirmed to this author that careful (and restrictive) drafting was a direct response to ECJ case law on Turkish workers.

25. For migration in "new" association agreements, see Thym, "Towards international migration governance?" in Van Vooren et al. (Eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (OUP, 2013), pp. 293–298, at 289.

26. Cf., in particular, Arts. 10–12 Regulation 1612/68 (O.J. 1968, L 257/1); and Art. 1(1) Directive 64/221/EEC (O.J. 1963/64, p. 117).

of "derived rights."[27] In a series of judgments during the past decade, the ECJ increased the level of protection.[28] Although early cases originated in classic constellations of cross-border movement (*Carpenter, Metock, Ibrahim,* etc.),[29] the Court later went one step further. In one of the most controversial judicial innovations in recent years, Luxembourg reached out to third-country national family members in purely internal situations (*Ruiz Zambrano*, *McCarthy, Dereci*, etc.).[30] They may, in certain circumstances, obtain a derived residence right although neither their spouse nor their children have moved to another Member State.[31] For a moment, it seemed as if the importance of free movement would trump migration policy considerations.

On closer inspection, recent ECJ judgments demonstrate sensitivity. The judges recognize that EU Treaties have more to say on third-country nationals than approximation with citizenship. Parallel discussion of the Citizenship Directive 2004/38/EC and the Family Reunion Directive 2003/86/EC[32] indicates that Luxembourg recognizes an alternative frame of reference: migration law within the Area of Freedom, Security and Justice.[33] With regard to the Turkish association agreement, the Court recognized explicitly that it pursued different objectives than EU citizenship and that, therefore, "the two legal schemes in question cannot be considered equivalent."[34] This conclusion extends, *mutatis mutandi*, to migration law in general. Whereas Union citizenship guides intra-European mobility, migration within the Area of Freedom, Security and Justice is oriented towards a different context. Human rights replace the fundamental freedoms as constitutional points of reference.

27. Case C-256/11, *Dereci* v. *Bundesministerium für Inneres*, judgment of 15 Nov. 2011, nyr, para 55; for a taxonomy of different categories see Barrett, "Family matters", 40 CML Rev. (2003), 369–421.

28. See Spaventa, "From *Gebhard* to *Carpenter*: Towards a (non-)economic European constitution", 41 CML Rev. (2004), 743–773; Epiney, "Von *Akrich* bis *Metock*", 840 EuR (2008), 847–583; and Costello, case note on *Metock*, 46 CML Rev. (2009), 587 at 611–614.

29. See, most prominently, Case C-60/00, *Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279; Case C-127/08, *Metock* v. *Minister of Justice, Equality and Law Reform*, [2008] ECR I-6241; and Case C-310/08, *Ibrahim*, [2010] ECR I-1065.

30. See *Ruiz Zambrano*, cited *supra* note 1; Case C-434/09, *McCarthy,* judgment of 5 May 2011, nyr; *Dereci*, cited *supra* note 27; Case C-40/11, *Iida*, judgment of 8 Nov. 2012; and Joined Cases C-356/11 & C-357/11, *O et al*, judgment of 6 Dec. 2012, nyr.

31. Cf. Thym, "Towards 'real' citizenship?" in Adams et al. (Eds.), *Judging Europe's Judges* (Hart, 2013), sect. II (forthcoming); and Hailbronner and Thym, Case Note on *Ruiz Zambrano*, 48 CML Rev. (2011), 1253–1270.

32. See, in particular, *Dereci*, cited *supra* note 27, paras. 71–72; *Iida*, cited *supra* note 30, paras. 78–81; and *O et al.*, cited *supra* note 30., para 59.

33. Despite calls to the contrary by A.G. Geelhoed in *Metock* cited *supra* note 29, paras. 59–62 and Case C-1/05, *Jia*, [2007] ECR I-1 239, paras. 26–35, the ECJ brushed aside the immigration dimension in *Metock*, ibid., para 66; cf. Costello, cited *supra* note 28, at 602–603.

34. Case C-371/08, *Ziebell* v. *Land-Baden-Württemberg*, judgment of 8 of Dec. 2011, nyr., para 74 concerning expulsion.

In *Dereci*, the Grand Chamber rightly emphasized the significance of human rights for the determination of migration statuses.[35]

None of the above suggests that it will be possible to distinguish ingeniously between citizens' rights and migration law. There will always be grey areas of overlap, in particular for third-country national family members. Moreover, citizens' rights may guide the interpretation of secondary legislation on migration, when similar terminology or dogmatic structure is used (like in the case of the association agreement with Turkey). Such overlap does not replace, however, the quest for the abstract constitutional status of third-country nationals and its underlying rationale.

3. The constitutional status of third-country nationals

For decades, the EU legislature and the ECJ dealt with third-country nationals indirectly only, in particular as family members of EU citizens or those benefiting from privileged treatment under association agreements. In most circumstances, their status appeared as a spin-off or side-effect of citizens' rights. That cannot be the ultimate answer. We should discuss the constitutional status of third-country nationals in abstract terms and consider the underlying rationale. This undertaking is facilitated by changes of the EU Treaties (section 3.1). The reformulation of the provisions governing the Area of Freedom, Security and Justice and the binding force of the Charter of Fundamental Rights establish migration law as a policy field in its own right with distinct rules and objectives (section 3.2). Differences in legal status between Union citizens and third-country nationals can be explained by special motivations reflecting the EU's character as a supranational union in the making (section 3.4).

3.1. *Emancipation of the Treaty regime for migration*

For many years, it was easy to portray Treaty rules on migration as "deficient." The original Schengen Conventions and Maastricht's intergovernmental "Third Pillar" on justice and home affairs were criticized by advocates of the Community method. Their intergovernmental design appeared as the "mal nécessaire"[36] of a political compromise due to Member State reticence

35. See *Dereci*, cited *supra* note 27, paras. 45–58; *Iida*, cited *supra* note 30, paras. 36–65; for earlier references in a similar direction see, by way of example, *Carpenter*, cited *supra* note 29, paras. 41–45.

36. de Witte, "The Pillar Structure and the Nature of the European Union" in Heukels et al. (Eds.), *The European Union after Amsterdam* (Kluwer, 1998), p. 51.

towards supranationalization. When the Treaties of Amsterdam and Nice transferred immigration, asylum and border controls to the "First Pillar", commentators rightly disapproved of a number of caveats which reflected concerns of some Member States; Treaty rules on migration appeared as a "ghetto"[37] within supranational Community law.[38] Over the years, the situation changed step by step. During the past decade, the Treaty of Nice, the expiration of interim rules and the activation of bridging clauses brought migration closer to the Community method and the Treaty regime proved robust enough to sustain a flurry of legislative activity.[39] In the age of the Lisbon Treaty, we may conclude that the former "ghetto" has been gentrified; the Treaty regime on migration is part and parcel of the supranational integration method.[40]

During discussions about Treaty amendments most minds were focused on institutional issues, while questions of policy substance obtained less attention. Considerable changes have nonetheless been agreed upon in the slipstream of the institutional debate. The European Convention, which drafted the Constitutional Treaty, was particularly active and its conclusions on migration retain full relevance, since they found their way into the Lisbon Treaty.[41] Besides the consolidation of Union competences,[42] changes concentrate on the self-sufficiency of migration law. EU activity is no longer presented as spillover of the single market in line with the original assumption that the abolition of border controls necessitated "flanking measures" compensating Member States for the loss of control options at domestic borders, which had characterized justice and home affairs cooperation since the 1980s.[43] Instead, migration law emancipated itself from the single market, defining itself as an integral part of the Area of Freedom, Security and

37. Peers, *EU Justice and Home Affairs Law*, 1st ed. (Longman, 2000), p. 2.

38. For a political science perspective on factors driving supranationalization see Stetter, "Regulating Migration", 7 *Journal of European Public Policy* (2000), 80–102.

39. Cf. Kuijper, "The evolution of the Third Pillar from Maastricht to the European Constitution", 41 CML Rev. (2004), 609–626; and Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff, 2006), pp. 3–102.

40. See Editorial Comment, 47 CML Rev. (2010), 1307 at 1311; for statistical data Peers, "Mission accomplished?", 48 CML Rev. (2011), 661 at 674–681; and for remaining exceptions Hailbronner, op. cit. *supra* note 3, ch. 1 paras. 7–13.

41. Art. 77–80 TFEU correspond to Art. III-265-268 Treaty establishing a Constitution for Europe of 24 Oct. 2004 (O.J. 2004, C 310/1), which never entered into force.

42. Cf. Thym, "Art. 77–80 TFEU" in Grabitz et al. (Ed.), *Das Recht der Europäischen Union. Kommentar* (C.H. Beck, 2010/11).

43. Cf. the original White Paper from the Commission: Completing the Internal Market, COM(85)310 of 14 June 1985, paras. 28, 55; and Case C-378/97, *Wijsenbeek*, [1999] ECR I-6207, para 40.

Justice.[44] In a nutshell: migration law towards third-country nationals has become a policy field in its own right.

3.2. *Rules and objectives for migration policy*

Criticism of the former "Third Pillar" concerned not only the persisting intergovernmentalism. Many immigration and asylum experts anticipated that "normalization" of the institutional regime would entail an approximation of policy substance to the single market paradigm.[45] That expectation was not met however; the Lisbon Treaty does not align migration law concerning third-country nationals and the rules governing the free movement of EU citizens. Rather, Lisbon establishes specific rules (section 3.2.1) and objectives (section 3.2.2) for migration law which define the framework for law-making and adjudication in the years to come. When interpreting these provisions, we should beware of false dichotomies. Acknowledging that migration law deviates from the single market template does not imply that we are building "fortress Europe." There are alternatives to the binary juxtaposition of open borders and unfettered State control, which this article designates as the "cosmopolitan outlook" of European migration law and which is presented in the last section.

3.2.1. *Distinguishing free movement and human rights*

It is widely accepted that the generous interpretation of the fundamental freedoms by the Court of Justice was crucial for the realization of the common market. It empowered EU citizens to challenge restrictive national laws.[46] More specifically with regard to free movement, both the constitutional guarantee at Treaty level[47] and the subsequent introduction of Union citizenship[48] served as doctrinal justifications for the judicial promotion of transnational mobility. Third-country nationals, by contrast, are not covered by the fundamental freedoms (the accusation that this is the result of "revisionist interpretation",[49] since the wording of Article 45 TFEU does not specify the nationality of workers, ignores the historic context of free

44. At a textual level, Art. 67 TFEU defines the Area of Freedom, Security and Justice without reference to the concept of flanking measures (as did Art. 61 lit. a EC-Amsterdam/Nice) and Art. 3(2) TEU identifies its realization as a free-standing objective independent of the single market, mentioned in Art. 3(3) TEU.

45. See the references *supra* in note 12.

46. Cf. Poiares Maduro, *We, the Court* (Hart, 1998).

47. Case 30/77, *Bouchereau*, [1977] ECR 1999, para 33; and Joined Cases C-482 & 493/01, *Orfanopoulos & Olivieri*, [2004] ECR I-5257, para 65.

48. Case C-413/99, *Baumbast & R*, [2002] ECR I-7091, paras. 81–82.

49. Guild and Peers, "Out of the Ghetto?" in Peers and Rogers (Eds.), *EU Immigration and Asylum Law. Text and Commentary* (Martinus Nijhoff, 2006), p. 81 at 114.

movement rules[50]). Correspondingly, the Court recognizes that third-country national family members benefit from the fundamental freedoms by means of a legal reflex as "derived rights."[51] Up to the present day, third-country nationals are not covered by the fundamental freedoms.

Exclusion from the free movement regime does not imply, however, that third-country nationals have no constitutional assurances on their side. On the contrary: they may invoke human rights, including the Charter of Fundamental Rights. In the field of migration, human rights establish an autonomous level of protection which may deviate from the free movement regime. As a general rule, human rights do not grant a right to enter third States. Only refugees may invoke Article 3 ECHR in order to have their asylum claims examined domestically (i.e. Member States must authorize entry to their territory).[52] Other human rights, including the right to family life, do "not create . . . an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification."[53] The degree of protection varies, but a common thread is noticeable: human rights do not guarantee transnational mobility in the same vein as the fundamental freedoms. In contrast to Union citizenship, migration law towards third-country nationals is not based upon individual rights to cross-border movement with constitutional status.[54]

It is important to underline that this initial conclusion is confirmed by the Charter of Fundamental Rights, which, generally, takes pride in presenting itself as an *avant garde* catalogue reflecting "changes in society, social progress and scientific and technological developments."[55] When it comes to migration, the Charter principally reaffirms existing rules under EU law and the ECHR. In other words, it emphasizes the privileged position of Union citizens and sanctions a lesser degree of constitutional protection for

50. During Treaty negotiations, the debate was whether (or to what extent) free movement should be established for citizens at all; no delegation wanted open borders for third-country nationals; clear language on nationality became the "victim" of Franco-Italian disputes about Algeria and German concerns about East Germans; see Goedings, *Labour Migration in an Integrating Europe* (SDU Uitgevers, 2005), pp. 128–135.

51. See *supra* section 2.2.2.

52. On effective remedies under Art. 13 ECHR, which, for practical reasons, require access to the mainland, see ECtHR, *Hirsi Jamaa et al.* v. *Italy*, Appl. No. 27765/09, judgment of 23 Feb. 2012 (GC), paras. 198–200; international refugee law is more ambiguous, cf. Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed. (OUP, 2007), pp. 206–208.

53. Case C-540/03, *Parliament* v. *Council*, [2006] ECR I-5769, para 59 in line with established ECtHR case law.

54. For a similar argument see Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International, 2000), pp. 87–89.

55. Recital 4 of the Charter and, by way of illustration, the prohibition of reproductive cloning (Art. 3(2)(d)) or equal treatment of gays and lesbians (Art. 21(1)).

third-country nationals. Article 15(2) of the Charter illustrates the point: "Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State."[56] This confirmation of the citizens' right to free movement is followed by a third paragraph on non-citizens: "Nationals of third countries *who are authorized to work* in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union' (Art. 15(3); emphasis added).

This sounds liberal, but the substance is meagre: whereas EU citizens possess an individual right with constitutional status to seek employment abroad, third-country national workers benefit from equal working conditions only. This is undoubtedly well-intentioned, but undisputed politically (at least in today's Europe[57]). It should in particular not hide the absence of a prior right to take up employment without State authorization. In contrast to EU citizens, Article 15(3) of the Charter does not establish a human right of third-country nationals to be admitted to the Member States' labour market. First admission of workers remains a public prerogative with few human rights limitations.[58] In a similar vein, the Charter distinguishes between the mobility of economically inactive EU citizens (Art. 45(1) CFR) and third-country nationals. In contrast to citizens' rights, the intra-European migration of a Russian national who resides in Germany and wants to move to France "may be granted in accordance with the Treaties" (Art. 45(2) TFEU).[59] Again, the Charter does not establish, for third-country nationals, a right to enter EU Member States as a matter of Treaty law.

Acknowledging the disparity between human rights and the fundamental freedoms sets the stage for the recognition of migrants' constitutional status. Human rights may, conceptually and in substance, stay short of citizenship; nevertheless they reject traditional notions of alienage without the protection of the law. Among international instruments, the ECHR plays a crucial role, since Strasbourg spearheaded the expansion of migrants' rights over past decades.[60] EU law builds upon these achievements. The Charter shall be

56. Art. 52(2) and (7) CFR and the official Explanations (O.J. 2007, C 303/17), p. 23 confirm that this right is to be interpreted in line with Art. 45, 49, 56 TFEU.

57. In the Gulf countries, for example, equal working conditions for non-citizens are not always guaranteed; Arts. 6, 13 Directive 2009/52/EC (O.J. 2009, L 168/24) are meant to render the rights of illegal workers more effective.

58. Cf. also the 1990 UN Migrant Worker Convention, which does *not* grant access to employment (and which has not been signed by any EU Member State).

59. As a "principle", Art. 45(2) CFR can be relied upon only indirectly, once legislation has specified conditions and limits of free movement; cf. Art. 52(5) CFR.

60. Cf. Boeles et al., op. cit. *supra* note 13, pp. 144–170, 291–314.

interpreted in line with ECtHR case law,[61] thereby strengthening its domestic legal authority.[62] Furthermore, the Charter supplements the Convention with novel guarantees which buttress the status of migrants. Innovations, whose potential is just being discovered, include social rights and principles[63] or rights of the child.[64] These novelties emphasize the autonomy of the Charter – even if it does not usually bring about a human right to enter EU territory analogous to citizens' rights.

It does not diminish the significance of the Charter to recognize that, in contrast to EU citizenship, the legislature benefits from principled discretion whether third-country nationals may enter EU territory. Human rights limit the legislature's discretion without eliminating it in ordinary circumstances. It has been indicated above that the degree of constitutional control varies: from strict standards for asylum seekers and refugees; to certain limits for family reunion; to enhanced protection against expulsion; to widespread legislative autonomy for economic migrants. This diversity of human rights constraints for different categories of migrants is the pivotal difference between the single market and migration policy. Whereas the former is defined by citizens' rights to cross-border movement, the latter embraces legislative discretion. The legislature may opt for a generous migration regime, but it is not obliged to do so. Primary law does not mandate open borders; decisions are taken in the legislative process.

3.2.2. *Objective: Migration governance*

If it is correct that human rights leave the legislature more leeway than Union citizenship, it is important to identify the objectives which the legislature should pursue. For our purposes, Article 79(1) TFEU states paradigmatically: "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows." The Treaty's choice of terminology is not beyond doubt, since the term "management" can be (mis-)understood to signal a depoliticized treatment of human beings akin to objects; a sort of modern "biopower" in a Foucaultian sense.[65] Instead, this contribution opts for the neutral term "migration governance" in order to emphasize that the management perspective of State authorities must be accommodated with legitimate interests of migrants in line with the Charter of

61. See Art. 52(3) CFR.

62. As integral part of EU law, the Charter benefits from direct and supreme effect also in States where international treaties, including the ECHR, have a lower status; cf. Case C-617/10, *Åkerberg Fransson*, judgment of 26 Feb. 2013, nyr, paras. 44–45.

63. For Art. 34 CFR see Case C-571/10, *Kamberaj*, judgment of 24 April 2012, nyr, para 92.

64. See Art. 24 CFR; and A.G. Cruz Villalón, Case C-648/11, *MA et al.*, paras. 70–73.

65. See also Cholewinski, "The Criminalization of Migration in EU Law and Policy" in Toner et al. (Eds.), *Whose Freedom, Security and Justice?* (Hart, 2007), pp. 301–336.

Fundamental Rights and the call for a policy "which is fair towards third-country nationals" (Art. 67(2) TFEU).[66]

The Treaty objective of migration governance implies that public authorities should have the capacity to design and implement migration policies which matter. In Europe, the cross-border movement of people is not meant to occur "outside the law" – like in the US – but rather, as far as possible, under the control of public authorities.[67] Of course, this objective remains counter-factual; authorities cannot be in full control and unauthorized migration is widespread also in Europe.[68] But the EU Treaty contends that public authorities should play an active role, reflecting the political desire to "proactively" shape cross-border movements instead of reacting "passively" to external events.[69] One may, indeed, describe Western European migration policies as a sequence of State failures to achieve the declared policy objective.[70] The Treaty commitment to "migration management" responds to this perception of failure. For this reason, the European Council first formulated the management objective in 1999,[71] which later found its way into the Lisbon Treaty without much debate.[72]

It should be emphasized that the Treaty objective of migration governance does not imply a specific policy design – although its emergence coincided with the proliferation of restrictive policies at EU level, which has been described (and criticized) as "securitization."[73] Yet, this parallelism between

66. This objective was introduced to counter the impression that the EU was heading towards "fortress Europe"; cf. Ladenburger and Verwilghen, "Policies relating to the Area of Freedom, Security and Justice" in Amato et al. (Eds.), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), p. 743 at 761.

67. In contrast to most European countries, the US engaged in effective external border controls only recently (which partly explains the prevalence of illegal immigration in the U.S.); see Castles, "The factors that make and unmake migration policies", 38 *International Migration Review* (2004), 852 at 855–856.

68. See Carlier, "Quelles Europes et quel(s) droit(s) pour quels migrants irréguliers?" in Leclerc (Ed.), *Europe(s), droit(s) et migrants irréguliers* (Bruylant, 2012), pp. XIII-XXVI.

69. Similar management objectives are laid down, *inter alia*, in Art. 2bis of the 2009 Spanish Immigration Law and Sect. 1(1) of the 2004 German Residence Act.

70. For domestic and external reasons, many guest workers settled; "zero immigration" policies did not stop family reunification; and asylum procedures functioned as *de facto* immigration policies (moreover, illegal immigration persists); see Hollifield, "The Emerging Migration State", 38 *International Migration Review* (2006), 885, 894–899.

71. The introductory sentence of Art. 79(1) TFEU takes up the wording of the European Council in Tampere, cited *supra* note 14, para 22.

72. The European Convention had no discussion on Art. III-267(1) Constitutional Treaty, cited *supra* note 41, which was first proposed by the Presidium in Convention doc. CONV 614/03 of 14 March 2003, p. 13 on the basis of the Final Report of Working Group X, doc. CONV 426/02, p. 5 which had considered Art. 63 EC-Nice to be sufficient in principle.

73. Cf. Guiraudon, "European integration and migration policy", 38 JCMS (2000), 251–271.

Treaty language and restrictive policy substance is no foregone conclusion. The governance paradigm strives for regulatory leverage, not for closed borders. It may similarly sustain liberal migration policies. That is confirmed by the assertion, in Article 79(1) TFEU, that third-country nationals shall receive "fair treatment" (*traitement équitable*), which introduces normative considerations of global justice into the legislative process and calls upon the legislature to consider the migrants' perspective.[74] What precisely "fair" means beyond human rights requirements cannot normally be deduced from the Treaty. It requires political decisions about secondary legislation which establish individual rights beyond the threshold of human rights requirements and international refugee law.[75] In contrast to Union citizenship, primary law does not dictate the policy outcome.

3.3. *Explaining the originality of Union citizenship*

From a sociological perspective, migrant Union citizens and third-country nationals are in comparable situations: they live in a country of which they do not possess nationality.[76] For this reason, the divergence between the constitutional regimes for Union citizens and third-country nationals calls for an explanation. Is the distinction arbitrary? This article argues that to answer this question in the affirmative fails to take account of the motivation underlying free movement for EU citizens. Differences in legal status can be explained by a distinctive impetus which, in the case of EU citizenship, reflects the EU's character as a supranational union in the making. By contrast, Treaty rules on migration for third-country nationals are defined by their "cosmopolitan outlook", which will be described hereafter.

In Europe, economic integration has always been an instrument and symbol for political integration – or, in the words of the Schuman declaration: "a first and tangible building-block for a European federation."[77] This normative surplus of the Treaty regime became evident in the 1960s, when the EU

74. While Art. 79(1) TFEU limits fair treatment to those "residing legally", Art. 67(2) TFEU, discussed *supra* note 66, embraces illegal residents in line with established ECtHR case law that Art. 8 ECHR extends to those staying illegally; cf. Thym, "Residence as *de facto* Citizenship?" in Rubio-Marín (Ed.), *Human Rights and Immigration* (OUP, 2013), in print.

75. See *infra* section 4.1; Art. 78(1) TFEU calls upon the legislature to adopt asylum directives that go beyond the minimum threshold of refugee law and the ECHR.

76. Generally speaking, cross-border effects trigger the application of the fundamental freedoms as well as Art. 3(1) Directive 2004/38/EC, cited *supra* note 9.

77. Schuman Declaration of 9 May 1950 (own translation); the citizenship component of earlier designs for a federal Europe during and after WW II is traced by Rabenschlag, *Leitbilder der Unionsbürgerschaft* (Nomos, 2009), pp. 28–43.

legislature opted for generous implementing legislation[78] which furnished the ECJ with a fit occasion to reinforce the rights of migrant EU workers.[79] In the 1970s, non-economic aspirations took centre stage in the debate about a passport union and special rights for EU citizens, including direct elections to the European Parliament.[80] These discussions provided the bedrock for the formal introduction of "Union citizenship" with the Maastricht Treaty, which links free movement with the project of a people's Europe. From today's perspective, the EU Treaties conceptualizes free movement among a wider set of "citizens" rights.[81] Free movement reflects and symbolizes, to this date, the historical motivation "to lay the foundations for an ever closer union among the peoples of Europe."[82]

Indeed, studies of comparative federalism reveal a remarkable parallelism between the legal dimension of EU citizenship and the federal experience in the US, Switzerland and Germany.[83] Political calls for an extension of citizens' rights in the EU can be conceptualized as building blocks for a federal Europe – a motivation which the Lisbon Treaty takes up by reinforcing political participation.[84] Union citizenship, of which free movement is an integral part, does not intend to harmonize immigration laws; it rather imitates classic State concepts. That is not to say, crucially, that the EU Treaty successfully creates real-life citizenship based on shared feelings of mutual belonging. On the contrary, most social scientists agree that the legal construction of Union citizenship does not coincide with the social construction of European identity.[85] This does not, however, unmake the pro-integrationist intentions underlying the introduction and interpretation of citizens' rights by the EU legislature and the ECJ.[86] Legally, EU citizenship

78. See on the implementing phase Goedings, cited *supra* note 50, ch. 3–5 (original Treaty negotiations had been characterized by technical discussions and national interests).

79. On early case law see Evans, "European citizenship", 45 MLR (1982), 497, 502–510.

80. For an overview see Wiener, *Building Institutions. The Developing Practice of European Citizenship* (Westview Press, 1998), ch. 2; and Magnette, *La Citoyenneté Européenne* (Université libre de Bruxelles, 1999), ch. 4.

81. Read the official heading of Title V of the Charter, Art. 45 Charter, and Art. 20(2) TFEU.

82. Recital 1 of the Preamble of the TFEU; also Kadelbach, op. cit. *supra* note 10, pp. 614–615.

83. For instructive reading see Schönberger, *Unionsbürger* (Mohr Siebeck, 2005).

84. See Art. 10(1) and 11 TFEU; for further reflection, see Nic Shuibhne, "The resilience of EU market citizenship", 47 CML Rev. (2010), 1597 at 1619–1627; and Shaw, "Citizenship" in Craig and de Búrca, op. cit. *supra* note 8, p. 575 at 605–608.

85. Cf. Delanty, "European citizenship: A critical assessment", 11 *Citizenship Studies* (2007), 63–72; and Přibáň, "The juridification of identity, its limitations and the search of EU democratic politics", 16 *Constellations* (2009), 44–58.

86. For a general statement, see Weiler, "Deciphering the political and legal DNA of European integration" in Dickson and Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law* (OUP, 2012), p. 137 at 144–148.

aims for federal structures, ignoring the social substratum. In this respect, EU citizenship establishes a seemingly virtual, legal reality.

What lessons can be learned for our topic? Union citizenship has always been more than the sum of its legal-dogmatic parts. It aspires – with limited success – to foster the process of European integration. This is what the Court may be trying to tell us when it invokes the "fundamental status" which Union citizenship "is destined to be" (*a vocation à être*).[87] To be sure, such generalized analysis conceals nuances and refinements of the Court's position, which often responds to criticism and is aware of wider constitutional implications.[88] Similarly, this article does not claim that the judicial expansion of Union citizenship lacks doctrinal justification.[89] All I say is that the Court's case law takes up and strengthens the target-oriented rationale of both the Treaty regime and implementing legislation on citizens' rights, which are meant to sustain the integration process. Their normative surplus explains the originality of EU free movement rules and cannot be extended to non-citizens without modification. With regard to third-country nationals, EU primary law pursues different objectives.

4. The "cosmopolitan outlook" of migration law and policy

Debates on European migration policy are easily trapped in false dichotomies, which replicate conventional wisdom of the era of sovereign statehood. At the time, one was either a citizen with equal rights or an alien without the full protection of the law.[90] This point of view resonates with criticism of "fortress Europe" which emphasizes restrictive elements of the EU's migration policy. From this perspective, our earlier analysis could easily be presented as a defence of the traditional model of largely unfettered State control. It would be argued that the EU imitates the nation State; migration governance (Art. 79(1) TFEU) would be a euphemism for State control. Such analysis is based, however, upon State-centred methodology.[91] The binary confrontation of citizenship and alienage leaves no room for intermediate solutions, which the

87. Case C-184/99, *Grzelczyk*, [2001] ECR I-6139, para 31.

88. See Thym, cited *supra* note 31, sect. I; and Dougan, "Judicial activism or constitutional interaction?" in Micklitz and de Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), pp. 113–148.

89. For a nuanced position see Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing, 2013); for the classic critique see Hailbronner, "Union Citizenship and access to social benefits", 42 CML Rev. (2005), 1245–1268.

90. For the classic perspective of international law, see Nafziger, "The general admission of aliens under international law", 77 AJIL (1983), 804 at 807–816.

91. Cf. Beck and Sznaider, "Unpacking cosmopolitanism for the social sciences", 61 *British Journal of Sociology* (2010), 381 at 386–393; Wimmer and Glick Schiller,

EU Treaty pursues *vis-à-vis* third-country nationals and which may be positively described as the "cosmopolitan outlook" of EU migration law and policy.

The identification of the cosmopolitan outlook builds upon the revival of cosmopolitan thought among political theorists and social scientists over the past decade. Cosmopolitanism certainly has a long tradition and manifests itself in multiple facets, but its essence may be summarized as the accentuation of universal moral respect for others.[92] Crucially, it should not be equated with calls for a borderless world society or even a world State; cosmopolitanism endorses the reform of global institutions and supports the reorientation of national law and politics, while recognizing the legitimacy of democratic self-government. With regard to domestic decisions, it argues for the expansion of moral responsibility and political coordination across borders. Cosmopolitanism in this latter sense already exists. The task is not to "create" it, but to reflect upon the principles according to which it can and should be extended.[93] This section demonstrates why and how EU rules on third-country nationals can be rationalized as an emerging migration law with a cosmopolitan outlook.

Normative proposals for how to deal with specific questions vary from author to author, but there are basic tenets upon which most agree at an abstract level. Cosmopolitanism is usually associated with promotion of migrants' rights, also in situations of cross-border movements.[94] Yet, cosmopolitanism also acknowledges democratic self-government by particularistic political communities[95] – even if the corresponding degree of acceptable migration control for purposes of legitimate self-government with regard to the economy, society, culture or security remains highly controversial.[96] This relativity does not, however, disqualify cosmopolitan

"Methodological nationalism, the social sciences, and the study of migration", 37 *International Migration Review* (2003), 576 at 582–599.

92. See Benhabib, op. cit. *supra* note 6; Brock, *Global Justice* (OUP, 2009), ch. 1; and Held, *Cosmopolitanism* (Polity, 2010), ch. 2.

93. Cf. Beck, *Cosmopolitan Vision* (Polity, 2006), ch. 1; Chwaszcza, *Moral Responsibility and Global Justice*, 2nd ed. (Nomos, 2011), ch. 7; and Niesen, "Kosmopolitismus in einem Land" in id. (Ed.), *Transnationale Gerechtigkeit und Demokratie* (Campus, 2012), p. 311 at 313–316.

94. See Stone Sweet, "A cosmopolitan legal order", 1 *Global Constitutionalism* (2012), 53 at 73–81; and Benhabib, op. cit. *supra* note 6, 94–96.

95. See Parekh, "Cosmopolitanism and global citizenship", 29 *Review of International Studies* (2003), 3–17; and Moore, "Cosmopolitanism and political communities", 32 *Social Theory and Practice* (2006), 627–658.

96. Cf. Song, "Three models of civic solidarity" in Smith (Ed.), *Citizenship, Borders, and Human Needs* (Penn Press, 2011), p. 192 at 194–206; Bader, "The ethics of immigration", 12 *Constellations* (2005), 331 at 344–352; and Miller, *National Responsibility and Global Justice* (OUP, 2007), ch. 8.

thought as a frame of reference for our constitutional analysis. Interdisciplinary feedback is not meant to provide definite answers. It rather aims at establishing channels of communication between law and other disciplines.[97] In this respect, ambiguity of the theoretical framework even has the advantage of emphasizing the autonomy of legal concepts. The interpretation of the law remains the responsibility of lawyers.

The remainder of the article illustrates the suitability of the cosmopolitan frame of reference for our findings on distinct constitutional rules and objectives for third-country nationals (section 3, above). The cosmopolitan outlook provides EU migration law with a positive constitutional rationale by resolving the apparent paradox between internal free movement and external migration governance. Three examples demonstrate that the cosmopolitan outlook is capable of rationalizing debates about the contents of European rules. Our approach recognizes the legal authority of the migrants' viewpoint (section 4.1, below) and similarly accepts democratic self-government (section 4.2). In line with cosmopolitan accounts, EU law obliges societies to redefine their self-perception in response to migration (section 4.3). Restrictions of space inevitably dictate a streamlined analysis. Yet, even a cursory survey shows how, at constitutional level, EU migration law may be construed as a prototype of rules on cross-border movements with a cosmopolitan outlook.

4.1. *Protecting the rights of non-citizens*

Accentuating the difference between the constitutional rules for Union citizens and for third-country nationals does not strip the latter of legal protection. On the contrary: Among the greatest achievements of European integration is tolerance towards outsiders; European law generally obliges the Member States to take into account the perspective of those who tend to be ignored by domestic decision-making.[98] In a similar vein, EU migration law protects non-citizens. This is not a trivial assertion, since many countries around the world do not give migrants similar legal weight.[99] Within Europe, however, non-citizens may invoke legal guarantees. Individual rights give migrants' positions a voice with legal sway – even if they stay short of citizens' rights to free movement.

97. See von Bogdandy, op. cit. *supra* note 5, pp. 98–100; and Koskenniemi, "Constitutionalism as mindset", 8 *Theoretical Inquiries in Law* (2007), 9 at 23–36.

98. See Somek, "The argument from transnational effects", 16 ELJ (2010), 315–344, 375–394; and Weiler, "In defence of the status quo" in Weiler and Wind (Ed.), *European Constitutionalism Beyond the State* (CUP, 2003), p. 7 at 18–21.

99. For the limited relevance of human rights in the US see Saroléa, *Droits de l'homme et migrations* (Bruylant, 2006), pp. 339–346, 419–426.

The cosmopolitan outlook of European migration law is tangible in disputes with a transnational character or in situations of extraterritorial State activity.[100] They show that migrants' rights do not stop at Europe's external borders. Those denied entry into the Schengen area may challenge the refusal of entry visas or border crossings on the basis of secondary legislation.[101] One step further, the ECtHR censured Italian rendition practices aimed at migrants intercepted on the high seas as inhuman or degrading treatment.[102] That is not to say, crucially, that everything is perfect on the ground. There are legitimate reasons to criticize the implementation or design of EU migration law. From a constitutional perspective, however, the mechanism is intact. Human rights and individual rights in secondary legislation feed migrants' interest into decision-making and serve as doors of entry for ethical considerations.[103] The cosmopolitan outlook vindicates this function and calls for the accommodation of migrants' rights with public policy objectives. This functioning is illustrated with a first example.

4.1.1. *Example: Family Reunion Directive*

Spouses and children are, quantitatively, the most relevant group of migrants in most Western countries. As a result, rules on family reunion are crucial building blocks of migration law. Moreover and in contrast to economic migrants, family members may invoke Article 8 ECHR – even if the ECtHR maintains that States have, as a matter of principle, discretion for purposes of first admission.[104] Given that Article 7 of the EU Charter emulates Article 8 ECHR,[105] discretion in cases of first admission extends to EU migration law. However, this is not the end of the line – as the Family Reunion Directive 2003/86/EC shows: "Going beyond [human rights], Art. 4(1) of the Directive [establishes] clearly defined individual rights [which require the Member States] to authorize family reunification."[106] The EU legislature's understanding of "fair treatment" (Art. 79(1) TFEU) brings about individual rights to entry as defined in the Directive. Its generous interpretation by the

100. See Bosniak, "Persons and citizens in constitutional thought", (2010) I-CON 8, 9 at 18–21; and Stone Sweet, op. cit. *supra* note 94, at 79–81.

101. See Art. 32(3) Visa Code Regulation 810/2009 (O.J. 2009, L 243/1); and Art. 12(3) Border Code Regulation 562/2006 (O.J. 2006, L 105/1).

102. See ECtHR, cited *supra* note 52; and Moreno-Lax, annotation of *Hirsi Jamaa and Others* v. *Italy*, 12 H.R.L. Rev. (2012), 574–598.

103. For further reflection see Thym, "The citizen and the alien in EU law", manuscript, sect. 4 (under review).

104. See Boeles et al., op. cit. *supra* note 13, pp. 144–170.

105. See Art. 52(3) CFR; and Case C-400/10 PPU, *McB*, [2010] ECR I-8965, para 53.

106. *Parliament* v. *Council*, cited *supra* note 53, para 60 with a view to Art. 4(1) Directive 2003/86/EC (O.J. 2003, L 251/12).

ECJ holds the potential to further expand migrants' rights, including occasional approximation with citizenship status.[107]

Yet, crucial differences remain. Individual rights based on legislative instruments are confined to "cases determined by the Directive."[108] In other words, the legislature retains the authority to establish terms and conditions for family reunion which the EU Treaty prohibits for EU citizens. That is no abstract theory. Article 7 authorizes Member States to require incoming spouses "to comply with integration measures, in accordance with national law."[109] This mirrors Article 79(4) TFEU which calls upon EU institutions to support actively the integration policies of the Member States. Indeed, it is generally accepted that the Family Reunion Directive sanctions the obligation to attend integration classes or to acquire language skills *after* arrival. Austria or Cyprus may oblige the spouse of a worker from a third State to learn the local language after arrival.[110] By contrast, pre-departure language requirements have caused heated discussions.

Dutch, German and British rules, in particular, have been contested, since they expect candidates for family reunion to acquire basic language skills *before* entry. Without basic language skills, family reunion will generally be denied.[111] The legality of these requirements is challenged in courts. The European Court of Justice had indicated already that human rights have to be respected when Member States implement the Directive[112] and it will soon have the opportunity to clarify its position.[113] Space precludes a detailed discussion of countervailing arguments, which focus on the wording and structure of the Family Reunion Directive 2003/86/EC and compatibility with Article 7 CFR.[114] Yet, the dispute is a perfect illustration of how EU migration law and its cosmopolitan outlook function in practice. Individual (human) rights serve as point of entry for considerations of equity, but will not necessarily vindicate the migrants' standpoint, since countervailing public policy considerations need to be taken into account. The outcome of the subsequent balancing exercise under the proportionality test is not always easy

107. Cf. Case C-578/08, *Chakroun*, [2010] ECR I-1839; and Wiesbrock, "Granting citizenship-related rights to third-country nationals", 14 EJML (2012), 63 at 76–87.

108. *Parliament* v. *Council*, cited *supra* note 53, para 60.

109. Art. 7(2) Directive 2003/86/EC, cited *supra* note 106.

110. Cf. COM(2008)610, "Application of Directive 2003/86/EC", at 8–9.

111. Cf. Pascouau and Strik (Eds.), *Which Integration Policies for Migrants?* (Wolf, 2012).

112. *Parliament* v. *Council*, cited *supra* note 53, paras. 22–23, 104–106.

113. Cf. Case C-513/12, *Ayalti*, pending, referred in October 2012; by contrast, Case C-155/11 PPU, *Mohammad Imran*, Order of 10 June 2011, nyr, left a Dutch reference undecided.

114. See Groenendijk, "Family reunification as a right under Community law", 8 EJML (2006), 215 at 223–225 and the counter-arguments by the German Federal Administrative Court (*BVerwG*), Judgment of 30 March 2010, Case 1 C 8.09, paras. 21–28.

to predict (I personally expect the ECJ to follow national courts which confirmed pre-entry language requirements with an exception for hardship cases[115]). Along similar lines, many political theorists accept that incoming migrants may legitimately be expected to fulfil abstract integration conditions, which stay short of cultural or religious assimilation.[116]

To sum up: the Family Reunion Directive illustrates two crucial aspects of the cosmopolitan outlook. Firstly, divergence from the citizenship regime does not imply that third-country nationals are aliens without the full protection of the law. They may invoke individual rights enshrined in legislation and human rights with constitutional status. Secondly, migrants' interests do not always trump countervailing public policy objectives, such as linguistic integration. The judiciary must respect legislative decisions unless human rights mandate constitutional limits.

4.2. *Public policy objectives*

Among lawyers, State discretion in migratory matters is usually described as an expression of sovereignty, while the perspective of migrants is presented on human rights grounds. Since human rights are, generally speaking, on the advance and State sovereignty is in retreat, public migration control can easily be portrayed as a remnant of the past. There is much truth in this assertion, since national immigration laws have not traditionally protected migrants. It would be wrong, nevertheless, to conclude that the erosion of sovereignty renders migration control obsolete. Sovereignty has traditionally served as a black box permitting the pursuit of public interests without the need for justification. The absence of an obligation to explain State action does not mean, however, that migration control cannot be justified. It may serve legitimate public policy objectives, which political theory usually discusses under the heading of self-government of political communities.[117] Notwithstanding the variety of positions among different theorists, the cosmopolitan outlook accepts this assumption in the same way as it takes the migrants' perspective seriously.[118]

115. See the (UK) High Court of Justice, Judgment of 16 Dec 2011, [2011] EWHC 3370 (note that the UK has opted out of the Family Reunion Directive); and the (German) Constitutional Court, decision of 25 March 2011, Case 2 BvR 1413/10.

116. Cf. Joppke, *Citizenship and Immigration* (Polity Press, 2010), ch. 4; and Orgad, "Cultural defence of nations", 15 ELJ (2009), 719, 729–736; it may, of course, be argued that these conditions should only apply *post* entry.

117. For different arguments see Kostakopoulou, *The Future Governance of Citizenship* (CUP, 2008), ch. 2; Nussbaum, *Frontiers of Justice* (Harvard University Press, 2007), ch. 4 & 5; and references *supra* note 95.

118. See the references *supra* note 92–93 and 96.

Cross-border migration is a diverse phenomenon with numerous implications for receiving societies. As a result, there are multiple public policy objectives which migration law may legitimately pursue. Their relevance depends upon the circumstances of the policy issue under discussion and may include self-government with regard to the economy, society, culture and security.[119] Article 79(1) TFEU with its call for migration governance is meant to facilitate the realization of these public policy objectives. Public migration governance requires – and enables – the European Union and its Member States to assess and weigh countervailing economic, social, cultural, security and human rights aspects which are affected by the international movement of people. It is left to the ordinary legislative procedure to define and evaluate public policy objectives for individual legislative acts.[120] Not the EU Treaty, let alone political theory, decides upon the contents of EU migration law.[121] Decisions are entrusted to the EU institutions and the legislature at national level – and are subject to judicial review, whenever the migrants' perspective translates into human rights considerations which may trump legislative decisions.

4.2.1. *Example: Blue Card Directive*

The "Blue Card Directive" illustrates the pertinence of our findings. Since human rights hold little sway over economically motivated migration, the legislature has much discretion how to design EU rules.[122] After initial controversies, the EU institutions opted for a flexible regime, which facilitates the entry of the highly skilled. Under the Blue Card Directive 2009/50/EC, third-country nationals who meet certain qualification requirements benefit from individual rights to entry, family reunion and equal treatment.[123] At the same time, the legislature laid down explicit caveats: family members may, for instance, be subject to integration conditions, including language classes, *after* arrival and Member States may retain rules of preference for domestic workers or immigration quotas.[124] In the case of unqualified workers, limits are more stringent: the proposed Seasonal Workers' Directive provides only for temporary migration without family reunion or access to long-term

119. See Castles and Miller, *The Age of Migration*, 4th ed. (Palgrave, 2009), ch. 8–11; Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011), ch. 2; and Boswell, "Theorizing migration policy", 41 *International Migration Review* (2007), 75 at 87–95.

120. Like in other policy fields, the legislature is usually not obliged to State explicitly the policy objectives it pursues; the ECJ adopts its own evaluation under the proportionality test in line with Art. 52(1) & 3 CFR and ECtHR case law.

121. See *supra* section 3.2.1.

122. Cf. Art. 79 TFEU; Art. 15(3) and 45(2) CFR; and *supra* section 3.2.1.

123. See Art. 7(1), 12, 14 and 15 Directive 2009/50/EC (O.J. 2009, L 155/17).

124. See Art. 15(3) and Art. 8(2) ibid.

residence status.[125] The underlying motivation is evident: economic public policy objectives (stimulate growth and counter demographic trends) complement social and societal concerns (protect less qualified domestic workers; support linguistic integration).

This brief overview of secondary law on economically motivated migration resonates with earlier findings: First-entry rules for third-country national workers are less generous than rules for EU citizens and their family members. Even with regard to the highly skilled, the EU legislature authorizes the realization of countervailing public policy objectives, including linguistic integration and labour market concerns, which are prohibited in situations of intra-European mobility.[126] EU primary law sanctions this departure from the citizens' model for the simple reason of laying down distinct rules and procedures. Migration governance under Article 79 TFEU calls for legislative decisions which, in line with the cosmopolitan outlook, combine migratory opportunities for the economically motivated with the pursuit of legitimate concerns of democratic self-government.

4.3. *Changing European societies*

Up until now, our analysis has been based upon a simple dichotomy which juxtaposed self-government with migrants' interests. EU migration law requires these contrasting positions to be accommodated as the example of language requirements, discussed above, indicates. Such balancing does not, however, overcome the distinction between "us" (European societies[127]) and "them" (migrants). These two categories have hitherto remained separate. The cosmopolitan outlook invites us to move beyond this dichotomy. Immigration changes European societies and has an impact upon the constant refinement of their self-image.[128] For our purposes, three functions of EU law should be highlighted.

Firstly, European integration was always meant to overcome closed nation States and prevent relapse into darker manifestations of nationalism.[129] This historic mission of pre-empting nationalistic closure on the side of the States is now replicated in the field of migration (even if the dividing line between nationalism and legitimate public policy objectives is often difficult to

125. See the Commission Proposal, COM(2010)379 of 13 July 2010.

126. For EU workers see *supra* section 2.1.

127. Space precludes an analysis of the subject of self-government in the EU at large and/or national societies within Europe; cf. Thym, op. cit. *supra* note 103, sect. 3.1.2.

128. Cultural studies show that identities, both individual and social, are not fixed but subject to permanent change and adaptation.

129. For a clear-cut statement see Weiler, "To Be a European Citizen" in id. (Ed.), *The Constitution of Europe* (CUP, 1999), p. 324 at 344–348.

define). Non-discrimination policies, including on grounds of race and ethnicity, are one prominent example how EU law prevents cultural, or even ethnic, closure.[130] EU law calls upon the Member States to reconsider their foundational values – in the light of Europe's commitment to "a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[131] These values influence the interpretation of European migration law.[132]

Secondly, EU law influences who settles permanently. It is true that the EU cannot harmonize naturalization due to lack of competence, but it nonetheless promotes modification of nationality laws through soft law instruments.[133] Indeed, many Member States have introduced elements of *ius soli* in their nationality laws over the past two decades.[134] The criticism that many Member States pursue ethnic-exclusionary *ius sanguinis* regimes holds no longer;[135] almost 9 million foreigners were naturalized throughout the EU between 1998 and 2010.[136] Yet, the acquisition of nationality on the basis of national laws is not the only route to permanent settlement. EU law also promotes the gradual convergence of alienage and citizenship through long-term residence status discussed below.

Thirdly, our focus on long-term residents does not imply that migration law is primarily concerned with settled migrants. On the contrary: the perspective of those denied entry or without stable residence status must also be considered. As universal guarantees, individual rights apply to everyone, not only to those who have become *de facto* members of societies they live in.[137] This conclusion extends to illegal residents. Both the ECHR and secondary

130. Cf. Council Directive 2000/43/EC (O.J. 2000, L 180/22), that, according to Art. 3(2), does not apply to migration law *sensu stricto*, i.e. the entry and stay of foreigners.

131. Art. 2 TEU.

132. Note that the ECtHR's standard formula for the proportionality test mirrors Art. 2 TFEU; cf. ECtHR, *Şahin* v. *Turkey*, Appl. No. 44774/98, judgment of 10 Nov. 2005 (GC), para 108: "Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'."

133. Cf. the 9th Common Basic Principles (CBP) for Immigrant Integration Policy, Council doc. 14615/04 of 19 Nov. 2004; and Shaw, *The Transformation of Citizenship in the European Union* (CUP, 2007), pp. 209–237.

134. See Joppke, op. cit. *supra* note 116, ch. 2.

135. Current pan-European debates focus on dual nationality and integration requirements for naturalization; cf. the contributions to Guild et al., op. cit. *supra* note 12.

136. These numbers include EU citizens, but exclude children which acquire nationality by birth; cf. Eurostat, *Statistics in focus* 45/2012, p. 2.

137. For the distinction between *de facto* and/or *de jure* citizenship and human rights see Thym, op. cit. *supra* note 103, sect. 4.3; and Hailbronner, "Presence and rights", 1 *Amsterdam Law Forum* (2008/09), 10 at 11–13.

EU legislation acknowledge certain rights of undocumented migrants.[138] That does not unmake the Treaty objective to pursue "enhanced measures to combat illegal immigration" (Art. 79(1) TFEU). In doing so, EU law may not, however, see all means as acceptable. There are no easy answers, but their absence does not render the quest for appropriate solutions obsolete. The cosmopolitan outlook rationalizes the juxtaposing of countervailing values.

4.3.1. *Example: Long-term Residents' Directive*

US immigration law distinguishes "immigrants" with permanent residence status and "non-immigrants."[139] EU law also guarantees extended protection for those with sufficient resources after five years of legal and continuous residence. The Long-term Residents' Directive 2003/109/EC, which has recently been extended to refugees and other beneficiaries of international protection,[140] pledges far-reaching equal treatment of long-term residents in employment and social affairs together with enhanced protection against expulsion and intra-EU mobility (but without political participation).[141] Similar rights are extended to other categories of migrants on the basis of other directives and national immigration laws, but long-term residence status remains the most tangible expression of the gradual convergence of alienage and citizenship; many rights which have traditionally been reserved to nationals are nowadays extended to settled migrants.[142] Long-term residence status has become a sort of "citizenship light".

From the angle of the cosmopolitan outlook, extended guarantees for long-term residents must be welcome. At the same time, the cosmopolitan outlook encourages us not to be content with compromise solutions such as long-term residence status, which stays short of full membership. It establishes "denizenship"[143] without political participation and *full* equal treatment. That should not be the ultimate answer. Migrants should not only

138. For residence security under Art. 8 ECHR see Thym, op. cit. *supra* note 74; for social and economic rights of those working illegally, see Art. 6 of the Employers Sanctions Directive 2009/52/EC (O.J. 2009, L 168/24).

139. Traditionally, US law distinguished (non-)immigrants at the point of entry, although status-change after admission has become more frequent in recent years.

140. See Directive 2003/109/EC (O.J. 2004, L 16/44) as amended by Directive 2011/51/EU (O.J. 2011, L 32/1).

141. Cf. Art. 11–12, 14 ibid.

142. For comprehensive studies, see Graser, *Gemeinschaften ohne Grenzen?* (Mohr Siebeck, 2008), ch. 6–8; Bast, op. cit. *supra* note 119, ch. 4; and the classic account by Soysal, *Limits of Citizenship* (University of Chicago Press, 1994), ch. 8–9.

143. Cf. Walker, "Denizenship and deterritorialisation in the European Union" in Lindahl (Ed.), *A Right to Inclusion and Exclusion?* (Hart, 2009), pp. 261–274; there are indications, at least in Germany, that some long-term residents, who would qualify for naturalization, do not pursue this route, partly because they have plenty of rights without nationality.

acquire ever more rights but be invited to become equal members of the communities they live in.[144] In legal terms, this translates into an argument for a conditional right to naturalization, which calls upon the Member States to realize the legitimate claim to equal membership with due regard to public policy objectives.[145] Again, we should be aware that the cosmopolitan outlook and interdisciplinary feedback do not absolve the legislature from discussing and adopting its standpoint. Constitutional rules on migration and the cosmopolitan outlook do not replace political decisions.

In short: over time, the binary opposition between migrants and host societies gives way to gradual convergence. National societies reconsider their self-image in reaction to immigration; migrants gradually become equal members of the communities they live in. EU law actively promotes this process, in particular through non-discrimination policy and long-term residence status with an extended set of rights.

5. Conclusion

Although border controls, immigration and asylum have become a central field of EU activity in recent years, considerable confusion persists – among both academics and practitioners – about the underlying object and purpose of migration law towards third-country nationals. Debates are often stuck in a false dichotomy which calls for open borders or laments "fortress Europe." Against this background, this contribution sets out a positive constitutional rationale for EU migration law. Its conclusions are based on the combination of, first, the dogmatic analysis of primary law provisions in the EU Treaties and the Charter of Fundamental Rights and, second, contemporary debates in political philosophy about cosmopolitan justice. The identification of the cosmopolitan outlook underlying the Treaty rules on migration overcomes the juxtaposition of citizenship with equal rights, on the one hand, and alienage without the full protection of the law on the other. In line with basic tenets of cosmopolitan thought, EU migration law accepts that migration control may support public policy objectives in the same way as it is bound to take migrants' interests seriously.

Any analysis of migration law *vis-à-vis* third-country nationals must position itself in relation to the free movement of EU citizens, which serves as a powerful paradigm for supranational rules on cross-border movements and

144. For a prominent cosmopolitan defence see Benhabib, op. cit. *supra* note 6, pp. 134–143.

145. In practice, such accommodation concerns conditions for naturalization, such as language requirements, economic self-sufficiency, or an acceptable criminal record.

which influences the legal status of non-citizens by guiding the interpretation of association agreements and family reunion rules. Yet, there are differences between Europe's domestic mobility regime and rules governing third-country nationals, which also the ECJ recognized in recent judgments. Insofar as the entry and stay of third-country nationals are concerned, primary law does not establish individual rights to cross-border movement with constitutional status. In the field of migration, human rights assume the function of the fundamental freedoms. In this respect, both ECtHR case law and distinct provisions on migration in the Charter of Fundamental Rights leave public authorities discretion – with varying degrees of control in cases of first admission ranging from strict standards for refugees to widespread autonomy with regard to economic migrants. The legislature may opt for a generous migration regime, but it is not constitutionally obliged to do so. This is the crucial difference to the single market.

The EU Treaty calls upon EU institutions to promote migration governance, which endorses the efficient management of migration flows in the same vein as fair treatment of migrants. These diverse, and often contradictory, objectives reflect contemporary debates in political philosophy about the cosmopolitan foundations of transnational justice. Cosmopolitanism is known best for propagating respect for transnational rights of migrants, which, in legal terms, concerns individual rights in the Charter and secondary legislation. At the same time, cosmopolitan thought accepts democratic self-government with regard to the economy, society, culture or security as a normative justification for migration control. To be sure, interdisciplinary feedback does not provide definite answers to legal disputes. However, it resolves the apparent paradox between internal free movement and external migration governance. The cosmopolitan outlook provides EU migration law with a positive constitutional rationale, which explains its specificity and may guide legislative and judicial decisions. Closer inspection of language requirements, the Blue Card Directive and long-term residence status shows how the legislative realization of the cosmopolitan outlook of European migration law functions in practice.