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Supranational courts in Europe: a moderately communitarian turn in the case law on immigration and citizenship

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ABSTRACT

Most interdisciplinary analyses intuitively depict the judiciary as an actor promoting post- or transnational conceptions of membership and equality in contemporary debates about citizenship and immigration. A qualitative survey of prominent judgments of two powerful supranational tribunals on five central themes identifies an intriguing twist in the case law. Over the past decade, the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg have frequently emphasised social affiliation with the host society, thereby cautiously embracing moderately communitarian narratives of membership, which tempered the traditional emphasis of both courts on equal treatment and residence security across borders. Institutionally, the outcome may be rationalised by a threefold limitation of the judicial function, which cannot bring about social change on its own, interacts with political actors and acknowledges the changing contours of the legal material.

KEYWORDS

European Union; European Convention on human rights; courts; human rights; citizenship; law

Introduction: courts and the transformation of citizenship

Legal developments in today's European Union played a prominent role in early accounts of post- or transnational membership. Many authors highlighted the transformative potential of legal rules and court rulings in both Europe (Soysal 1994, 145–151; Jacobson 1996; Sassen 1996, 88–99) and Latin America (Dembour 2015), while others underlined the lasting influence of domestic courts (Hollifield 1992), not least in the United States (Bosniak 2006). It was often assumed at the time that this process would continue and that court judgments would keep expanding equal treatment and residence security across borders, thus transforming prevailing conceptions of citizenship (Kostakopoulou 2007; Maas 2008).

It has been widely discussed in the literatur on immigration and citizenship that things turned out differently. Domestic legislation in many countries (Guild, Groenendijk, and Carrera 2009) and the supranational legislation of the European Union (Carrera 2009) embraced different versions of 'integration' requirements, including citizenship tests or pre-departure language exams as a precondition for family reunification. Political

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scientists and sociologists have analysed the driving forces, substantive features and normative implications of the seemingly ubiquitous policy changes at the national and European levels (Joppke 2008; Hampshire 2013; Goodman Wallace 2014). What is missing in these studies, however, is the position of the supranational courts, which had played a central role in earlier accounts of post- or transnational membership.[1] Would judges embrace the novel integration paradigm or stick to earlier conceptions of equality and residence security? It is the objective of this paper to answer that question.

The argument will unfold in three steps. Our point of departure is a qualitative survey of the recent case law of two powerful supranational tribunals in Europe in five areas of immigration and citizenship law that have defined legal debates in recent years. These judgments do not necessarily reverse the protective credentials of earlier case law, but reconfigure underlying ideas of membership and equality towards social affiliation with the host state. To emphasise this change of direction fills a gap in the literature on immigration and citizenship, which often ignores the internal dynamics of the case law. The contribution proceeds with a discussion of factors that might explain the empirical results on the basis of a multidisciplinary inspection of the role of supranational courts. It highlights a threefold limitation of the judicial function, which concerns the distinct layout of the legal material, interaction with political actors and the limited impact of court judgments on social change. We conclude that the supranational judiciary cautiously embraces moderately communitarian narratives, even though the collective of judges cannot be expected to have a uniform vision of membership, whose normative foundations remain politically and theoretically contested.

Qualitative findings: changing visions of membership in the judicial reasoning

In Europe, two powerful international courts have shaped many policy areas over past decades: the Court of Justice of the European Union in Luxembourg (CJEU) and the European Court of Human Rights in Strasbourg (ECtHR). Both institutions closely interact with domestic actors, since individuals can seize them either directly or via national courts referring questions how to understand the law to the supranational judiciary.[2] While the jurisdiction of the Strasbourg court is limited to human rights, the tribunal in Luxembourg has responsibility for both constitutional issues and everyday questions of statutory interpretation regarding directives and regulations adopted by the EU institutions. It will be discussed later in how for the distinct layout of the legal material can influence the judicial output.

Selection of the relevant case law

It is important to remember that the legal material judges are called upon to interpret differs markedly. Whereas Union citizens can rely on a fundamental guarantee to free movement and extensive equal treatment, so-called 'third country nationals' who are not nationals of an EU member state cannot usually invoke legal guarantees to entry and are generally accorded a lesser degree of equal treatment. Notwithstanding these differences, this contribution considers the case law on Union citizens and third country nationals concurrently. Instead of comprehensively assessing the judicial output

in quantitative terms, this study aims at identifying changing paradigms of belonging through a qualitative inspection. Judgments on equal treatment and residence security are particularly useful for that purpose, since judges often present arguments exhibiting underlying visions of belonging in these cases, while questions of asylum procedure, for instance, are usually decided on the basis of technical arguments or human rights considerations that are not directly linked to membership narratives.[3]

The five areas discussed below represent themes that have dominated the case law of the ECtHR and the CJEU since the mid-2000s: protection against expulsion, the compatibility of language requirements with EU law, the status of Turkish 'guestworkers', access of Union citizens to social assistance and equal treatment of immigrants on human rights grounds. These five topics have been subject to long-running legal and political debates, thereby resulting in multiple rulings, which allow us to identify changing patterns. They will be presented below by accentuating selected core judgments that established a new line of reasoning; other rulings are discussed at length in the literature cited below. Our focus on the judicial output implies that the range of social or political questions covered depends on the focal points of the case law. Themes that are not the object of a prominent series of rulings transcend the realm of this inquiry.

It was mentioned above that the judgments discussed below do not usually reverse the protective credentials of earlier case law, which, moreover, can be reinforced by new verdicts enhancing the legal protection of Union citizens and third country nationals, for instance by extending free movement rights to same sex partners (CJEU 2018) or by generously defining the level of social assistance for refugees (CJEU 2019b). In that respect, our analysis is not about a potential 'rollback' withdrawing legal safeguards that had existed previously. It is, rather, about changing narratives of citizenship, residence security and equality in the case law that reconfigure underlying ideas of membership towards social affiliation with the host state.

Expulsion and the 'Solidity of social and cultural ties'

The starting point of ECtHR's case law on immigration were judgments limiting the discretion of state parties to expel foreigners, when it became apparent that the former 'guestworkers' and their children had settled in European countries. Relying on the human right to private and family life, judges developed an abstract set of criteria such as family ties, criminal records or the length of stay, which national authorities have to consider when deciding expulsion cases (ECtHR 2001, 48; Boeles et al. 2014). After almost twenty years, during which these standards had been applied more or less consistently, the grand chamber of the court introduced a new criterion in 2006: 'the solidity of social, cultural and family ties with the host country and with the country of destination' (ECtHR 2006, 58). This new yardstick has been applied in numerous judgments ever since.

In essence, the new reasoning accentuates broader societal aspects, which combine more formal factors like the length of stay with qualitative considerations, such as language skills, education or economic activity. To categorise a persons' behaviour as either good or nor not good enough may tilt the proportionality assessment in the favour or against them. A good example is the case of a Turkish national who had been born in Germany in 1980 and was expelled after a series of drug-related criminal convictions. The ECtHR upheld that decision noting, amongst others, that 'he has never worked',

spoke Turkish and 'was familiar with Turkish living conditions, as he had been brought up in a rather traditional Turkish environment by his grand-parents' within Germany (ECtHR 2018, 50–51). That he had a young daughter with German nationality did not change the verdict, since the girl was essentially living with the mother. Many other rulings evolve along similar lines (Thym 2014; Hilbrink 2017), even though aspects of cultural affiliation are mentioned less systematically than factors such as language skills or labour market participation, which are easier to measure.

None of the above dismantles the protective effects of the human rights jurisprudence. States still have to justify decisions on a case-by-case basis and judges may find a violation in some situations. Moreover, the ECtHR expanded protection against expulsion to those without family ties in the country of residence, even though the relevant criteria guiding the proportionality test are identical with the standards discussed above (ECtHR 2003; Thym 2014). Judges thus refrained from increasing the level of protection in a categoric manner. They explicitly rejected to follow a political recommendation by the Parliamentary Assembly of the Council of Europe to lay down an absolute prohibition of expulsion for long-term residents (2001, 11.2), since their status 'cannot be equated with that of a national' (ECtHR 2006, 55–56). That supports the gradual reconfiguration of the normative benchmark towards social affiliation mentioned earlier. In a telling example that residence-based personhood does not replace citizenship as the gold standard in human rights law, judges concluded in one case that the applicants' failure to apply for naturalisation was one factor why he could be deported from the country in which he had been born (ECtHR 2007, 64).

Language requirements and the legitimacy of integration policies

There was a widespread assumption that the European Union would replicate its traditional inclination for cross-border mobility and equal treatment when it started adopting legislation on so-called 'third country nationals'. Heads of state or government had originally signed up to a political promise to 'approximate' the status of long-term residents from third states to that of EU citizens (European Council 1999, 21). During the legislative debate, they changed minds and considerably watered down initial proposals by introducing stricter conditions for residence permits, including the option of integration requirements (Mourão Permoser 2017, 2543–2545; Carrera 2009: ch. 4). On this basis, several member states introduced language tests for different categories of foreigners, including as a precondition for family reunification (Guild, Groenendijk, and Carrera 2009; Goodman Wallace 2014). These measures caused legal disputes across Europe until two Dutch cases on family reunification and long-term residents were referred to the Court of Justice of the European Union.

Experts of immigration were awaiting these judgments eagerly, especially after two advocates general had delivered conflicting proposals how the Luxembourg court should answer the question. Advocate General Maciej Szpunar propagated an equality-based integration concept, including a reference to the political promise of heads of state or government, to conclude that language tests were incompatible with EU law (2015, 28–30, 89-90). By contrast, Juliane Kokott emphasised the significance of language skills for diverse integration factors such as labour market participation or familiarity with social norms on gender equality (2015, 34). Judges sided with the latter argument: knowledge of the language 'greatly

facilitates communication' between foreigners and nationals, thereby 'encourag(ing) interaction and the development of social relations between them' as well as labour market participation (CJEU 2015c, 47). The court approved language requirements, but obliged states to introduce a hardship clause in national legislation that allows for exceptions in light of individual circumstances, such as age, level of education, health or the availability of language courses. In addition, it prohibited excessive fees.

Given the visibility of language tests in political and academic debates, the rulings can be qualified as landmark cases that expressed a position of principle on the direction of EU immigration law. Judges in Luxembourg recognised the move towards integration requirements, even though earlier rulings had indicated that they might adopt a stricter approach (Acosta and Geddes 2013). That did not happen. Closer inspection of over 150 judgments on immigration, asylum, border controls and return confirmed that judges nowadays tread carefully in most cases by concentrating on the wording, the structure and the objectives of supranational legislation (Thym 2019). They will not usually turn secondary legislation on its head, even though judicial oversight may still result in legal limits, such as the introduction of a hardship clause, which has guided the administrative practice on language requirements across Europe ever since.

Association agreements: a 'Domino effect' and its termination

It was not only heads of state or government who had initially promoted an approximation of migrants' rights with the status of EU citizens. In a series of more than 70 judgments, the CJEU enhanced the level of protection for Turkish 'guestworkers' and their families on the basis of an association agreement, which today's European Union had signed with Turkey in 1963 and which had been complemented with generous implementing decisions. Judges concluded that these rules should be interpreted in light of the EU's internal free movement rules 'so far as is possible' (CJEU 1995, 20), since the wording and the objectives of the association agreement supported this conclusion.[4] On that basis, they applied the higher level of protection against expulsion for EU citizens to Turkish nationals and promoted equal access to the labour market. Other association agreements with countries such as Morocco or Ukraine were less generous, but judges nevertheless established legal limits (Thym and Zoeteweij-Turhan 2015). It seemed as if a sort of 'domino effect' would gradually extend the privileges of Union citizens to different categories of third country nationals (Groenendijk 2014).

Judicial dynamics were reversed when the CJEU was asked whether the 'so far as is possible' formula covered a higher threshold for the expulsion of EU citizens that have lived abroad for more than 10 years, which the EU legislature had introduced in 2004. Judges answered to the negative, since the new rules transcended the purely economic rationale of the association agreement. The protection of Turkish 'workers' does not embrace the membership rationale of Union 'citizenship', since 'the two legal schemes in question cannot be considered equivalent' (CJEU 2011, 72–74). Judges recognised, in other words, discrepancies between different immigration categories (a distinction that will influence the interpretation of any post-Brexit association agreement).

To distinguish the status of Turkish nationals from Union citizenship does not reverse the protective credentials of the earlier case law, which remains intact. Similarly, other third country nationals can benefit from enhanced protection against expulsion under

EU legislation that the CJEU interprets in light of free movement rules as a matter of principle (2015d), even though specific scenarios may require differentiation, mirroring the argument presented above (CJEU 2019c; Thym 2019, 179–183). Such ambivalence of the judicial output does not, however, contradict our conclusion that underlying visions of membership in the judicial reasoning cautiously embrace a moderately communitarian narrative. A telling example is a judgment, which found that the acquisition of the nationality 'represents, in principle, the most accomplished level of integration of the Turkish worker in the host Member State' (CJEU 2015a, 54).

When union citizens turn into illegal immigrants

Free movement of workers in the EU's internal market and its combination with 'Union citizenship' were traditionally heralded as 'the most comprehensive legal enactment' of post- and transnational membership (Soysal 1994, 147; Shaw 1998; Kostakopoulou 2007). It is widely recognised that judges in Luxembourg generously interpreted the original provisions on the free movement of workers (O'Leary 2011) and the subsequent rules on citizens that are not economically active. In a tantalising series of judgments over the past 20 years, which revolved around access to social benefits for those who are not working, the CJEU seemed to upgrade the significance of Union citizenship via an innovative interpretation of free movement and equal treatment provisions (Wollenschläger 2011) – a development which played a critical role in public debates prior to the Brexit referendum (Curtice 2017, 22–23). For a while, it seemed as if a quasi-federal Union citizenship was in the making by means of judicial fiat.

Things turned out differently when judges flatly denied access to social benefits for jobseekers and other citizens without a job which do not have sufficient ressources to sustain themselves (CJEU 2014b, 2015b) and allowed the UK to restrict access to child benefits for those with habitual residence (CJEU 2016). For our purposes, these verdicts demonstrate a new willingness on the part of supranational judges to distinguish between different categories of Union citizens and nationals. Access to equal treatment and residence security across borders is limited to those who are economically active in line with older notions of 'market citizenship'. After having previously described Union citizenship as a uniform 'fundamental status' (CJEU 2001, 31), judges accentuate its internal fragmentation nowadays (O'Brien 2013), thereby effectively turning citizens living abroad without a job and sufficient ressources into illegal immigrants.

A common thread underlying many recent citizenship judgments is the 'certain degree of integration' or 'real link' benchmark that may regulate the degree of equal treatment and residence security (Shachar 2009, 175–177). While the test had been applied since the early 2000s, a qualitative inspection of the case law over the past decade demonstrates a shift of emphasis away from residence-based conceptions of membership towards qualitative indicators of social affiliation with the host society (Thym 2015, 2017) with judges implicitly branding individuals as either 'good' or 'bad' citizens (Azoulai 2016). In a similar way as the human rights' court in Strasbourg emphasised the 'solidity of social and cultural ties' described above, judges in Luxembourg supplanted older notions of residence-based citizens' rights by qualitative factors of social integration.

A fine example is the heightened level of protection against expulsion after 10 years of residence mentioned earlier, which judges interpreted to reflect an understanding of

integration that 'is based not only on territorial and temporal factors but also on qualitative elements', thus excluding prisoners from the seemingly clear-cut 10 year rule (CJEU 2014a, 25). On other occasion, judges prohibited the city of Luxembourg from deporting a family with a minor EU citizen to a third state, but did not allow the family to stay, since it was expected to return to their home state of France (CJEU 2013). The Netherlands were authorised to prescribe the loss of nationality after ten years abroad, since it was legitimate 'to protect the special relationship of solidarity and good faith … , which form(s) the bedrock of the bond of nationality' (CJEU 2019a, 33). These verdicts exemplify that traces of transnational membership decreased over the years, highlighting instead the continued significance of national belonging.

Human rights and the limits of equal treatment

In contrast to the CJEU, which applies detailed legal rules for specific migration purposes, the ECtHR interprets the often vaguely formulated European Convention on Human Rights, which covers all persons within the jurisdiction of the state parties irrespective of their nationality or immigration status (ECHR 1950: Art. 1). Against this background, the Convention's equal treatment guarantee deserves our attention, since it can serve as a legal basis to challenge distinctions between different categories of migrants in EU legislation or national immigration laws – in line with a widespread preoccupation of the broader normative debate with equal treatment (Fine 2016). For a while, it seemed as if the ECtHR would embark on rigorous scrutiny when it stated in abstract terms that only 'very weighty reasons' would justify unequal treatment based on nationality (1996, 42). Judges delivered several rulings ensuring that access to social assistance of a generic nature, such as child benefits, or contributions-based social security payments do not usually differentiate among nationals and foreigners or between different immigration statuses (Dembour 2015: ch. 8).

However, judges have considerably limited the effects of the generic statement that discrimination on grounds of nationality can only be justified by 'very weighty reasons' over the past ten years. Firstly, the ECtHR recognised that states 'may have legitimate reasons for curtailing the use of resource-hungry public services … by short-term and illegal immigrants, who, as a rule, do not contribute to their funding' (2011a, 54). Together with the additional assumption that states enjoy a certain margin of appreciation, this verdict resulted in a considerable leeway to exclude migrants who are not long-term residents from 'resource-hungry' public services such as health care, social housing or welfare programmes. Secondly, judges found that immigration status 'is not an immutable personal characteristic', since it involves an element of choice regarding the place of residence (ECtHR 2011b, 45). That may sound innocent to observers without a legal background, but has important constitutional implications, since it indicates a lower level of scrutiny, thereby making it easier for governments to justify unequal treatment (Harris et al. 2018, 776–790). Thirdly, the CJEU followed the example of the Strasbourg court and excluded third country nationals from the generic prohibition of nationality-based discrimination that defines the case law on free movement (CJEU 2009).

None of the above gives states a *carte blanche*, since judges continue exercising review and may find a violation (Dembour 2015: ch. 8), which are complemented by EU legislation prescribing equal treatment with nationals in various policy fields (Verschueren

2016). In a recent case, the ECtHR even concluded that distinct family reunification rules for Danish citizens who had been naturalised and those with a longer presence in the country amounted to discrimination on grounds of ethnic origin, since the government had relied on 'speculative arguments' and 'prevailing social prejudice' (ECtHR 2016, 125–126). Rulings like this one do not, however, revisit the earlier finding that unequal treatment based on immigration status does not warrant strict scrutiny in usual circumstances. The ECtHR generally accepts that EU citizens are treated better than other migrants (ECtHR 1991, 49, 2011a, 54), while the CJEU refused to classify reliance on the place of birth as indirect racial discrimination (2017). Judges in Strasbourg and Luxembourg generally turn a deaf ear to the academic criticism of an embedded racism of migration law (Johnson 2000; Benedí Lahuerta 2009).

Institutional setting: the limited power of supranational courts

Courts are strange animals, which many academic struggle to get hold of, precisely because they project a mythical aura of institutional impermeability, when they decipher and pronounce the meaning of the legal script like high priests in premodern societies (Elliott 1968). This section aims at lifting the veil through a multidisciplinary inspection of the role of the supranational judiciary in the field of immigration and citizenship, thereby identifying several factors that might help explain our empirical findings about gradual retrogression from more liberal conceptions of equality and residence security across borders. In doing so, our analysis will discuss the distinct layout of the legal material, interaction with the legislature and political actors as well as the relationship between legal developments and broader social trends and transformations.

Distinct layout of the legal material

Political scientists often describe courts as semi-autonomous players that maximise their power vis-à-vis other institutions.[5] If that was correct, the analysis would concentrate on 'court curbing mechanism' through which other actors mitigate the autonomy of supranational judges (Stone Sweet 2011; Kelemen 2012). However, such focus on court autonomy tends to underestimate the procedural and substantive constraints guiding judicial decisions. Judges are more than political actors; they decide in accordance with procedural rules and on the basis of epistemic standards of interpretative hermeneutics, which are held in high regard among judges in Strasbourg and Luxembourg in line with the continental European civil law tradition (Beck 2012; Horsley 2013). That is not to say that extra-legal factors are irrelevant, as the critical legal studies movement rightly highlights (Perišin and Rodin 2018), but they are combined with classic arguments of legal interpretation, which define many rulings and are emphasised by the CJEU's president in his extra-judicial writing (Lenaerts 2013).

This is not to say, crucially, that judges simply discover a pre-determined outcome. The open-ended structure of human rights norms, in particular, can serve as a projection sphere for different visions of social justice, including the progressive expansion of migrants' rights by means of dynamic interpretation (Spijkerboer 2014). Changing dynamics of the ECtHR's case law are less suited, therefore, to be rationalised by the distinct layout of the legal material.[6] For that reason, this section concentrates on the CJEU's

approach to the interpretation of Treaty articles and secondary legislation with detailed prescriptions. These rules may not usually provide for clear-cut answers either, but they are one important factor that can help explain the twist in the recent case law.

Transnational access to social benefits for EU citizens is a case in point. It is explicitly stated in the EU Treaties that free movement shall be 'subject to the limitations and conditions laid down' in implementing legislation (TFEU 2007: Art. 21.1), which stipulates that citizens who do not work shall 'have sufficient resources … not to become a burden on the social assistance system of the host Member State' (Directive 2004/38/EC: Art. 7.1.b). To be sure, judges could have relied on other articles or legal techniques to justify a different outcome, as they had done in some earlier rulings (Wollenschläger 2011). However, they did not do so in the series of rulings discussed above, which rather concluded that the denial of equal treatment was 'an inevitable consequence of Directive 2004/38' (CJEU 2014b, 77). Similarly, the Family Reunion Directive authorised Member States to 'require third country nationals to comply with integration measures, in accordance with national law' (Directive 2003/86/EC: Art. 7.2). Again, legal arguments had been put forward why that provision did not permit pre-departure language tests, but judges chose not to follow them.

At an abstract level, it is worth highlighting that the Treaty of Lisbon, which entered into force in 2009, established justice and home affairs as a separate policy field in its own right, which differs markedly from the free movement of EU citizens. While the latter benefit from a constitutional guarantee to cross-border mobility, third country nationals are subject to distinct Treaty rules, which comprise diverse objectives such as 'fair treatment' together with 'enhanced measures to combat illegal immigration' or 'support for the action of Member States with a view to promoting the integration' of foreigners (TFEU 2007: Art. 79; Thym 2013). The evolution of the case law may be rationalised as a process of discovery recognising the distinct features of migration law towards third country nationals, thereby overcoming the path-dependency of earlier citizenship rulings (Schmidt 2012; Horsley 2013). Remember that the CJEU justified the reversal of the 'domino effect' regarding Turkish nationals by asserting that the different sets of rules 'cannot be considered equivalent' (2011, 74).

Of course, the CJEU could have interpreted the EU's Charter of Fundamental Rights generously to correct the outcome of the legislative process. It could have found, for instance, that pre-departure language tests violate the EU vision of the human right to family life, as academics had suggested (Costello 2016: ch. 4), rather than following the comparatively restrictive case law of the ECtHR on family reunification. Again, judges decided not do so, also considering that the EU Treaties state explicitly that meaning of the Charter and the ECHR 'shall be the same' (CFREU 2007: Art. 52.3). In short, the distinct layout of the legal material appears as one factor amongst others why the case law on third country nationals did not fulfil the expectation that personhood would replace citizenship as the basis for rights.

Interaction with the legislature and political actors

The assumption that judges would enhance the legal position of migrants was nourished by the initial case law and the general experience with the vigorous stance of the supranational judiciary on the dynamic interpretation of the European Convention and

the construction of the European Union. However, there is a flipside of this hypothesis from the perspective of constitutional theory, since influential courts can restrain the power of the legislature and may conflict with political discourses (Waldron 1999; Stone Sweet 2011). Both factors help rationalise the variation of the case law on immigration and citizenship regarding both the CJEU and the ECtHR.

It was mentioned already that EU migration law for third country nationals comprises distinct rules that differ from the EU's internal free movement regime and that judgments on access to social benefits, pre-departure language requirements and the status of Turkish nationals can be explained, in part at least, as an act of deference towards legislative choices. Indeed, there is ample evidence that judges in Luxembourg generally aim at securing their 'external' legitimacy towards the legislature (Lenaerts 2013; Hatzopoulos 2013), even if the latter may be in a weak position to overturn Court rulings through legislative change or Treaty amendment because of the procedural rigidity of decision-making (Kelemen 2012; Schmidt 2018). Quantitative studies show that the CJEU mostly follows the legal opinions expressed by the political institutions (Carrubba and Gabel 2014; Larsson and Naurin 2016). Our quantiative survey indicated the same for migratory matters. A comprehensive appraisal of all CJEU judgments on immigration, asylum and border controls showed the pertinence of an 'administrative mindset' with judges focusing on the wording, general scheme, objectives and drafting history of secondary legislation (Thym 2019). They try to follow the position of the legislature.

Such considerations cannot fully explain why more recent judgments are less dynamic than earlier rulings in exploring the progressive potential of the legal material, in particular when it comes toopen-ended human rights norms. This lack of further expansion can be explained, however, by a modification of the structural context. For many years, the dynamic growth of supranational institutions in Europe benefited from a 'permissive consensus': citizens by and large agreed with their activities, but they did not care much (Scheingold and Lindberg 1970). Courts and other technocratic bodies thrived in such a depoliticised environment. That has changed. Migration has turned into a salient issue that defines the democratic contest. Voters are concerned with what they perceive, rightly or wrongly, as the negative effects of migration – a perception that is exploited by populist parties to mobilise public opinion (Genschel and Jachtenfuchs 2018). The permissive consensus has given way to a 'constraining dissensus' on supranational issues (Hooghe and Marks 2009), which hampers policy reform and may entail a lesser role for judges. Decision-making on migratory matters tends to become more restrictive, once it is being politicised (Howard 2009: ch. 3; Koopmans and Statham 2000).

Similar contextual factors accompanied the modification of the interpretative dynamics identified earlier. Access to social benefits by EU citizens played a critical role in public debates before the Brexit referendum (Curtice 2017, 22–23). What is more, other countries had lobbied the EU institutions to prevent what they described as the 'abuse' of free movement (Austrian Ministry of the Interior et al. 2013; Blauberger et al. 2018). Less than two years later, judges abandoned earlier rulings that had expanded transnational equal treatment for those who do not work (CJEU 2014b, 2015b); another judgment confirming that trent was delivered a few weeks before the Brexit referendum (CJEU 2016). Doing so had the side-effect of rendering it easier to implement the political concessions the British government had secured in the run-up to the referendum in the case of a victory of the remain

camp (Reynolds 2017). Along similar lines, the reversal of the 'domino effect' towards Turkish nationals coincided with the factual suspension of accession negotiations, when it became apparent that Turkey would not join the European Union in the foreseeable future (Hatzopoulos 2014, 653–654).

The situation is similar with the ECtHR, whose judgments on immigration and asylum are politically contested in several states (Popelier, Lambrecht, and Lemmens 2016). It may be no coincidence, therefore, that important rulings confirming that states may deport even those who had lived in their societies since early childhood concerned Switzerland, the Netherlands or the United Kingdom, where criticism of an alleged judicial 'activism' of the Strasbourg court was particularly pronounced. British Conservatives had promised for years to dilute the domestic role of supranational human rights (Masterman 2016) and the Swiss Peoples' Party launched a referendum to the same effect, even though the 'self-determination initiative' was defeated (Schlegel 2018). Not having progressed further with a dynamic interpretation of migrants' rights arguably supported that outcome. In 2018, the members of the Council of Europe officially called upon judges to exercise restraint when assessing the proportionality of state measures in complex fields such as migration (Committee of Ministers 2018, 28c).

Courts, social change and the risk of a 'hollow hope'

It is a general feature of the academic debate about immigration and citizenship to concentrate less on questions of formal status these days, highlighting instead the performative potential and informal practices which top-down inspections of the law and institutions tend to sideline (Isin 2017; Bloemraad 2018). By the same token, the pervasive variations in the case law of supranational courts in Europe may reflect broader social trends. It is widely recognised in constitutional theory that the transformative potential of abstract legal norms and principles, such as human rights, results from a co-creation of judicial institutions, political actors and social practices, even though the relative weight of the different factors remains contested (Michelman 1988; Benhabib 2009). Progressive court judgments risk remaining a 'hollow hope', if they cannot bring about social change on their own, since they are not connected to social movements and broader transformative processes (Rosenberg 2008).

Against this background, initial predictions about new forms of membership via supranational rule-making and court judgments (Soysal 1994; Jacobson 1996; Sassen 1996) arguably underestimated the relative failure of these institutions in influencing social practices and in altering societal self-perceptions (Hansen 2009; Hampshire 2013). To be sure, supranational rules and court judgments empower domestic actors to challenge state policies in national courts (Hollifield 1992) and in the political debate (Bonjour 2016), but the previous optimism about their potential to advance transnational human rights law or to create a genuine postnational 'EU citizenship' has faded. There is a noticeable parallelism of aspirational CJEU and ECtHR judgments and the rise and weakening of the European integration project (Dougan 2013; Thym 2017). Supranational legal rules and court judgments have translated into a limited degree of post- or transnational identificatory patterns, which might have sustained a further emancipation of the supranational case law (Delanty 2007; Recchi 2015). Without societal foundation, the legal reconfiguration of membership remained a hollow hope.

Conclusion: a moderately communitarian vision of membership

A qualitative inspection of the case law of Europe's leading supranational courts, the CJEU in Luxembourg and the ECtHR in Strasbourg, revealed empirical evidence that the judicial reasoning has cautiously embraced social affiliation and the lasting significance of nationality since the mid-2000s. These developments should not be misunderstood as a return to the status quo ante. Judges continue reviewing restrictive measures and enhance the level of protection in some cases, but the underlying vision of membership has shifted away from liberal conceptions of equal treatment and residence security across borders towards what one might tentatively call 'moderately communitarian' in outlook. The widespread expectation that residence-based personhood would replace citizenship as the basis of rights did not materialise.

I consciously use careful language when describing visions of membership in the judicial reasoning. This study does not claim that the collective of judges at either court subscribes to a specific membership model or that the rulings necessarily fit into a coherent whole (Motomura 2006). Nevertheless, I submit that we can reconstruct an underlying idealtypical narrative on the basis of the legal phenomena presented in our empirical analysis above in full awareness that the normative foundations of the case law remain politically controversial and theoretically contested – both within the judiciary and in broader debates (De Schutter and Ypi 2015; Honohan 2017). Against this background, the open formulation 'moderately communitarian' is meant to encapsulate a shift towards social affiliation in the judicial reasoning and does not imply that the case law feeds into a coherent normative mindset or subscribes to specific political theories.

Our qualitative analysis highlighted that the ECtHR nowadays considers the solidity of social and cultural ties with the host society when reviewing expulsion decisions. Those who learn the language or find a job are better protected against deportation, which is not generally prohibited for second generation immigrants who do not naturalise – in the same way as the CJEU concluded that the approximation of the legal position of Turkish nationals to the status of EU citizens should come to an end. Nationality retains its significance as a door-opener for exclusive membership rights, such as absolute protection against expulsion or unconditional equal treatment. Tellingly, judges in Luxembourg emphasised that even advanced guarantees for EU citizens have limits: those who do not work cannot access social benefits when living abroad and qualitative factors of social affiliation may influence the degree of residence security. In a symbolic judgment, the CJEU recognised the legality of pre-departure language tests, although it required states to introduce a hardship clause. Finally, judges in Strasbourg refused to classify immigration status as an immutable personal characteristic, which would have rendered it more difficult for states to justify distinctions between different categories of migrants.

Academic observers disagree how the new emphasis on integration requirements in immigration and citizenship law should be evaluated. While some emphasise restrictive effects and the implicit resurgence of ethno-cultural notions of belonging (Kostakopoulou 2007), others conceive a modest reconfiguration of membership (Joppke 2008; Barbou des Places 2018), or present the inherent ambiguity of policy developments (Grzymala-Kazlowska and Phillimore 2018). It was not the intention of this contribution to evaluate or revisit these findings. It rather aimed at complementing these studies with qualitative evidence on the position of supranational courts, which are ignored in most analyses,

even though the case law demonstrates a remarkable shift away from transnational notions of equality and residence security towards social affiliation.

We have identified several factors, which help explain the changing dynamics of the case law. The legal material in the EU Treaties and secondary legislation did not support the steady move towards personhood as the basis for rights. Judges are generally eager to respect the preferences of the political actors and arguably reacted to protracted criticism of their case law in several countries, including before the Brexit referendum. Eventually, the expansion of trans- and postnational membership rights was not accompanied by a parallel fortification of societal developments and self-perceptions. By embracing moderately communitarian narratives of membership, judges reconnected their case law to political and social developments. None of the above implies that the supranational judiciary substantially reduced the level of protection. They continue reviewing the legality of restrictive measures in line with their traditional function of taming the nation state (Müller 2011: ch. 4), thereby preventing a potential downward spiral that undoes existing safeguards. Courts will not, however, turn European immigration and citizenship regimes on their head unless such a move is embedded in broader political trends and social practices.

Notes

1. By referring to 'trans- or postnational' membership, this contributions covers both the 'vertical' stratification of national belonging to include regional and continental attachment and the 'horizontal' recognition of membership in two or more communities; I do not claim that there is a uniform theoretical concept underlying either or both ideas.
2. I employ the term 'supranational' in a descriptive manner for institutions 'above' the state, which – in contrast to inter-state dispute settlement – are closely interwoven with domestic legal orders, irrespective of whether judgments have a direct 'supranational' effect from a legal doctrinal perspective.
3. For a list of all relevant cases, see the quarterly 'Newsletters on European Migration/Asylum/Free Movement Issues' of the Centre for Migration Law at the University of Nijmegen, https://cmr.jur.ru.nl; and the holistic analysis by Thym 2019.
4. Article 12 of the Association Agreement of 1963 states that the parties 'agree to be guided by (free movement rules in the EU Treaties) for the purpose of progressively securing freedom of movement for workers between them'; moreover, the Preamble notes that it aims at 'ever closer bonds' and 'will facilitate the accession of Turkey.'
5. Such assumption would have to ascertain to what extent enhanced (or less) rights for migrants coincide with the ECJ's institutional self-interest.
6. Note, however, that the ECtHR justified the rejection of an absolute prohibition of expulsion for second generation immigrants by highlighting that the right to private and family life was subject to a limitation 'in the interests of national security, public safety or the economic well-being of the country' (ECHR 1950: Art. 8.2; ECtHR 2006: 55).

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