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What Place for Migrants' Rights?

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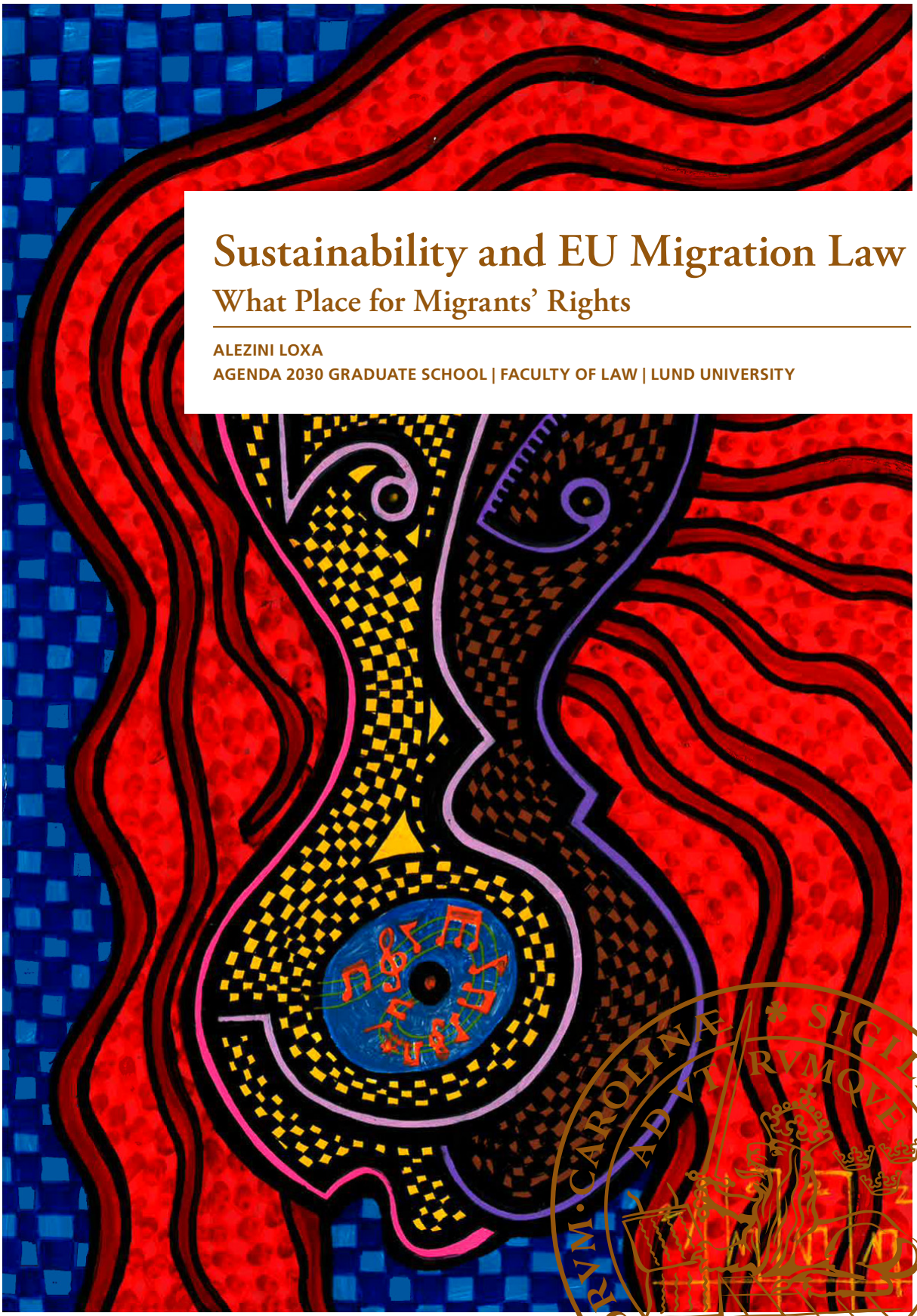

Sustainability and EU Migration Law

What Place for Migrants' Rights

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Sustainability and EU Migration Law

What Place for Migrants' Rights?

Alezini Loxa

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DOCTORAL DISSERTATION

Doctoral dissertation for the degree of Doctor of Philosophy (PhD) at the Faculty of Law at Lund University to be publicly defended on the 5th of October 2023 at 10.15 in Pufendorfsalen, Faculty of Law, Lilla Gråbrödersgatan 3C, Lund

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Abstract:

Sustainable migration is the new objective of EU migration law, a term whose meaning and legal implications are unclear. Through a critical historical study of different areas of EU migration law, the dissertation explores whether and how the past can guide the way for a contemporary understanding of sustainable migration. Specifically, the project looks into the historical development of EU migration law from the Treaty of Paris to this day with a focus on free movement of workers, Accession Treaties, Association Agreements and the regulation of migration from third countries. By investigating how the economic and social pillars of sustainability, as historically conveyed in the EU primary law objectives of economic growth and social progress, shaped the rights of migrants, the project identifies the limitations that lie behind the novel objective of sustainable migration.

The analysis demonstrates that the balancing of economic and social considerations, currently reflected in the concept of sustainability, has shaped EU migration law as a legal system with very specific characteristics. These are the attribution of rights to migrants due to their contribution to growth, the limitation of their rights due to perceived risks to growth , an emphasis on work-related rights as a means to social progress without a broader conception of the human being behind the economic actor, and the incorporation of clauses to guarantee that there is always a safety valve to stop migration in case of threats to the economy. These characteristics reveal inherent limitations in the way migrants' rights are construed at EU level, and these in turn frame the limitations of an EU sustainable migration.

Comparing the characteristics that flow from the history of EU migration law with the current formation of the EU legal system under the Lisbon Treaty, the project also examines whether and how such limitations could be overcome. The suggestions made on the matter cannot do away with the structural limitations that characterize the EU legal order and, relatedly, EU migration law. Rather, taking a pragmatic approach, the dissertation suggests that sustainable migration is not far from the legal framework currently in place for EU migrants. Pursuing sustainable migration in the Area of Freedom, Security and Justice would mean reproducing the structures of economic exclusion that exist in free movement while attributing effective mobility rights to third-country nationals and extending their social rights. Conceptualizing EU sustainable migration in this way would not put an end to the exclusion of vulnerable migrants, which is after all attributed to the inherent limitations of a legal order structured around the objectives of growth and progress. It would, however, offer more extensive protection to third-country nationals who contribute equally to the EU project of growth, thereby guaranteeing more socially sustainable societies.

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What Place for Migrants' Rights

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Lund, 11 August 2023

Abbreviations

ACP	African, Caribbean and Pacific States
AEI	Archive of European Integration
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CEAS	Common European Asylum System
CEECs	Central and Eastern European Countries
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
CVCE	Centre virtuel de la connaissance sur l'Europe
EA	Europe Agreement
EC	European Community
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
HAEU	Historical Archives of the European Union
OJ	Official Journal
SAA	Stabilisation and Association Agreement
TCN	Third Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	the United Kingdom

UN	United Nations
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of the Treaties

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Chapter 1. Introduction

Sustainable migration is the new objective of the European Union (EU) migration policy. But what does this mean in terms of legal design? What instruments should be put in place to achieve it? And most importantly what does it imply for migrants' rights? These were the questions that came to my mind upon the discovery that almost every EU migration policy document issued from 2015 onwards, had the professed objective of shaping a 'fair, efficient, and sustainable' migration at EU level.[1]

As an aspiring EU law scholar, I first turned to the Treaties to see if primary law could inform the concept of an EU sustainable migration. I discovered that sustainable development can be found as an objective of the EU internal market under Article 3(3) Treaty on European Union (TEU); as an objective of the Union in its external action under Articles 3(5), 21(2) (d) and (f) TEU; and finally, that Article 11 Treaty on the Functioning of the European Union (TFEU) and Article 37 of the Charter of Fundamental Rights (Charter) demand the integration of environmental requirements in the EU policies in order to promote sustainable development. Unable to understand how this general framing, with more emphasis on environmental protection – an emphasis which is starkly absent from EU migration law and policy documents – could inform sustainable migration, I steered my investigation towards sustainability in law and scholarship, so as to understand if the concept has normative premises that could have implications for the rights of migrants under EU law.[2]

As the reader will discover in Chapter 3, sustainability is a contested concept, whose premise, short history, and understanding can have very diverse implications for law and policy in general.[3] What is not contested is that sustainability has three interdependent pillars – economic, social and environmental – and that it entails a

[1] See the analysis in Chapter 3, Section 3.3. The objective was confirmed more recently in the 2020 Asylum and Migration Pact. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM(2020)609 final.

[2] See analysis in Section 1.1 in this chapter and in Chapter 3, Section 3.2.

[3] Michael Jacobs, 'Sustainable Development as a Contested Concept' in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999). More analysis in Chapter 3, Sections 3.1. and 3.5.

balancing between the pillars with a view to the long-term preservation of the whole, and under considerations of inter-generational and intra-generational justice.[4] Subsequently, I turned to non-legal scholarship dealing specifically with sustainable migration to examine if extra-legal considerations could inform sustainable migration.

By that point, it had become clear to me that the concept of sustainable migration has little or no precedent.[5] It implies the balancing of economic, social, and environmental considerations in the way the migration phenomenon unravels. How this balancing should take place, how the different interests of migrants, host states and states of origin should be considered, and what kind of legal structures should operationalise it, is unclear. What is more, it also became apparent that such balancing has a very different meaning and takes into account very different parameters whether applied at the national, supranational and global level.[6] Therefore, as I have argued elsewhere, the recent branding of EU migration policy in the apparel of sustainability should be understood as an attempt to unite Member States behind a common slogan that sounds appealing, at times of extreme disagreement on the instruments and principles that should guide EU migration law.[7]

In attempt to go further than diagnosing the political function sustainable migration serves, and to imagine how such an objective could inform migrants' rights in the EU, in this project I argue the following: if sustainable migration is pursued at EU level, the place of migrants' rights in it will not be something radically new born out of nothing. The inclusion of sustainability in EU primary law as an overarching objective of the EU that incorporates economic, social and environmental considerations is recent.[8] But the parallel pursuit of economic growth and social progress as primary law objectives have been part of the EU legal system from its inception.[9] As EU migration law is not a new area under harmonization, there is a history of how social and economic considerations have shaped migrants' rights. In this project I will investigate this history to shed light on both the potential and the limits of pursuing an EU sustainable migration framework.

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[4] Different authors see the whole as the planet, a system, etc. The reader is referred to Chapter 3, Section 3.1.

[5] See Chapter 3, Section 3.4.

[6] ibid.

[7] Alezini Loxa, 'Den Nya Migrations- Och Asylpakten Och Löftet Om En Hållbar EU-Migration' [2022] Europarättslig Tidskrift 175.

[8] Environmental considerations were added in the Maastricht Treaty, but sustainable development as primary law objective first appeared in the Amsterdam Treaty. For a detailed overview of the evolution of the EU sustainable development strategy see Chapter 3, Section 3.2.1.

[9] For details on the evolution of primary law see Section 1.1.

Through a critical historical study of different facets of EU migration law, I demonstrate that the balancing of economic and social considerations, a balancing currently reflected in the concept of sustainability, has shaped a legal system with very specific characteristics. These are the attribution of rights to migrants due to their contribution to growth, the limitation of their rights due to perceived risks to growth (without due consideration of whether such risks are evidence based or not), an emphasis on work-related rights as means to social progress without a broader conception of the human being behind the economic actor, and the incorporation of clauses to guarantee that there is always a safety valve to stop migration in case of threats to the economy. These characteristics when examined closely reveal inherent limitations in the way migrants' rights are construed at EU level, and these in turn can frame the limitations of an EU sustainable migration. Comparing the characteristics that flow from the history of EU migration law with the current formation of the EU legal system under the Lisbon Treaty, I also investigate whether and how such limitations could be overcome by emphasis on elements that could make migrant's rights more closely aligned with the objectives of the EU project.

A preliminary note of caution should be made before engaging with the remaining of the dissertation: legal scholars should be careful when picking up new concepts raised in international and European governance. Not all concepts come with specific purpose, clear-cut meaning and legal implications. There is considerable value in interrogating the appearance of such concepts, examining their genesis, and looking at their interplay with legal norms before jumping on the bandwagon of institutional discourse and integrating new buzzwords into legal writing. At a time when sustainable migration is the professed objective of the EU, and new proposals are put on the table with the aim to achieve it,[10] one objective of this work is to caution against the uncritical use of fuzzy concepts with unclear premises, but also to spearhead scholarly dialogue grounded in what sustainable migration can and cannot deliver for migrants' rights in the present form of the EU legal system.

After this short overview of the research problem, the next section will present the theoretical framework and research questions that guide my analysis. Section 1.2 clarifies the boundaries of this work in terms of the areas of EU law examined. Section 1.3 then presents the research design and material, and highlights the necessity of approaching the topic through a critical legal historical perspective. Section 1.4 presents the dichotomized scholarly approach to EU migration law to show the benefits of this horizontal historical study for academic research. Finally,

[10] Most recently the Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast), COM(2022)650 final; Proposal for a Directive of the European Parliament and the Council, On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final.

Section 1.5 outlines the structure of the dissertation and its significance and objectives.

1.1 Theoretical Framework and Research Questions

The EU legal system sits at the intersection of national and international law, drawing elements from both, while still operating as a *sui generis* legal order, as will be presented in more detail in Chapter 2. Sustainability is equally particular, though from a different perspective. As Chapter 3 will show, the concept is characterized by multidisciplinary and multidimensional understandings which take into account both the object of sustainability (what is to be sustained) and its quality as a balancing exercise between conflicting demands.

Taking the concept of an EU sustainable migration as the starting point of the analysis, a preliminary question to ask would be: migration that is sustainable for whom? The answer could vary: migration that is sustainable for the host states; for the states of origin; for the migrants involved; for the host communities; for the EU as a whole; for the planet; or for all of the above. Considering the diverse EU policy plans connected to sustainable migration,[11] all these would be equally valid answers; indeed each would frame a different investigation path. At the same time, not all these paths could and should be approached by means of legal research, as sustainable migration can be connected to different political approaches to growth and the role of human movement in it.[12] This project focuses on the EU legal order itself. Consequently, it will investigate what the past can tell us about the attribution of rights to migrants in a way that is sustainable for the EU legal order and that allows the maintenance of a 'common legal space that advances common aims under common values'.[13] In short, the project will investigate how migration can be sustainable for the EU legal order.

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[11] See Chapter 3, Section 3.3.

[12] See Jørgen Carling and Marta Bivand Erdal, 'Is "Sustainable Migration" a Valuable Concept?' (PRIO Policy Brief 2018) 5; On critical views behind sustainable development goals see Jane Briant Carant, 'Unheard Voices: A Critical Discourse Analysis of the Millennium Development Goals' Evolution into the Sustainable Development Goals' (2017) 38 Third World Quarterly 16; On the issues raised for human rights law by moving migration in the sustainable development discourse see Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: To What Extent Are Human Rights and Sustainable Development Mutually Compatible in the Field of Migration?' (2020) 16 International Journal of Law in Context 239; On a systematization of the different trade-offs involved in sustainable migration see Judith Janker and Susan Thieme, 'Migration and Justice in the Era of Sustainable Development Goals: A Conceptual Framework' (2021) 16 Sustainability Science 1423. All these issues are discussed in Chapter 3.

[13] Neil Walker, 'Legal and Constitutional Theory of the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 111; Armin von

Turning to the Treaty text as a starting point of the investigation, we see that sustainability appears in primary law under Article 3(3) TEU. In this Article, the sustainable development of Europe appears an overarching objective of the internal market, and it is based on an interdependence of economic growth, social progress, and environmental protection. Article 3(3) TEU incorporates all three pillars of sustainability (economic, social, and environmental) and turns them into integral parts of the EU legal system. The inclusion of sustainability in EU primary law as an overarching objective which incorporates economic, social, and environmental considerations is recent. While environmental considerations were first introduced with the Maastricht Treaty, the parallel pursuit of economic growth and social progress has formed part of the EU legal system from its inception.

Specifically, Article 2 of the Treaty of Rome referred to the aims of a harmonious development of economic activities, a continuous and balanced expansion, and an accelerated raising of the standard of living, among the objectives of the common market. In the Maastricht Treaty, Article 2 referred to harmonious and balanced development of economic activities, a high level of employment and of social protection, and the raising of the standard of living and quality of life. Under the Maastricht Treaty, these aims were to be accomplished not only through the internal market, but also through the policies to be adopted on movement of persons in the internal market under Article 3(d) TEU. The Amsterdam Treaty changed the wording of Article 2 into harmonious, balanced, and sustainable development of economic activities next to the social objectives included in the Maastricht Treaty. Moreover, in the Amsterdam Treaty, these objectives were to be achieved not only through the internal market, but also through measures on the entry and movement of persons in the context of the newly established Area of Freedom, Security and Justice (AFSJ).

The overview of the evolution of the Treaties points to the persistence of economic and social objectives in primary law. Essentially the economic and social pillars of sustainability have been constantly reflected in EU primary law through these objectives. The term 'objectives' should be understood as the imperatives behind the adoption of EU secondary law. Secondary law is adopted as means to achieve the objectives expressed in primary law. Thus, as I argue in this dissertation, to understand the potential legal implications of an EU sustainable migration for the rights of migrants it is essential to investigate its history, that is to investigate how economic, environmental, and social objectives have to this day been considered behind the attribution of rights to migrants under EU law. A challenge of this investigation is that environmental aspects have never been considered in EU

Bogdandy, 'European Law Beyond "Ever Closer Union" Repositioning the Concept, Its Thrust and the ECJ's Comparative Methodology' (2016) 22 European Law Journal 519, 520.

migration law.[14] A single Commission Staff Working document issued in 2013 suggested that environmental aspects should be taken into account in the planning of EU migration policy; however, the Commission held that there was not enough evidence at the time to evaluate how such migration could affect flows in the EU.[15] Therefore, due to lack of material, it is impossible to conduct a historical study on this aspect of an EU sustainable migration. In this sense, there can be no history of what has not existed.

As a result, my investigation into the past will be restricted to economic and social objectives, for these are the two pillars of sustainability that predate the appearance of the novel concept of sustainable migration in EU law, by being EU primary law objectives from the establishment of this legal order. In this, they must have affected how EU law creates rights for migrants. Investigating the way economic and social objectives have shaped EU migration law can point to the inherent limits and, perhaps, to the potentials of an EU sustainable migration for the rights of migrants. In light of the above, the project will address the following research question:

How have the economic and social pillars of sustainability, as historically conveyed in the EU primary law objectives of economic growth and social progress, shaped the rights of migrants under EU law?

By asking this question, I investigate how the economic and social objectives of the EU legal order, as specific manifestations of the economic and social pillar of sustainability in EU law, have shaped a legal area where the national of a state becomes the subject of EU law rights law by virtue of their cross-border movement and settlement (temporary or permanent) in a Member State. More specifically, I explore how the parallel pursuit of growth and progress by this legal order has affected the attribution, limitation, and extent of rights such subjects enjoy under EU law. To this end, I examine how economic and social considerations have historically appeared in the relevant law-making and adjudication at EU level. Specifically, in answering my main research question, I address the following sub-questions,

[14] Unlike migration law scholarship. See Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020); Simon Behrman and Avidan Kent (eds), *Climate Refugees: Global, Local and Critical Approaches* (Cambridge University Press 2022).

[15]Commission Staff Working Document Climate Change, Environmental Degradation, And Migration Accompanying The Document Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions An Eu Strategy On Adaptation To Climate Change SWD(2013) 0138 final. See also Fitness Check on EU Legislation on legal migration, SWD(2019)1055 final, Part 2/2 149.

- How do social and economic considerations manifest themselves in the process of negotiation and adoption of EU legal instruments creating rights for migrants?
- How are social and economic considerations demonstrated in the case-law of the Court of Justice of the EU on the rights of migrants to security of residence, free movement, equal treatment, and enjoyment of the right to family life?

The investigation of the role played by economic and social considerations entails exploring the factual elements examined by EU institutions when adopting a legal instrument or interpreting EU law. Economic considerations refer to factors related to the economy of the Member States more broadly, including, for example, labour market conditions, recession, trade. Social considerations refer to factors related to human life and society including, for example, human rights, social cohesion, education, social welfare. These considerations are taken into account in the negotiation and adoption of secondary legislation in order to steer the development of EU law in line with primary law objectives. In the interpretation of EU law by the Court of Justice of the EU, these considerations are taken into account in order to ensure that the effects of a decision will be aligned with primary law objectives. The examination of legal instruments and case-law in view of the social and economic purposes migrants' rights serve for the development of the EU legal order highlights the centrality of the economic and social pillars of sustainability in the historical evolution of EU migration law. The analysis further reveals that considerations of sustainable migration have historically informed EU law and case-law with very specific implications for the rights migrants draw from the EU legal order.

1.2 Delimitations

A preliminary clarification, before going into the methodological design of the research, is that this project does not cover all the fields that can be considered as falling under the rubric of EU migration law as a category of examination. Specifically, I examine the fields of free movement, Accession Treaties, Association Agreements and regular migration under the Area of Freedom, Security and Justice. I do not examine the history of legal instruments adopted in the fields of border management, illegal migration, asylum. The regulation regarding posted workers and intra-corporate transferees is also excluded from the examination. Finally, I only partially engage with external aspects of EU migration. These choices are made for three reasons.

First, border management and illegal migration instruments are part of the legal apparatus of the EU which is shaped by security related considerations, and which

emphasizes supranational administrative and police management.[16] In the relevant area, the EU regulates the movement of individuals by the coordination of networks of cooperation between Member States. The individual and their movement are the object, but not the subject of EU law.[17] This is also partly behind the exclusion of a full analysis of the external aspects of migration policy. While I examine Agreements between the EU and third countries which create EU law rights for migrants, I do not investigate more recent elements of the cooperation that are focused on returns and irregular migration, or Agreements that institute transnational cooperation in migration without creating rights for individual migrants.[18] These instruments are permeated by management of flows and security-related considerations. When they mention economic and social factors, they do so with the aim of ensuring the sustainable development of these third countries. As a result, they might yield interesting results as to how sustainable migration could be linked with the objectives of the EU external action, but they cannot inform us on how EU law regulates the rights of migrants in connection to the social and economic objectives of the EU legal order.

Second, regarding asylum, there are two reasons why it is excluded from this study; one is connected to the empirical legal reality, while the second is connected to normative demands. On the empirical legal reality, the regulation of asylum has historically been disconnected from economic and social considerations. A closer look into EU asylum law shows that the harmonization of the area stems from compliance with humanitarian obligations of Member States under the Geneva Convention.[19] Due to such humanitarian obligations, refugees fell under the scope

[16] Didier Bigo, Rob BJ Walker and Sergio Carrera, *Europe's 21st Century Challenge : Delivering Liberty* (Routledge 2010); Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004); Dora Kostakopoulou, 'The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion? : Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart Publishing 2009).

[17] It should be noted that the Court has emphasized the protection of rights even in these frameworks. See Moraru Madalina, 'EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022).

[18] For example, I do not investigate soft law in the context of the EU-Africa cooperation (EU-Africa Partnership on Migration, Mobility and Employment, AU-EU Migration and Mobility Dialogue, Rabat process, Khartoum process, Valetta summit). I also do not examine the Euro-Mediterranean Agreements that make reference to cooperation on social matters or migration, but do not set up concrete obligations for the parties as regards migrant workers like the EMAA with Jordan, Lebanon, Israel, and Egypt. Finally, I do not look into the agreements put in place in the context of the Eastern Partnership or the cooperation with Western Balkans as regards visa liberalization, as these refer to temporary movements.

[19] Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol. 189, p. 137 and Protocol Relating to the Status of Refugees, 31 January 1967, UNTS, vol. 606, p. 267.

of EU instruments adopted in the 1950s and 1960s, that is, long before the creation of the Common European Asylum System (CEAS).[20] Similarly, refugees were excluded from national policies geared towards halting migration after the 1970s oil crisis.[21] Further, under the CEAS, the case-law of the Court on refugees is characterised by a dignity-based approach cognizant of the vulnerability of refugees, and in line with international protection obligations of the Member States.[22] This approach is of course not without limits. Various scholars have expressed valid critiques on the failure of EU asylum law to uphold fundamental rights and its focus towards institutional cooperation and soft law.[23] Scholars have also suggested that the Court has followed more formalist interpretations in this area, especially after the migration crisis.[24] While their observations have merit, the reasoning of the Court in this area has never expressed a functional approach to the role of humans for the EU project of growth, as is the case in almost every other EU law area, and consequently, the differentiation on the role of asylum law for the EU legal order needs to be emphasised.

The difference between asylum and migration reflected in legal material is not always followed in EU policy discourse. Specifically, despite the emphasis of the Commission in the 1990s that asylum and migration are separate areas, and require separate approaches and solutions,[25] from 2000 onwards asylum has been addressed

[20] See Article 4(1) Règlement n° 3 concernant la sécurité sociale des travailleurs migrants [1958] OJ 30/561 and later Article 2 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2.

[21] See Commission Communication to the Council and the European Parliament on immigration, SEC(91)1855 final.

[22] Nika Bačić Selanec and Davor Petrić, 'Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law' (2021) 17 European Constitutional Law Review 498 See also the example of family reunification, where more favourable treatment is reserved for refugees.

[23] Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017); Violeta Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law' in Evangelia (Lilian) Tsourdi and Philippe De Buycker (eds), *Research handbook on EU migration and asylum law.* (Edward Elgar Publishing 2022).

[24] See Iris Goldner Lang, 'Towards "Judicial Passivism" in European Union Migration and Asylum Law?' in Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022).

[25] See the Vienna Action Plan, which is one of the last instances of this separate approach, and which mentions that 'The measures to be drawn up must take due account of the fact that the areas of asylum and immigration are separate and require separate approaches and solutions.'. Vienna Action Plan Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [1999] OJ C 19/1.

together with migration in EU policy documents.[26] In this regard, sustainable migration is no exception. Chapter 3 shows that asylum has not escaped the EU policy discourse on sustainability. However, the fact that asylum is included in the discourse of an EU sustainable migration does not mean that it should form part of it. Specifically, the incorporation of asylum law in a policy discourse that is based on balancing of society and economy to determine whether individuals should have rights, and of what kind, carries a real risk of further diluting the nature of international protection.[27] Instead of following the track set by the Commission, which mixes asylum and migration in the objective of sustainable migration, I suggest that refugees should be excluded from this policy objective. International humanitarian obligations should not be balanced against the social and economic demands constantly pursued by EU law.

Finally, posted workers and migrants falling under the Intra-Corporate Transfer Directive are excluded, not for lack of social and economic considerations in the relevant instruments, but because in this type of movement, migrants are not the subject of rights individually; rather, they draw such rights from their employer, who is the subject EU law seeks to protect. Specifically, these migrants are already employed in a state, and migrate to carry out services for their employers in another state. Thus, their movement becomes absorbed by the transnational business transactions they serve. For posted workers, the Court has dealt with these cases under the free movement of services provisions, and there is significant literature on the labour law tensions and implications of the relevant instruments.[28] As to the Intra-Corporate Transfer Directive, the instrument is not just part of the regular migration *acquis*, but is also adopted to comply with the EU commitments under the General Agreement on Trade in Services and bilateral trade agreements. [29] In the relevant legal areas, the mobility of individuals is tied to the operational needs of

[26] The failure to distinguish is apparent in the 1999 Tampere Council Conclusions which refer to the 'separate but closely related issues of asylum and migration'.

[27] A risk that has been materializing. See Goldner Lang (n 24); also Tsourdi and Costello (n 23) who refer to 'flight from law'; See also Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration' (n 12) where her arguments on the relation of development and international human rights law could apply by analogy in the case of EU asylum law.

[28] Georg Menz, 'Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014); Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 European Law Journal 711.

[29] See Recital 13, Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1. General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

international companies. The specificity of the regime is also reflected in the fact that the Intra-Corporate Transfer Directive refers to the Posted Workers Directive to assimilate the degree of protection between the migrants falling under their scope.[30]

Despite these limits to the material under examination, the response to the research questions will frame the history of sustainable migration in the EU. Based on a review of the relevant material, the project suggests that the parallel promotion of economic growth and social progress has driven the development of the EU migration law from its inception. In this regard, the concept of sustainable migration might be a recent one, but the objectives it serves have been at the core of EU law making for quite some time. Over the years, economic and social considerations have not been pursued with equal vigour, or for all categories of migrants. Indeed, the emphasis put on their pursuit differs depending on whether the times are characterised by growth and increased labour demands, or by recession and high unemployment.

The constant pursuit of these objectives has shaped a system where migrants draw rights (security of residence, free movement in the EU territory, equal treatment, and enjoyment of the right to family life) directly from the EU legal order insofar as they are implicated in promoting the economic goals of the EU project. The connection of the migrant to the internal market arguably breaks the tie with their residential or national community and connects them with the EU legal order through their utility in promoting the objectives of the EU. At the same time, the rights attributed to migrants who contribute to the EU project lead to social progress as a byproduct. As the years progressed and the independent constitutional structure of the legal order became more concrete, the migrants who are within the territory have seen their rights consolidated under a thicker social consideration of what EU law should, as a minimum, deliver to all those falling within its scope. To put it simply, the analysis demonstrates that economic objectives have led to the attribution of rights to entry, and social objectives have shaped social rights for migrants resident in the Member States; in this sense, sustainability has always been behind the regulation of EU migration law.

1.3. A Critical Legal History of EU Migration Law

To answer the research questions presented above, I have undertaken a critical historical study of EU migration law. Specifically, I examine EU primary and

[30] See Recital 15, Article 18 Directive 2014/66/EU and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

secondary law and case-law to investigate how social and economic considerations appear behind it. The research is doctrinal insofar as it provides an overview and analysis of all the relevant legal provisions of EU migration law, and it systematically presents and investigates an otherwise scattered body of legal rules. The research also extends to EU institutional practice. As de Witte recently pointed out,

> [P]ositive EU law cannot properly be understood (and described) without knowledge of key institutional practices; the 'black letter' of EU law remains a dead letter without reflecting in its analysis the various practices which EU institutions develop in shaping and implementing the formal legal norms.[31]

At its core, however, the research is historical, since I examine how the relevant legal material evolved from the time of the European Coal and Steel Community to the present day. The next section provides an overview of the material examined as part of my investigation. Section 1.3.2 provides certain terminological clarifications that are necessary due to the historical nature of this enquiry. Finally, sections 1.3.3 and 1.3.4 discuss the theoretical elements that inform the methodology.

1.3.1 Material

The completion of this project entailed the examination of considerable material due to the areas of EU law investigated and the time-period covered.[32] Specifically, in terms of doctrinal material I look at the areas of free movement of workers, Accession Treaties, Association Agreements, and regulation of regular migration from 1951 to the present. The investigation extends over 44 Association Agreements, out of which 28 contain labour migration or equal treatment related clauses, all the 7 Accession Treaties, 11 Regulations, and 17 Directives.

To investigate the economic and social considerations behind the adoption of relevant instruments, I looked through all the Bulletins of the EU Commission, which provide statistics and information on the broader geopolitical and demographic context of different time periods,[33] and I investigated material from

[31] Bruno de Witte, 'Legal Methods for the Study of EU Institutional Practice' [2022] European Constitutional Law Review 1, 2.

[32] Various scholars conducting historical EU studies I met during my stay at the European University Institute in Florence in spring 2022, and in the European Papers-Jean Monnet Network Summer School 'Rule of Law and Human Rights in Europe and the World in Times of Contestation', organized by Paris 1 Panthéon-Sorbonne University in September 2022 suggested that the thematic and chronological breadth of material examined would make it quite challenging to conclude the project in time.

[33] The bulletins can be found online in the AEI for the period of 1950-1995 http://aei.pitt.edu/view/eusries/GENERAL=3ABulletin_of_the_EEC=2FEC=2FEuropean_Union.

the Historical Archives of the EU (HAEU) and the University Pittsburgh Archive on European Integration (AEI). Certain documents related to institutional reforms of the EU were found in CVCE, a digital research infrastructure run by the University of Luxembourg with documents and publications on European integration.[34]

The investigation of archival material was not without challenges for several reasons. First, EU documents become public after 30 years.[35] Thus publicly available documents can in principle be found only until 1993. However, unlike the AEI, the HAEU, which host the largest collection of material, have no thematic repository, either by field of EU law, or by legal instrument.[36] The collection repository is also often faced with delays in the submission of archives by the EU institutions.[37] What is more, when going through the material in HAEU, one is left with the impression that there are documents which have not been submitted, or which are impossible to locate.[38] By searching in both institutional and personal collections of former EU officials implicated in the negotiation and preparation of specific instruments, I did my best to locate all the material that could inform my investigation. I remain eternally grateful to the staff of the Historical Archives of the EU, who did their best to support my research despite these challenges, which are not attributable to them.

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html. From 1996-2009 the relevant Bulletins are found in the archived website of the Commission https://ec.europa.eu/archives/bulletin/en/bullset.htm.

[34] All the documents are available online in https://www.cvce.eu/en/home.

[35] Based on Article1 of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community [1983] OJ L 043/1 as amended by Council Regulation (EU) 2015/496 of 17 March 2015 amending Regulation (EEC, Euratom) No 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence [2015] OJ L 79/1.

[36] See however the Research guides developed by the HAEU to assist scholars in different topics. https://www.eui.eu/en/academic-units/historical-archives-of-the-european-union/research-support/research-guides

[37] For example, the Council transferred files containing Legal Acts from 1990, 1991 and 1992; documents from the Lomé IV Agreement with the African, Caribbean and Pacific (ACP) countries; files from the Intergovernmental Conference pertaining to the revision of the EEC Treaty in 2022. See https://www.eui.eu/news-hub?id=additional-european-investment-bank-archives-released.

[38] Fernanda G Nicola, 'Waiting for the Barbarians: Inside the Archives of the European Court of Justice' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford University Press 2020) for a scholarly account. Her criticism is mostly addressed to the hesitation of the Court to release the full archival material.

I also proceeded in information requests for Commission and Council documents, to access documents from the period after 1993, which were all successful.[39] To do that, however, one must know the precise number, and in some cases also the title of the document they request, which means that I used this avenue for specific material I had located, and which appeared relevant to my investigation. For more recent instruments, especially those adopted after the 2000s, I investigated documents on the procedure of negotiations which can all be found in the Procedure section of the respective legislation in EUR-Lex, the official database of EU Law.

When going through the analysis, one might notice that the material I invoke from the Commission (and hence the Commission's approach to migration) exceeds the material related to the Council (and relatedly its approach). The reason for this discrepancy relates to the very different practice of the two institutions. As Thym has pointed out, the Commission has used its monopoly of initiative 'skilfully by presenting itself as the source of technical expertise and as a repository of knowledge'.[40] In contrast, the Council – especially in the area of AFSJ – operates under a veil of secrecy, making it almost impossible to access the discussions that preceded the negotiation of different instruments.[41] This discrepancy in institutional practice, combined with to the fact that all the instruments on regular migration were adopted in the past twenty years (and thus the documents on their negotiation are not deposited in the archives), does not allow a nuanced understanding of the position of the Council.

Furthermore, the case-law reviewed was selected by searching the website of the Court of Justice of the EU by subject-matter and by reference to the relevant legal instruments. I then cross-checked the results, with the case-law presented in the Document Information Section of different legal instruments in EUR-Lex, and I have engaged with the relevant literature to make sure that no case was missed. The case-notes and information sheets from the Centre for Migration Law in Radboud University, which are regularly updated, were invaluable in confirming the relevant material and ensuring that no recent case was missed.

The results of this search are systematically presented and analysed in this manuscript. The only area where I did not analyse all the relevant case-law produced

[39] This is not always the case. For a critique on denied requests on access to documents by the EU institutions and its relation to academic practice see Päivi Leino-Sandberg and Maarten Zbigniew Hillebrandt, 'Challenging the EU Institutions on Transparency- What Is the Role of Academics?' [2021] EU Law Live Weekend Edition 6; Päivi Leino-Sandberg, Maarten Zbigniew Hillebrandt and Ida Koivisto (eds), *(In)Visible European Government: Critical Approaches to Transparency as an Ideal and a Practice* (Routledge 2023).

[40] Daniel Thym, 'Institutional and Constitutional Framework' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 60.

[41] ibid 63.

by the CJEU, but rather selected cases which provide more insight into the research questions, is that of free movement after the adoption of the EU citizenship provisions. This is due to the extensive research already produced on the case-law, which would make any systematic analysis redundant.[42] The analysis also excludes cases which engage in the relation of EU citizenship to national citizenship, its acquisition and loss, as well as cases related to political rights EU migrants enjoy.[43] I also excluded from the analysis the case-law of the Court where EU citizenship provisions are invoked against the state of nationality of an EU national that has never moved away from their state of origin.[44] These cases relate to the nature of EU citizenship against the broader legal and political architecture of the EU, and are already examined in depth in scholarship.[45] Despite their importance with regard to

[42] See Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon' (2013) 62 International and Comparative Law Quarterly 97;; Elspeth Guild, Cristina Gortázar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014); Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 The Modern Law Review 233; Dimitry Kochenov, Nathan Cambien and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Nijhoff 2020); Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012).

[43] For example, Judgment of 2 March 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104; Judgment of 12 March 2019, *Tjebbes and others*, C-221/17, ECLI:EU:C:2019:189. See also case-law on Brexit, Order of 19 October 2018, *Wightman and others*, C-621/18, ECLI:EU:C:2018:851; Judgment of 9 June 2022, *Préfet du Gers and Institut National de la Statistique and des Études Économiques*, C-673/20, ECLI:EU:C:2022:449. Cases on name change and like Judgment of 8 June 2017, *Freitag*, C-541/15, ECLI:EU:C:2017:432; Judgment of 14 October 2008, *Grunkin and Paul*, C-353/06, ECLI:EU:C:2008:559; Judgment of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, ECLI:EU:C:2016:401; Judgment of 2 October 2003, *Garcia Avello*, C-148/02, ECLI:EU:C:2003:539.

[44] For example Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124; Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675; Judgment of 10 May 2017, *Chavez-Vilchez and others*, C-133/15, ECLI:EU:C:2017:354; Judgment of 14 November 2017, *Lounes*, C-165/16, ECLI:EU:C:2017:862. In such cases, the Court applies by analogy the rules on EU migrants to national law and nationals that have not left their state of origin.

[45] Dora Kostakopoulou, 'The Evolution of European Union Citizenship' (2008) 7 European Political Science 285; Sujit Choudhry, 'Citizenship and Federations: Some Preliminary Reflections' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001); Jo Shaw, 'Towards a Political Europe?: Citizens, Elections and the European Parliament' in Dimitry Kochenov and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019); Jo Shaw, 'View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010); Rainer Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) 15 German Law Journal 751.

the political link shaped by the EU citizen status, they do not allow for reflection on how EU law creates rights for migrants.

I further excluded cases related to the interpretation of the concepts of public policy, public security, and public health as a limitation for migrants' rights. Public policy, public security and public health are grounds invoked by the Member States to legitimately limit the EU right of entry or stay of aliens both in the area of free movement and in the area of migration from third countries.[46] Such grounds relate to statist perception of how national communities could function better by exclusion of an individual who is perceived as a threat. EU law and case-law have set standards on how these grounds can be judicially reviewed in order to avoid Member States curtailing the effectiveness of EU law.[47] The relevant case-law is important in showing how and on what grounds EU law limits state discretion in the application of national migration law.[48] Nevertheless, it does not allow any reflection on how a

[46] See Article 45 (3) TFEU and Articles 27 and 28 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) [2003] OJ L 158/77. Public policy and public security can be found as grounds for rejection/non-renewal in all the regular migration Directives and in Article 14 Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the EEC-Turkey Agreement.

[47] On free movement see Judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708; Judgment of 17 April 2018, *B*, C-316/16 and C-424/16, ECLI:EU:C:2018:256; Judgment of 16 January 2014, Onuekwere, C-378/12, EU:C:2014:13. On Turkish workers see Judgment of 10 February 2000, *Nazli and others*, C-340/97, ECLI:EU:C:2000:77 para 56; On family members of Turkish workers see *Dörr and Ünal* C-136/03 para 68.See however Judgment of 8 December 2011, *Ziebell* C-371/08, ECLI:EU:C:2011:809 para 60 where the Court found that the higher standards of review under Article 28(3) Directive 2004/38 for EU migrants with long residence in a Member State cannot be extended to Turkish workers and that the standards applicable under the Long-term Residents Directive should apply by analogy. The Commission had suggested that the case-law on EU migrants should be extended to TCN migrants as well, Commission working paper on the relationship between safeguarding internal security and complying with international protection obligations COM(2001)743 final. However, the case-law has differentiated the standards of review finding a wider margin of discretion on admission, an intermediate level of review for family reunification and a more extensive protection for long-term residents. See Judgment of 4 April 2017, *Fahimian*, C-544/15 on admission, ECLI:EU:C:2017:255 para 42-46; Judgment of 12 December 2019, *G.S.,* C-381/18 and C-382/18, ECLI:EU:C:2019:1072 paras 62-68 on family reunification; Judgment of 3 September 2020, *Subdelegación del Gobierno en Barcelona*, C-503/19 and C-592/19, ECLI:EU:C:2020:629 on public security considerations and attribution of the long-term residents status; Judgment of 7 December 2017, *López Pastuzano*, C-636/16, ECLI:EU:C:2017:949 and Judgment of 11 June 2020*, Subdelegación del Gobierno en Guadalajara*, C-448/19, ECLI:EU:C:2020:467 on public security considerations and expulsion of long-term residents.

[48] Cf Elspeth Guild, *European Community Law from a Migrant's Perspective* (Katholieke Universiteit Nijmegen 2000).

link is construed between the migrant and the EU in connection with the economic and social objectives of the EU legal order.

1.3.2 Terminological Clarifications

The transformation of the EU legal order since the Treaty of Rome necessitates a clarification of the terms I use when engaging with the relevant material. Being true to the discipline, I use the term Community and Community law in the period prior to the Maastricht Treaty adopted in 1992. The Treaty set up the European Union with different pillars and different decision-making processes in each pillar.[49] From the period from the Maastricht Treaty until the Amsterdam Treaty, which moved migration to the first pillar, the term Community is used for the legal framework of the first pillar. From the Amsterdam Treaty onwards, I make reference to the EU, and EU Law.

To ensure uniformity throughout the dissertation, the following terms are used to describe specific groups of people who fall under the legal instruments examined herein. First, the term migrant is used to describe any person who has moved away from their state of origin – whatever that state might be – and has moved to an EU Member State, temporarily or permanently. Especially in the period prior to the 1970s, the term migrant is intentionally used broadly to describe both nationals of Member States and third-country nationals. Community migrants or EU migrants are the terms I use to refer to migrant workers that are nationals of Member States. TCN migrants is used to refer to migrants who are nationals of non-EU Member States. When it comes to Accession Treaties and Association Agreements, more specific geographical terms are used to identify the migrants who come within the scope of such Agreements by virtue of their nationality.

The Maastricht Treaty introduced the legal category of European citizen. This legal status is attributed to any person holding the nationality of a Member State, which also covers those persons who have never moved away from their state of origin. I avoid the widespread use of this term. It will figure in the discussion in Chapters 5 and 6, as the legal basis of European citizenship has been used by the Court in the free movement case-law after 1992. However, it is a particular legal concept with different implications for people who never left their state of origin, or, at times, who are not associated with migrants. The term EU migrant will thus be consistently used also in the period after 1992 to indicate the nationals of Member States who have moved from their state of origin to another Member State.

Further clarification needs to be made in relation to the use of the term ‘children’. Different EU law instruments attribute rights to children of migrant workers or former workers either directly or by reference to equal treatment for migrants and

[49] See Chapter 2.

their families on social security and access to education. When the Court has examined the relevant provisions, it has never applied any limitation regarding age. So, when reference to children is made in the analysis, it signifies the family bond to the migrant, and it is not restricted to minor children.

When reference is made to EU law rights, I mean legal entitlements stemming from EU law. Chapter 2 provides a more detailed overview of how EU law creates rights for individuals. Relatedly, when reference is made to residence rights, these mean the right to reside in a Member State created by EU law. This right takes effect in the national legal order by the attribution of a national permit that allows a migrant to reside. A migrant can thus enjoy residence rights by EU law and in that case, the Member State needs to undertake appropriate action to give effect to that right. A migrant could also enjoy residence rights under national law, and not always be entitled to protection under EU law, as the analysis will show. Finally, where reference is made to social rights, the term is used broadly to refer to equal treatment provided by EU law on access to social security, social assistance, and other state supported facilities like education and healthcare.[50]

1.3.3 The Necessity of EU Legal History

This project is undertaken at a time when EU legal history is beginning to take shape as an independent field of scholarly research. Rasmussen has contended that EU law differs from most other fields of law because it does not have a well-established legal history.[51] While this is to an extent to be expected, as EU law has only been around since the 1950s and has rapidly transformed in terms of legal design and areas under harmonization, he argues that 'the lack of an established legal history poses a serious problem to those scholars and practitioners who want to think critically about how European law has evolved and identify the major challenges to the field today'.[52]

During an earlier encounter between Rasmussen and Mark Pollack,[53] Pollack suggested that 'if the 1990s were the Golden Age of law and politics research, today

[50] The definition is inspired by the similar use of the term social rights in Karin de Vries, 'The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in European Union Law?' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

[51] Morten Rasmussen, 'Why European Law Needs a Legal History' (2021) 49 EU Law Live Weekend Edition 2.

[52] ibid. Also in Morten Rasmussen, 'Towards a Legal History of European Law' (2021) 2021 6 European Papers - A Journal on Law and Integration 923.

[53] Morten Rasmussen, Mark Pollack, Francesca Bignami, Bill Davies and Fernanda Nicola participated in a workshop titled 'Toward a New History of EU Law' organized by the American

is the Golden Age of EU legal history.'[54] Indeed, significant contributions in EU law, by both historians and legal researchers, have been produced in the past decade.[55] Nicola and Groschinski have categorized historical research in EU law in three areas: research that investigates the history of European integration and the resistances to it; research that looks into the members of the Court of Justice of the EU; and research into the stories of the lawyers in the legal services of the institutions and the Member States, and their visions of EU integration.[56] One could also add a fourth area of historical research, one which investigates the connection of EU law to earlier judicial practices and legal theories.[57]

Nevertheless, historical research in EU law has not engaged in the same depth with the development of specific areas of EU law. As a result, Rasmussen suggested that 'Perhaps the most important development would be to move from the history of European constitutionalism to the histories of material law.'[58] Relatedly, legal historical research on material EU law is slowly developing through contributions which investigate the evolution of different areas of EU law, even if the authors do not always frame their work as historical.[59] Such contributions are adding to the proliferation of edited collections that revisit the case-law of the Court and investigate how it set the foundation for the evolution of the legal order or of specific areas of EU law.[60] This dissertation contributes to this strand of scholarship. Taking

University Washington College of Law on November 7, 2012 that led to the publication of Issue 5, Volume 28 of American University International Law Review with their contributions.

[54] Fernanda G Nicola, 'Critical Legal Histories in EU Law' (2013) 28 American University International Law Review 1173, 1183.

[55] For a detailed compilation of the most important contributions, see Anna-Katharina Groschinski and Fernanda G Nicola, 'Essential EU Legal History Research for Lawyers' (2021) 49 EU Law Live Weekend Edition 18.

[56] ibid 19.

[57] Michel Erpelding, 'Juristes internationalistes, juristes mixtes, Euro-Lawyers : l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational' (2022) 22 Clio @ Themis on the relation of EU lawconcepts to colonial mixed-tribunals; Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Hart Publishing 2003) on the relation of EU law with different legal theories.

[58] Rasmussen (n 53).

[59] See for example Pedro Gustavo Teixeira, *The Legal History of the European Banking Union: How European Law Led to the Supranational Integration of the Single Financial Market* (Hart Publishing 2020); Olga Giakouminaki, 'The Administrative Acquis of EU Public Procurement Law: A Study on Administrative Law as a Tool of European Integration' (Thèse de doctorat, Paris 2 2021) with elements of comparative law a well; See also Paul Craig and Gráinne de Búrca, *The Evolution of EU Law* (3rd ed, Oxford University Press 2021) providing an overview of institutional and case-law evolutions in different areas of EU law.

[60] See interdisciplinary works like Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (1st edn, Cambridge University

the fuzzy concept of sustainable migration as a starting point, I argue that it can only be understood through a backward look into the history of migrants' rights in the EU legal order. Such a historical investigation in EU migration law will prove that the economic and social considerations that are part of sustainability have guided EU law-making from its inception.

Finally, in conducting such historical research, I employ both internal and external legal history methods.[61] Specifically, I examine the history of the legal instruments (internal legal history) in parallel to the processes and the geopolitical events that shaped them, the law in context.[62] It should be noted that historical and geopolitical events are presented as they appear in analyses carried by the EU institutions. I do not step outside of the EU institutional material when describing the factual reality on the ground at different times. Rather, I operate under the assumption that the description provided by the EU institutions is valid. This choice could be criticised for failing to consider a factual reality that might not always align with EU institutional discourse. However, this research investigates how different EU institutions, based on their perception of factual economic and social reality, attempted to align EU migration law to the social and economic objectives of the EU legal order. Consequently, stepping outside the institutional description of the economic and social context in Member States throughout the past 70 years would not add to the investigation.

1.3.4 The Desideratum of EU Critical Legal Studies

The project employs a critical approach to EU Law. In light of the manifold crises experienced in Europe after 2008, a 'critical turn' in EU law scholarship emerged.[63] According to the editors of the 52nd volume of the Common Market Law Review, two forms of critique appear in EU law scholarship. The first focuses on the failures of EU law to achieve its 'high ideals, notably justice, freedom, democracy and

Press 2017); William Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press 2019); Graham Butler and Ramses A Wessel (eds), *EU External Relations Law : The Cases in Context* (Hart Publishing 2022) providing an overview of the case-law that shaped the building blocks of EU external relations law. Doctrinal works like Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010).

[61] Philip Handler, 'Legal History' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Routledge 2013) 95.

[62] ibid.

[63] 'Editorial Comments: The Critical Turn in EU Legal Studies' (2015) 52 Common Market Law Review 881; Nicola (n 54) 1178.

prosperity'.[64] In this critique, EU law is perceived as a well-designed order to achieve these ideals, but in practice, it fails to serve them.[65]The second strand of scholarship focuses on the social injustices created by EU law, and seeks to challenge the mainstream assumption in EU law scholarship which is that 'integration is virtuous, economically, socially and legally advantageous'.[66]

This project is part of the second strand of critique. I so situate it since I emphasize the nature of EU free movement as a scheme of labour migration that was beneficial to the industrial economies of the Member States. The rights granted to EU migrants and the social progress created thereby are a byproduct of this. Such rights do not extend with the same vigour to EU migrants who do not pursue economic activity, as this could come with implications for the economies of the Member States, and could affect the pursuit of growth. This points to the limits of EU integration and the social injustice it creates for the non-mobile and inactive citizens of Europe. At the same time, the project highlights the inconsistencies created by the failure of EU law to extend rights to TCN migrants even when such migrants have a similar function for the EU legal order by contributing to growth.

It is also necessary to clarify that such critical approach is vital to the autonomy of the EU legal system. With reference to EU critical legal studies, Judges Rodin and Perišin suggested that

> European critical legal thinking establishes its agenda around the process of Europeanisation, which, in turn, serves as a benchmark for an external critique of national legal rules, principles and concepts. While the CLS [Critical Legal Studies] agenda is dominantly social, the EU critical agenda is primarily supranational … the European critical legal studies agenda is supranational in the sense that one of its ideals is a better, larger life for all, and it undermines étatist protectionist policies.[67]

[64] 'Editorial Comments: The Critical Turn in EU Legal Studies' (n 63). Here they identify the following works; Michelle Everson and Christian Joerges, 'Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism' (2012) 18 European Law Journal 644; Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549.

[65] 'Editorial Comments: The Critical Turn in EU Legal Studies' (n 63) 884–885.

[66] ibid 885–887. Here they place; Alexander Somek, 'Europe: From Emancipation to Empowerment' (The London School of Economics and Political Science 2013) LSE 'Europe in Question' Discussion Paper series 60; Agustín José Menéndez, 'Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship' (2014) 15 German Law Journal 907.

[67] Siniša Rodin and Tamara Perišin, 'Chapter 1. Transformation or Reconstitution of Europe: The European Critical Legal Studies Perspective' in Siniša Rodin and Tamara Perišin (eds), *The Transformation or Reconstitution of Europe : The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018) 11 Note that Tamara Perišin became a judge at the General Court in 2019 after this publication was issued.

The critique in this project is focused on the EU legal system, and I do not intend to – implicitly or explicitly – criticise national legal systems. By investigating the persistent economic roots of EU migration law (both in free movement and regular migration), I suggest the following: To the extent that economic considerations permeate the regulation of labour migration from third countries, the rights-based approach that characterises free movement should be extrapolated to migration from third countries, and, hence, circumvent the remaining statist conceptions of migration as regards third-country nationals.[68] In this regard, my critique merges a social agenda (when directed to free movement rules) with a supranational one (when directed to AFSJ rules).

The project is also situated in the methodological category of a critical legal history of EU law. According to Nicola, critical legal histories in EU law have been developed by the New Historians as a methodology to allow the interrogation of the 'functional determinist narratives of EU law that explain how each ECJ decision is part of a puzzle that creates, or fails to create, a more constitutional Union'.[69] In this regard, the historical investigation undertaken shows more nuanced understanding of what EU institutions tried to achieve by regulating migration at different points in time.

In the same context of critical legal history, Davies has engaged in the debate of US legal historiography over the distinction between 'applied' and 'pure' legal history.[70] Pure history is perceived as more scientific and descriptive, whereas applied history has a more normative approach. According to Davies, applied historiography holds the promise of making historical narratives 'useable'. [71] It can normalize or destabilize contemporary practices by showing that they have or lack antecedents.[72] He then goes on to locate the work of New Historians in between these two methods, suggesting that they proceed in an 'indirect applied' legal history.[73] This type of research 'offer[s] conclusions from legal history and can be

[68] For a similar approach see Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016).

[69] Nicola (n 54) 1178. A central figure among the New Historians is Rasmussen, who situates 'the jurisprudence of the ECJ in a web of "multiple trajectories of possibility"'.

[70] Bill Davies, 'Why EU Legal History Matters- A Historian's Response' (2013) 28 American University International Law Review 1337, 1350.

[71] ibid 1350–1351 with reference to Alfred Brophy, 'Introducing Applied Legal History' (2013) 31 Law and History Review 233-240.

[72] Davies (n 70); One could also add as an example Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649 who looks at alternative possibilities that did not materialize on the development of EU fundamental rights.

[73] Davies (n 70) 1350–1351.

used in contemporary debates by other disciplines to clear up uncertainties and falsehoods'.[74]

Such an indirect applied legal history is pursued in this project. By a critical examination of the development of free movement of workers and migration from third countries, I aim to debunk the central narratives of both these legal areas, which are examined through a literature review in the following section. Through a joint reading and investigation of the development of different fields of EU migration law, I hope to show that free movement was not a one-way street to the creation of a supranational polity, and that migration from third countries was not necessarily regulated as a way to create a securitized area for the citizens of Europe.

Instead, these legal areas can also be seen as migration frameworks developed based on economic demand, where the social progress achieved resulted from the economic function of individuals in the internal market. This reading allows us to relate the history of EU migration law to the contemporary indeterminate objective of an EU sustainable migration and to reflect on whether, and if so, how EU law can pursue such an objective. It also shows that the EU has pursued sustainable migration in the way it has regulated the rights of EU migrants, and that EU institutions have attempted the transposition of this framework to TCN migrants as well. The fact that the free movement framework has not yet been extended to TCN migrants does not necessarily mean that an EU sustainable migration is a groundbreaking concept, lying far from what the EU has already devised.

1.4. The Broad Approach to EU Labour Migration as a Category of Examination

The historical investigation carried out in this dissertation examines both free movement and regulation of migration from third countries. This approach to EU migration law as a broader category of examination is rarely encountered in EU law literature. Migration law research is dichotomized along two distinct categories: free movement, and migration from third countries. There is a presumed difference in the normative foundations of the attribution of rights to each category of migrants under these frameworks.[75] More specifically, scholars develop their research under the assumption that regulation of migration from third countries was necessary to ensure the better functioning of a free movement for EU migrants, who should move

[74] ibid 1351.

[75] Daniel Thym, '"Citizens" and "Foreigners" in EU Law. Migration Law and Its Cosmopolitan Outlook' (2016) 22 European Law Journal 296; Daniel Thym, 'EU Migration Policy and Its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 Common Market Law Review 709.

in an area of freedom security and justice.[76] By investigating these fields in light of the economic and social considerations that underpin them, I challenge the mainstream scholarly paradigm that insists on the differentiation behind the rights of EU and TCN migrants, showing that there are significant common elements in how EU law grants rights to these categories of migrants. In this section I will map out and review the relevant scholarly research, and further explain how this dissertation covers a scholarly gap.

First, an independent body of literature has developed on free movement and the rights that are enjoyed by EU migrants in that framework.[77] In this literature, and in the EU institutional practice, migration is termed as mobility, so as to emphasize its domestic character.[78] EU migrants are referred to as citizens and they enjoy specific (privileged) mobility rights and certain political rights.[79] The history of EU citizens' rights tells a story of gradual attribution of rights as a means to 'the legal and practical realization of the internal market'.[80] As economic integration progressed, the status of EU citizenship was established, and nationals of Member States were attributed rights as members of a supranational community that developed with the purpose of closer political integration.[81] The attribution of free movement rights to nationals of EU Member States is seen as the central difference that distinguishes them from third-country nationals, as EU mobility rights are tied to a fundamental freedom located at the core of the EU project, the internal market. In this context, Thym has noted that there is a 'normative surplus' of citizen's rights because their implementation is 'meant to sustain the integration process'.[82]

On the other hand, migration to the EU from third countries is examined in the context of the AFSJ. The regulation of third-country nationals' movement has taken

[76] This is also reflected in the wording of Article 3(2) TEU. Costello (n 68) 5; Kay Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International 2000).

[77] See Sandra Mantu and others (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020); Daniel Thym (ed), *Questioning EU Citizenship : Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017); Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff Publishers 2013); *Elspeth Guild, The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004).

[78] Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 302.

[79] Rights enumerated in Article 20 (2) b, d and Articles 22- 24 TFEU.

[80] Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New legal dynamics of European Union* (Clarendon Press 1995) 85.

[81] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 723.

[82] ibid 725.

place in parallel to the internal market core of the EU project.[83] Initially part of the intergovernmental pillar of Justice and Home Affairs, the AFSJ became part of the EU constitutional structure with the Treaty of Amsterdam. A full set of constitutional safeguards came with the Lisbon Treaty.[84] The abolition of border controls between the Member States and the facilitation of movement for EU migrants created the need for the creation of common borders with the outside world and for the harmonization of the categories of third-country nationals who were to have access to this common area.[85] The central presumption on the regulation of migration from third countries is that it was introduced to ensure that a true Area of Freedom, Security and Justice would be available to EU citizens on the move.[86] In making this presumption, the literature does not differentiate between the very different frameworks of regular migration, asylum, border management and illegal migration. This can be explained by the simultaneous development of all these policies in the various intergovernmental fora and their common institutional evolution in the Treaties.[87]

The literature that engages with migration from third countries to the EU is primarily human rights geared. Scholars explore international and EU human rights frameworks, and they argue for the necessity of a more liberal approach to third-country nationals.[88] In this area, Costello has examined human rights protection for migrants and refugees by invoking the transformative potential of EU law. She has argued that bringing these areas into the EU law system carried the potential for higher standards of human rights protection than those available under human rights law.[89] Critical scholars have also engaged in research in this field. Specifically, some

[83] Kees Groenendijk, 'Categorizing Human Beings in EU Migration Law' in Dirk Jacobs, Andrea Rea and Saskia Bonjour (eds), *The Others in Europe* (Editions de l'Université de Bruxelles 2011).

[84] In the Amsterdam Treaty, judicial review by the Court of Justice of the EU was limited substantively and procedurally pursuant to Articles 62(1) 68(3) EC for the transitional period prescribed in Article 67 EC. In contrast with the other transitional arrangements of Amsterdam, the limitation to the Court's jurisdiction was only abolished with the Treaty of Lisbon.

[85] Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 303.

[86] This is also reflected in the wording of Article 3(2) TEU. Costello (n 68) 5; Hailbronner (n 76) 1.

[87] More details on the intergovernmental past of these areas are provided in Chapter 5, while details on the evolution of the Treaty framework are provided in Chapter 2.

[88] Joseph HH Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 European Journal of International Law 65; Anja Wiesbrock, *Legal Migration to the European Union* (Brill Nijhoff 2010) 5-6 for a brief overview of the relevant literature.

[89] Costello (n 68).

have criticized the EU legal order for the exclusion of migrants therefrom, and have identified different reasons underlying it.[90]

Few scholars have addressed adequately both EU migrants and third-country nationals in their research. Over the years, and especially in the 1990s, certain authors examined the potential of convergence between free movement and AFSJ migration. In light of the evolution of the EU legal order in the 1990's, O'Keefe suggested that it would be 'anomalous' if the protection provided under the free movement framework was confined to Community nationals.[91] Specifically, he argued that the contribution of third-country nationals to the achievement of the aims of the Treaties necessitates their protection by Community law, and that '[t]o entrust competence in this area to the Member states at [that] stage of European integration only recalls and reinforces a statist view of Community law which is inappropriate in this area.'[92] Guild also conducted research on the matter from a migration law premise in the 1990s. Specifically, in her PhD dissertation, she examined whether free movement could inform the future of migration from third countries in the EU, taking as a starting point the establishment of EU competence in the field of asylum and migration in the Amsterdam Treaty.[93] As her work was written towards the end of the previous century, Guild's contribution examined how the free movement *acquis* with its rights based approach and principles could affect the action that the Community would take in the future in this new area of migration.

With the new millennium, it became clear that the rights afforded to EU nationals under free movement would not be extended to third-country nationals under similar liberal considerations. Thereafter, scholars focused more on the effects of the legal differentiation for third-country nationals. Indicatively, Maas, among other scholars, suggested that the difference in rights between EU citizens and third-country nationals legally residents in the EU, replaced 'one dichotomy with another: the separation between citizen and foreigner has gradually been replaced by the distinction between European and non-European'.[94]

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[90] Security, externalization, colonialism are identified as reasons for exclusion. See Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) 31 Journal of Refugee Studies 216; Étienne Balibar, *Nous, citoyens d'Europe ?* (La Découverte 2001); Bigo, Walker and Carrera (n 17).

[91] David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 European Law Review 3, 16–17.

[92] ibid 17.

[93] Guild, *European Community Law from a Migrant's Perspective* (n 51); Later published as Elspeth Guild, *Immigration Law in the European Community* (Brill Nijhoff 2001).

[94] Willem Maas, 'Migrants, States, and EU Citizenship's Unfulfilled Promise' (2008) 12 Citizenship Studies 583; Balibar (n 94) talking about a European apartheid.

In a series of contributions, Thym engaged with the relation between free movement and migration from third countries.[95] The starting point of his analysis is that while EU law distinguishes between the legal categories of EU citizens and third-country nationals, the differentiation does not fit the state-centred understanding of citizenship and alienage, of citizens with equal rights and aliens who are excluded from the protection of the law.[96] At the same time, the difference in rights enjoyed by EU citizens and foreigners respectively does not fit with accounts of universalism or with attempts of scholars to present the EU as a prototype of transnational governance with new forms of membership.[97]

According to Thym, the separate categories of EU citizens and foreigners, and the rights the latter can claim, cannot be explained by a binary juxtaposition of sovereign statehood and universalism.[98] To explain this categorization, he looked at Treaty rules and case-law with the purpose of reconstructing the normative-constitutional aspiration of EU migration law.[99] He distinguished between the characteristics of EU free movement and EU migration law as follows. The EU free movement scheme of transnational mobility aspired to promote integration; the creation of a supranational Union was driving that migration framework.[100] In the free movement framework, the individual preference of the EU migrant guides mobility and there is no state discretion on entry.[101] The constitutional point of reference is fundamental freedoms, and these are used 'as doctrinal justification for

[95] Thym, '"Citizens" and "Foreigners" in EU Law' (n 75); Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75); Daniel Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law : Rights, Roles, Identities* (Hart Publishing 2016); His position also frames the introductory discussion in Daniel Thym, *European Migration Law* (Oxford University Press 2023) 23–29.

[96] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 735; Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 316.

[97] Daniel Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law : Rights, Roles, Identities* (Hart Publishing 2016) 128 with reference to Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994).

[98] ibid 129; Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 316.

[99] Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' (n 97) 120 with reference to doctrinal constructivism as in; Armin Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 European Law Journal 95; Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 297.

[100] Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 302; Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 723.

[101] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 711.

the judicial promotion of transnational mobility'.[102] According to Thym, the free movement framework did not aim to harmonize national migration laws, but rather imitated state concepts.[103] Migration under the AFSJ, then, is a 'euphemism for State control'.[104] The AFSJ together with the Charter establish migration law 'as a policy field in its own right with distinct rules and objectives'.[105] In this framework there is no individual right to cross-border movement with a constitutional status.[106] Entry is a public prerogative of the state, with human rights limitations.[107] The constitutional point of reference is human rights.[108]

Looking at the contrast between the two frameworks, Thym suggested that the constitutional frame of reference of EU migration law can be described as its cosmopolitan outlook.[109] This cosmopolitan outlook describes a migration governance that can 'combine migratory opportunities for the economically motivated with the pursuit of legitimate concerns of democratic self-government' of the Member States.[110] These concerns, he argues, can be economic, social and cultural such as protecting less qualified domestic workers or supporting linguistic integration.[111] The cosmopolitan outlook suggested by Thym essentially describes the curtailment of absolute state discretion on migration due to considerations related to migrants as human beings, whose rights should be protected.[112]

Thyms' account of the supranational impetus of EU free movement and the cosmopolitan outlook of EU migration law resonates if we approach EU migration law from a national lens. It would allow us to understand how EU law has affected the sovereign nation state as the central actor of migration control, without however, overcoming it. At the same time, it would fit with constitutional pluralism theory on the relation of EU law with the Member States, as it allows the combination of 'pan-

[102] ibid 718; Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 299.

[103] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 724.

[104] ibid 726.

[105] ibid 716.

[106] ibid 719.

[107] ibid 720; Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 305.

[108] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 715.

[109] ibid 726; Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 316.

[110] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 732.

[111] ibid.

[112] Thym, '"Citizens" and "Foreigners" in EU Law' (n 75) 306–307.

European values and rules with particularistic self-government and identity-construction at national level'.[113]

Nevertheless, this approach comes up against paradoxes if we look at EU law from an internal constitutional perspective related to the structure of the EU legal order and the rights individuals draw from it. Thym suggests that '[i]n the field of migration, human rights assume the function of fundamental freedoms.'[114] In the distinction between EU citizens and foreigners, he juxtaposes EU citizenship with the AFSJ and the Charter. However, especially after the Lisbon Treaty, the Charter plays a specific role in the construction of the EU as a constitutional legal order.[115] A normal constitutional framework would demand full and equal protection of fundamental rights for citizens, with limited/curtailed protection for aliens. However, in EU law the protection of fundamental rights is determined by whether there exists a sufficient connection to EU law. As a result, the way in which fundamental rights application has developed in the case-law challenges 'common wisdom about the way in which a political entity engages with the fundamental rights of citizens and foreigners'.[116]

This particularity creates paradoxes for the interaction of EU citizenship and migration law with the EU constitutional framework, which have been examined in different contributions by Iglesias Sánchez[117]. In her work, she has shown that the specificity of the EU fundamental rights protection regime, combined with the EU competence on citizenship and migration does not correspond to expectations based on how the categories of 'citizen' and 'foreigner' would normally shape fundamental rights protection.[118] As she mentions,

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[113] ibid 314; See also Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2008) 1 European Journal of Legal Studies 137.

[114] Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 75) 736.

[115] Xavier Groussot and Gunnar Thor Petursson, 'The EU Charter of Fundamental Rights Five Years on : The Emergence of a New Constitutional Framework?' in Ulf Bernitz, Sybe de Vries and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument : Five Years Old and Growing* (Hart Publishing 2015).

[116] Sara Iglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017) 265.

[117] Sara Iglesias Sánchez, 'Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy' in Elspeth Guild, Cristina Gortázar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014); Sara Iglesias Sánchez, 'Constitutional Identity and Integration: EU Citizenship and the Emergence of a Supranational Alienage Law' (2017) 18 German Law Journal 1797.

[118] Iglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' (n 116).

> [I]n a rather paradoxical fashion, the progressive development of EU law has led to a situation in which EU law on free movement of persons is still reminiscent of an internationalist approach, whereas the EU migration policy seems to have adopted a constitutional approach.[119]

While Iglesias Sánchez does not contest the different normative background identified by Thym, she shows that, in some respects, EU migration policy goes further than free movement law as regards the application of EU fundamental rights.[120] She has therefore suggested the following on the system of fundamental rights protection in EU law:

> It unveils the specificity of the reconstruction of the concepts of citizens and migrants in the European Union as two parallel but disconnected statuses, where any attempt at reintroducing conceptual dynamics inherited from the State encounters rigid structural limitations in the current primary law design.[121]

Iglesias Sánchez begins from a normative constitutional point of view and examines what the categories of citizens, migrants, EU nationals and EU foreigners tell us about the structure of the EU legal order. The present work will ultimately show the same but in reverse engineering. It looks at the bits and pieces of EU migration law through the lens of their historical development to see what this history tells us about the way economic and social objectives have conditioned the link between the migrant (EU or TCN) and the EU legal order.

The present research project does not contest the differentiation between free movement and migration regulation in the AFSJ. The history of inception of the legal frameworks, the institutional design and the difference in the rights granted under the free movement and AFSJ framework cannot support the opposite. Instead, it conclusively examines the regulation of migration through these frameworks so as to reveal the thread that in fact links them in light of economic and social considerations. If the historical examination succeeds in showing that both these frameworks can be perceived and utilised as means to achieve economic and social objectives (even to different extent), then this demonstrates the integral nature of migrant's rights in the EU legal order. More specifically, my research shows that EU law has always taken into account the relation of migrant populations to the growth of EU economy, and that migrants are vested with rights due to their active participation in furthering the economic goals of the EU project. This function of migration in promoting growth and the correlation of migrants' rights with social progress places sustainable migration at the heart of the EU project. It should be noted that seeing the rights of migrants in this way does not necessarily lead to a

[119] ibid 262.

[120] ibid.

[121] ibid 266.

migration system that will be more humane or inclusive; rather it highlights the inherent limitations of EU migration law and the economic exclusion it produces. These limitations will be examined in more detail in the concluding chapter, together with some modest suggestions for overcoming the legal tensions that arise therefrom.

1.5. Structure and Objectives

In conducting a critical historical study of EU migration law, the dissertation develops as follows. First, Chapter 2 provides a guide to the reader, serving a double objective. The present study lies at the intersection of EU and migration law, and aims to contribute to scholarly analysis in both these fields. Chapter 2 thus clarifies the central rules and concepts of EU law to facilitate the understanding of readers not acquainted with EU law specifics in the rest of the investigation. At the same time, this dissertation is a historical investigation into different areas of EU law with their own legal specificities. Consequently, a mapping of historical evolution of the general legal framework of each area, next to their specific concepts, can be considered necessary before going into a horizontal investigation that will cut through the different frameworks in different time periods. Essentially, Chapter 2 provides the groundwork for understanding and evaluating the analysis that takes place in this work not only for non-EU law scholars, but also for EU law experts, to the extent that they are not acquainted with all the areas of EU law under investigation.

Chapter 3 provides an overview of the indeterminate nature of sustainable migration and the impossibility of using it as a starting point for the adoption of specific legal initiatives at EU level. The analysis in this chapter disentangles the interrelation of economic, social, and environmental objectives, long-term approaches and inter and intra generational justice demands inherent to sustainability. It also emphasizes how the historical research undertaken is a necessary precondition for making assessments about the legal implications of sustainability for the rights of migrants under EU law.

Chapters 4, 5 and 6 form the heart of this project. In these chapters I examine chronologically at all the different areas of EU migration law from 1951 to the present. Chapter 4 begins with an examination of the period from 1951 to the Single European Act. Chapter 5 continues by reviewing material from the Single European Act to the failed Constitutional Treaty. Chapter 6 concludes the analysis by looking at the evolution of the relevant areas of law from 2004 to the present day. The material investigated in the relevant chapters might entail certain overlaps. Instruments adopted during one period, might be interpreted in case-law that follows

many years after, into another period.[122] What is more, a legal instrument could be negotiated for years before being eventually signed, and then might take effect years after its adoption due to temporal limitations.[123]

To categorize the material in the respective time periods, I have considered a number of factors. Legal instruments (Regulations, Directives, Treaties, International Agreements) are categorised based on the date of their signing. It is more difficult to temporally categorise the case-law analysis. A dispute related to EU law might occur close in time to the adoption of a legal instrument, but that is not usually the case. It takes time for different EU law instruments to take effect in national law; it takes more time for a factual dispute to arise; and it takes even more time for a case to reach the national court and eventually, the European Court. In principle, the case-law is classified in the respective chapters in connection to the legal instruments interpreted. In situations where case-law continued to be issued across different periods, and the legal instruments were not amended, it is affected by the changing Treaty framework.[124] Thus, case-law analysis is categorized based on a combination the Treaty framework applicable at the time the dispute was heard by the Court, and the secondary law applicable to the dispute.

During the analysis it will become clear that the three periods are framed not only by a Treaty framework that guided and transformed the EU structure, but also by broadly similar economic and geopolitical circumstances with specific repercussions for EU legal imagination. Once the linear historical investigation carried out in these chapters is concluded, the centrality of the economic and social pillars of sustainability in the development of EU migration law will become apparent.

Finally, Chapter 7 concludes the dissertation by drawing conclusions from the investigation carried in the three historical chapters, answering the research questions, and fleshing out how the history of EU migration law can inform the contemporary objective of an EU sustainable migration. This chapter will examine more closely the limitations inherent in sustainable migration for migrants' rights, as well as the potentials of this objective, if it is placed squarely within the current EU legal framework.

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[122] This is the case in Regulation 1612/68 which was valid until 2011. Case-law interpreting rights from that Regulation appears throughout the three periods examined in Chapters 4-6.

[123] This is the case on 2004 Accession Treaties which started being negotiated in the 1990s, were signed in 2004, and certain temporal limitations still apply.

[124] The change of primary law after the adoption of secondary law is considered by the Court when interpreting provisions of instruments adopted under a previous Treaty framework. The reason is tied also with the techniques of adjudication used by the Court. See more in Chapter 2, Section 2.1.2.

As to the significance and objectives of undertaking this intellectual endeavour, my analysis shows that the overt emphasis on growth cannot sustain the EU legal order anymore. This conclusion is based on the premise that the impossibility of delivering unhindered growth for 27 Member States, with extremely diverse industrial, economic and social conditions has led to a diverse and incoherent legal framework on migration, which in turn negatively impacts both growth and social progress.[125] However, an academic analysis, let alone a legal one, cannot hope to convince the hundred million EU voters whose resistance to migration in view of its assumed economic implications underpins the inability of current EU migration law to deliver on the promise of growth for Member States, and on the issue of social and mobility rights for migrants.[126] Instead, in this scholarly contribution I wish to make clear three things on different levels.

On the first level I demonstrate that the novel concept of sustainable migration comes with specific limitations if applied to EU legal imagination. Highlighting the close ties of EU migration law to economic development would mean that an EU sustainable migration is migration that supports the EU project of growth. If migrants are not a burden to national economies, and if they contribute to growth, then their residence and rights in Member States will not cause tensions. In one way or another, migration law, and especially in the EU, has always been exclusive. The non-mobile [citizen], the economically inactive, the vulnerable, the migrant whose value cannot be monetised, have always been excluded from legal protection.[127] By understanding how economic objectives have shaped EU migration law, we can make sense of the exclusionary politics of the EU towards more vulnerable categories of migrants. EU migration law will always be geared towards prioritizing the utility of migrants to the internal market. Sustainable migration thus captures the need to ensure that the sustaining of the EU internal market, and relatedly the disconnection of the individual from the market, operates as a basis for exclusion.

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[125] Indicative here is the dire need for economic migration in the context of ageing societies, which cannot be fulfilled. See analysis in Chapter 6.

[126] The way this takes place is by national political views on migration affecting the approach of Member States in the Council. See also Gregor Noll, 'Viciously Circular: Will Ageing Lock the European Union into Immigrant Exclusion?' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022).

[127] Cf Heinz Werner, 'Migration and Free Movement of Workers in Western Europe' 22; Noreen Burrows, 'The Promotion of Women's Rights by the European Economic Community' (1980) 17 Common Market Law Review 191; Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making The ECJ's Migrant Worker Model' (2009) 46 Common Market Law Review 1107; Tamara Hervey, 'Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law' in Jo Shaw and Gillian More (eds), *New legal dynamics of European Union* (Clarendon Press 1995); Clare McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 Columbia Journal of European Law; Isabella Moebius and Erika Szyszczak, 'Of Raising Pigs and Children' (1998) 18 Yearbook of European Law 125.

On a second more theoretical level, I connect two strands of scholarship – free movement and migration law – and challenge the mainstream scholarly paradigm that insists on the disconnect between the rights of EU and TCN migrants. The Court has indeed used free movement provisions and economic considerations to shape an EU constitutional architecture, long before these were ingrained in a Treaty text. However, since the EU legal architecture shifted due to closer integration and the adoption of the Charter, the Court has interpreted secondary law on migration in light of the Charter, in order to consolidate the rights of TCN migrants and further the social objectives of the EU project. I suggest that this judicial move does not come under a different cosmopolitan paradigm that would apply to TCN migrants, but rather utilizes secondary law on TCN migration to furnish a more complete constitutional structure after the Lisbon Treaty.

In doing so, the Court can be seen as a political actor continuing the path of using law as a means of integration.[128] In a way, the judicial approach to migrants' rights mirrors economic and social considerations in different points in time, so as to further the construction of the EU legal order. The economic considerations behind migrants' rights were highlighted by the Court before the Maastricht Treaty with the purpose of furthering the constitutional elements of the EU legal order via the construction of legal principles.[129] This was the case not only as regards free movement provisions, but also in the case-law on Association Agreements. The social considerations behind migrants' rights were highlighted by the Court after the Lisbon Treaty with the purpose of furthering the constitutional elements of EU legal order via the fortification of the Charter.[130] To put it simply, the Court has used both economic and social objectives at different points in time to furnish a more complete constitutional structure for EU law.

On a more abstract level, pointing to the unsustainability of the current system, I ask the reader to imagine how an EU sustainable migration could be informed by a legal design grounded in legal rules and principles, which form part of the EU *acquis*, but which have nevertheless been side-lined in the legal instruments adopted to this day. The suggestions I make on the matter cannot overcome the structural limitations that characterize the EU legal order and, relatedly, EU migration law. Rather, taking a pragmatic approach on the current form of the EU legal system, I make some practical suggestions that could better align migration law to the economic and social objective of the EU project. Ultimately, I suggest that sustainable migration is not far from the legal framework currently in place for EU migrants. Pursuing

[128] Cf Mark Dawson, 'The Political Face of Judicial Activism: Europe' s Law-Politics Imbalance' in Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

[129] See Chapter 2 and bear in mind equal treatment and direct effect. See also Chapter 5 on the relevance on direct effect for international agreements attributing rights to migrant workers.

[130] See Chapter 7, Section 7.2.2.

sustainable migration in the AFSJ would mean reproducing the structures of economic exclusion that exist in free movement while attributing effective mobility rights to third-country nationals and extending their social rights. Conceptualizing EU sustainable migration in this way would not do away with the exclusion of vulnerable migrants, which is after all attributed to the inherent limitations of a legal order structured around the objectives of growth and progress. It would, however, offer more extensive protection to third-country nationals who contribute equally to the EU project of growth, thereby guaranteeing more socially sustainable societies.

Chapter 2. The EU Law Mosaic

The legal material examined in the dissertation extends over a significant period of time and several areas of EU law. The effects of economic and social sustainability for migrants' rights, as historically manifested in the primary law objectives of economic growth and social progress, can only be understood after understanding what EU law is and how it functions. The continuous transformations of the EU legal order and its specificities differentiate it from both national and international law. A mix of legal structures and techniques of adjudication inspired by national, international and federal orders necessitates a close understanding of the EU law mosaic as a precondition for engaging with the investigation carried in the dissertation. [1] Since this scholarly work sits at the intersection of EU and Migration Law and addresses an audience that may come to the topic from different backgrounds, it is necessary before proceeding further to familiarise the reader with all the different areas of EU law and their specificities. This is the role of the present chapter.

The following sections provide an overview of the basic structures and concepts of EU law and a guide for readers who are not EU law experts, or who are not experts in all the different areas of EU law examined here. Section 2.1 begins with an analysis of the structure of the EU legal order, its evolution through Treaty amendments and its characteristics in terms of law-making and techniques of adjudication used by the Court of Justice of the EU. This analysis can by no means be exhaustive. The thickness of the EU law handbooks attests to the impossibility of presenting the specifics of different EU law areas in a few pages.[2] Rather my aim here is to provide an overview of the central elements the EU legal order, which are a precondition for engagement with the investigation carried out in the study. Subsequently, in Sections 2.2-2.5, I engage with the different areas of EU law that will be examined chronologically in the chapters that follow. In doing so, I consider

[1] Neil Walker, Jo Shaw and Stephen Tierney, *Europe's Constitutional Mosaic* (Hart Publishing 2011) have used the term 'constitutional mosaic' as a frame of reference for description of the EU legal order as an order based on plurality, diversity, heterarchical relations between its parts and fluidity rather than fixity. The term 'mosaic' in this chapter is used as a simpler way to describe the composition of diverse fields of EU law examined in this study.

[2] See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th ed, Oxford University Press); Steve Peers, *EU Justice and Home Affairs Law* (Fourth edition, Oxford University Press 2016) stretching over two volumes.

the relevant primary law provisions and the central concepts of each category, so that these can be used without further clarification in the subsequent chapters. As this dissertation is historical in its nature, the analysis of the respective areas also provides the background to their development as well as the law in force.

2.1 The Structure of the EU Legal Order

The EU is a particular legal order. In the late 1990s, Bañkowski and Christodoulidis investigated the challenges the EU posed for legal theorists, 'for it appears to be an entity that cannot adequately be captured by existing legal theory'.[3] As Walker has put it more recently, the EU is a constitutionally unsettled and disputable polity.[4] Elsewhere, Walker has also suggested that 'one reason why the theoretical debate on EU law retains such a generous explanatory and normative range is that even in its relative maturity, the project itself, with its deep and undeniable reliance on law, remains a work in contested progress'.[5]

The EU legal order has in considerable part acquired its present shape due to several Treaty amendments and case-law interpretations by the Court of Justice of the EU. Currently, the Treaty of the European Union, the Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights constitute the primary law which provides the constitutional framework of this legal order. They set out the objectives of the EU legal order, its institutional framework, the powers of institutions and Member States, and rules governing its functioning. EU primary law takes precedence over all other sources of law and it acts as a yardstick against which secondary law and national law (in the areas where the EU has competence) can be reviewed.

These Treaties have been adopted by the Member States. Over the years, they have been amended several times, and as a result the structure of the EU has changed: new areas of cooperation have been introduced, and different powers have been granted to EU institutions. In the beginning, the founding Member States established the European Coal and Steel Community with the Treaty of Paris in 1951. This Treaty, which was negotiated after the end of the Second World War, created interdependence between the coal and steel industries of the Member States in order to take away national incentives to attack one another. Thereafter, the Treaty of

[3] Zenon Bañkowski and Emilios Christodoulidis, 'The European Union as an Essentially Contested Project' (1998) 4 European Law Journal 341, 354.

[4] Neil Walker, 'The Theoretical Foundations of EU Law' in Claire Kilpatrick and Joanne Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 32.

[5] Neil Walker, 'Legal and Constitutional Theory of the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 121.

Rome set up the European Economic Community and the European Atomic Energy Community, thus extending the areas of economic cooperation. In 1965, a Merger Treaty streamlined the European institutions; the Commission and the Council were to serve all the three Communities. The Single European Act, signed in 1986, reformed the institutions to make decision-making more efficient. It extended qualified majority voting to the Council, it gave more influence to the European Parliament, and it created cooperation procedures.

The Treaty of Maastricht, signed in 1992, added political elements to this cooperation. It established the European Union and introduced the co-decision procedure which involved the Parliament in decision making. In addition, it introduced new forms of cooperation between the Member States which would operate in a mix of Community and intergovernmental decision-making structures. The Treaty of Amsterdam, signed in 1997, reformed the institutions in preparation for a massive enlargement of the EU and it introduced changes in decision-making by increasing the use of ordinary legislative procedure in different areas of cooperation. The Treaty of Nice subsequently instituted methods of changing the composition of the Commission and the voting system in the Council to allow the EU to function after the conclusion of the 2004 enlargement.

Following the Treaty of Nice, there was an attempt to change the structure of the EU through the introduction of federal elements of cooperation and constitutionalisation. This attempt failed, as the Constitutional Treaty was rejected by two Member States. The next evolution of the legal order came with the Lisbon Treaty, signed in 2007, which in fact incorporated many of the elements of the failed Constitutional Treaty.[6] Its aim was to make the EU more democratic, and decision-making more efficient. To that end, it gave more power to the European Parliament and national parliaments, it changed the voting procedures in the Council, and it structured the representation of the EU in the global arena by instituting a High Representative for Foreign Affairs and a diplomatic service. Most importantly, it gave binding force to the EU Charter of Fundamental Rights which protects the rights of people within the areas of application of EU law.

Next to primary law, secondary law, which takes the form of Regulations, Directives and Decisions, Recommendations and Opinions operationalizes the Treaty provisions and is adopted as a means to achieve the objectives of the EU.[7] The areas where the EU adopts binding legislation are set out in the Treaties and are referred to as areas where the EU has competence to act.[8] Under the principle of conferral enshrined in Article 5(2) TEU, the EU can only act within the limits and

[6] Paul Craig, 'Institutions, Power, and Institutional Balance' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 70–72.

[7] See the typology of legal acts in Articles 288-291 TFEU.

[8] See Articles 2-6 TFEU.

competences that Member States have conferred on it.[9] In areas of exclusive competence, only the EU has the power to adopt legislation to operationalise primary law. Shared competence, on the other hand, means that the EU shares the power to adopt legislation with the Member States. In the context of this work, it should be noted that the EU has shared competence in both the internal market and the area of freedom, security and justice. In order to guarantee the balance between the EU and the Member States in areas of shared competence, the principles of subsidiarity and proportionality are introduced.[10] Together they dictate that the EU can only act in areas where such action can be more effective in achieving the objectives of the Treaties than action at national level, and that such action cannot go beyond what is necessary for achieving the objectives of the Treaties.

The case-law of the Court of Justice of the EU also serves as a source of EU law. The Court, in interpreting and applying EU law – especially through preliminary references – has given shape to many features that make this legal order unique.[11] The role of the Court becomes more important given that the EU does not have its own enforcement mechanism.[12] Instead, national legal orders need to ensure the effects of EU law and guarantee the rights individuals draw directly from the EU legal order.[13] This does not mean that any national law dispute is an EU law dispute. Rather, a case comes within the scope of EU law when it involves the interpretation, application, or implementation of EU law, or of national law adopted to implement EU law. Cases also come within the scope of EU law if they concern the rights individuals draw directly from EU primary or secondary law. This is important to understand, since if a case does not fall within the scope of EU law, then judicial review for compliance with primary law and especially with the Charter is not exercised by the Court, as it concerns a 'purely internal situation'.[14]

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[9] See Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) particularly his analysis in Chapter 9.

[10] See Article 5(3) and (4) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/206.

[11] See Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) for a historical study on how the Court's decisions were embedded in the national legal and political context of the time.

[12] There are, of course, legal means of enforcement, like the infringement procedures the Commission can open for violation of EU law, but there are no classic state mechanisms of enforcement like police or similar.

[13] See more details in Section 2.1.2.

[14] Note that this is not without exceptions that have been tantalising legal scholarship for many years on the scope of the Charter and the review conducted by the Court. See Xavier Groussot and Gunnar Thor Petursson, 'The EU Charter of Fundamental Rights Five Years on : The Emergence of a New Constitutional Framework?' in Ulf Bernitz, Sybe de Vries and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument : Five Years Old and*

Another relevant element here is that EU law grants rights to individuals regardless of nationality. Primary law includes provisions which directly confer rights on individuals without reference to nationality.[15] Certain provisions have been specified in secondary law as applying specifically to nationals of Member States.[16] Other provisions refer to nationality of Member States to specify their applicability to EU nationals.[17] Charter rights are construed in different ways in order to restrict applicability to nationals of the Member States, or to apply to all persons falling within the scope of EU law.[18] Finally, third-country nationals can directly enjoy EU law rights if they fall within the scope of EU law *ratione personae* or *ratione materiae*.[19]

The Court has further acknowledged that legality of residence is not a condition for enjoyment of EU law rights by third-country nationals.[20] At the same time, not all nationals of Member States enjoy all EU law rights. For a person to enjoy EU law rights they need to have a connection to EU law; that is, they need to fall within the scope of primary or secondary law, and especially the former would require some link with cross-border movement to be triggered.[21] In this context, it is important to do away with misconception regarding the meaning of 'persons' or 'individuals' in EU law provisions and to understand that such references do not necessarily restrict the scope of EU law to EU nationals. The remaining chapters will examine in depth the way rights are created for third-country nationals under considerations which at times are similar to those existing behind the rights of EU nationals.

This analysis of the main legal structures and characteristics of EU law is necessary to understand the distinctiveness of migration in this area. EU law is specific in that it attributes rights to migrants and it ruptures the sovereign prerogatives of Member States to control their population to different extent for different categories of

Growing (Hart Publishing 2015); Sara Inglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in *Daniel Thym (ed), Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

[15] This is the case for Article 45(1) TFEU for example.

[16] This is the case for free movement of workers. See the analysis in Section 2.2.

[17] This is the case for citizenship. See Article 20(1) TFEU.

[18] See for example Title V of the Charter titled Citizen's rights.

[19] See for example social security coordination, equal treatment acquis. See also Sara Iglesias Sánchez, 'Constitutional Identity and Integration: EU Citizenship and the Emergence of a Supranational Alienage Law' (2017) 18 German Law Journal 1797, 1806.

[20] See Judgment of 5 November 2014*, Tümer,* C-311/13, ECLI:EU:C:2014:2337 analysed in detail in Chapter 6. Section 6.3.3.1.

[21] See indicatively Chapters 3 and 4 on free movement in Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013).

migrants. Moreover, it is also necessary to understand the distinctiveness of law-making and adjudication in EU law in order to evaluate the sub-questions guiding the investigation, that is how economic and social considerations appear in EU law making and adjudication on the rights of migrants. The next section elaborates on how law-making takes place at EU level, before turning to the techniques of adjudication used by the Court, and some of the central legal principles that have been judicially constructed by the CJEU in Section 2.1.2.

2.1.1 The Challenges of Law-making at EU Level

The present research investigates how economic and social objectives, which have historically expressed the economic and social pillars of sustainability in EU law, are pursued in law-making on migrants' rights. To this end, a description of the ways in which law is produced at EU level is necessary. This will allow the reader to understand how different institutions affect law-making, how the institutional powers have evolved over time, and how, at the end of the day, the EU legislature cannot be conceived as an abstract subject with singular will, but rather as a network of actors with different interests, which do not always coincide. As Craig has suggested, it is difficult to fit the EU institutions in any clear categorization that would correspond to the institutional structures we find in the nation-state.[22] The share of legislative and executive power in the EU legal order has been complicated, and has evolved in line with the legal order itself. Craig categorises this evolution into four periods.

The first period unfolded between Treaty of Rome and the Single European Act.[23] During that period, which is examined in Chapter 4, institutional power was shared between the Council and the Commission. The Commission had the right of legislative initiative and it devised the legislative agenda of the Community. The Council had to consent to the proposed legislation, and it could only amend it by unanimity. This is essentially the so-called classic Community method, based on exclusive right of initiative of the Commission, or under the maxim 'the Commission proposes, the Council disposes'.[24] This approach created tension between the Community and the Council, especially in light of the Treaty change in 1965 shifting voting from unanimity to qualified majority.[25] The ensuing practice was that while qualified majority was the Treaty rule, in practice it was rather the

[22] Craig (n 6) 46.

[23] ibid 47.

[24] ibid 48.

[25] See Craig (n 6) for more details on the empty chair crisis and the Luxembourg Accords.

exception, and individual Member States could still veto policies put forward by the Commission.[26]

In this first period, COREPER (Committee of Permanent Representatives) was set up to examine Commission proposals and set the agenda for Council meetings, and comitology entered the picture. Comitology refers to a committee system whereby national administrators are involved in the Commission deliberations leading to secondary legislation.[27] In parallel, the European Council was institutionalized in the 1974 Paris summit as a political actor expressing the Member State views through conclusions, that, despite being non-binding, shaped the future Community policy.[28] During the same period, the Court also played a crucial role in progressing integration when politics blocked decision making.[29]

The second period Craig identifies is between the Single European Act and the Nice Treaty. During this period, the rules on the disposition of legislative power were clarified, and the European Parliament acquired a role in the process. The Single European Act recognized the role of the Parliament in the cooperation procedure, which was then consolidated in the Maastricht and Amsterdam Treaties with the co-decision procedure. The legislative measures were now shaped by three actors: the Commission, the Parliament and the Council. In parallel, to make the EU more democratic, Maastricht included a provision on subsidiarity.[30]

Even though there was clarity over the legislative process, there was a disagreement and contestation over which institution had the power to initiate rule making and which held the executive authority in the EU.[31] This contestation was matched with institutional complexity that was attested in different ways. The most relevant for the present examination was through the pillar structure instituted by the Maastricht Treaty and the intergovernmental processes of decision making, which are reviewed

[26] ibid 49 with reference to Karlheinz Neunreither, 'Transformation of a Political Role: Reconsidering the Case of the Commission of the European Communities' (1972) 10 Journal of Common Market Studies 233.

[27] Under rational choice institutionalism the idea is that national delegates monitor compliance of the supranational agents. See Mark A Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press 2003). Under constructivism, the idea is that this creates deliberative supranationalism where national delegates exist in transnational problem-solving coordinated by the Commission, see Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 European Law Journal 273.

[28] Craig (n 6) 54.

[29] ibid 54–57. See also discussion in the following section.

[30] See Article 3b TEU [1992] OJ C 22/1.

[31] Craig (n 6) 47.

in Chapter 5.[32] Within the third pillar, different rules applied to legal instruments.[33] The decisions had to be adopted by the Council unanimously at the initiative of a Member State or the Commission, the Council had to be consulted for these measures (apart from Common Positions), and the jurisdiction of the Court was limited. The European Council established a central role in setting policy and legislative priorities and suggesting actions for the Council and the Commission. The Commission continued to be the source of legislative initiatives, which, as we will see in Chapter 5, did not find support in the Council. The Court continued to be an important actor, most notably in the areas of free movement, citizenship and social rights.

Craig locates the third period from the Constitutional Treaty to the Lisbon Treaty, characterized by the continuation of the same contestations, and the fourth period from Lisbon Treaty to the present. These periods can be examined together as they are characterized by a series of crises exposing different problems of institutional balance.[34] In the Lisbon Treaty, the Commission retained its right of initiative, and the European Parliament and the Council participated in the negotiation and shaping of legislation under co-decision, which became the ordinary legislative procedure. At the same time, the role of national parliaments has been elevated by the fact that they now receive all the legislative proposals at the same time as EU institutions and may send a reasoned opinion on why they consider a proposal to infringe the principle of subsidiarity.[35] The regime of law-making and the input of different institutions in it is clear. The contestation over who holds the executive power in the EU has persisted.

The resolution provided by the Lisbon Treaty was that the Council should define the general political directions of the EU, while the Commission would have the power to initiate programming to secure interinstitutional agreement.[36] The final period identified by Craig points to the different challenges of the current institutional set up in different crises. For example, in the migration crisis, the Commission came up with various initiatives which, however, were all blocked because of the need to secure their acceptance by the Member States. Craig suggested on this matter that institutional failure is not connected to the institutional structure of the EU, but rather it should be understood as the failure of Member

[32] ibid 62–69. Among these he mentions the Comitology, agencies, pillars, and new governance strategies like the Open Method of Coordination.

[33] Legal instruments also differed. They included Common Positions, Framework Decisions (like Directives but without direct effect), Decisions (binding with no direct effect) and Conventions.

[34] Craig (n 6) 80, financial crisis, Brexit, Rule of Law crisis, immigration, pandemic.

[35] Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/206.

[36] Articles 16(6), 17(1) TEU.

States to perceive the various crises as collective problems that required resolution at EU level.[37]

In light of the evolving dynamics in EU law-making, which also appear in the historical analysis undertaken in Chapters 4-6, and of the resolution of institutional balance as described above, the reader should remember the following. The way economic and social objectives appear in EU law-making rarely corresponds to a single will. Rather, the meaning of the objectives and the best way to achieve them, and relatedly to achieve economic and social sustainability, are perceived very differently by all the actors involved in law-making. This differentiation has hindered the adoption of measures to promote positive integration, and has instead led to an expanded reach of negative integration in which the Court has also been central.[38] Thus the next section will address the special role of the Court in the construction of the EU legal order.

2.1.2 The Special Position of the Court and its Techniques of Adjudication

The Court of Justice of the EU is one of the most central actors in the construction and development of the EU legal order.[39] Under Article 19(1) TEU the Court is tasked with ensuring that, in the interpretation and application of the Treaties, the law is observed. The majority of groundbreaking rulings of the Court have taken place in the context of preliminary rulings.[40] Under Article 267 TFEU, courts or tribunals of Member States should request a preliminary ruling by the Court when questions about EU law are raised in the context of pending disputes and are necessary to enable the national judiciary to provide a resolution to the dispute. In such a context, the Court provides guidance regarding the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices and agencies of the EU. In doing so, the Court might review the compliance of national law with EU law or of EU secondary law with EU primary law. The Court does not resolve the national dispute; rather, it provides guidance on how EU law

[37] Craig (n 6) 85.

[38] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999). The terms 'positive' and 'negative integration' derive from theory of economic policy. Negative integration refers to the removal of barriers to trade or free competition, like removal of tariffs and quantitative restrictions. Positive integration refers to the reconstruction of a system of economic regulation which rests on the agreement of different institutional actors as to what substance this positive integration would entail.

[39] Anthony Arnull, 'The Many Ages of the Court of Justice of the European Union' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford University Press 2020) on the establishment and development of the Court; Robert Lecourt, *L'Europe Des Juges* (Bruylant 1976).

[40] For a description of how the preliminary ruling found its way in the Treaties see Arnull (n 39).

should be understood and what considerations should drive the national judge when resolving the dispute.[41]

In the context of preliminary rulings, the Court has developed concepts that are central to the functioning of this legal order. Walker has suggested that 'there is simply no precedent or analogy in the annals of national-constitution building for the key role the ECJ has played in the construction of Europe as an integrated polity'.[42] Indeed, the Court has shaped the legal order.[43] By judicial constructions of different types, the Court developed Community law much further than the political actors on the ground were willing to do, or even envisioned in the adoption of different instruments.[44] It did so through the judicial construction of legal principles, like the principle of supremacy, the principle of direct effect, the principle of autonomy of the EU legal order and, prior to the adoption of the Charter, the protection of fundamental rights as general principles of EU Law which will be briefly presented following.[45]

First, the principle of supremacy of the EU legal order demands that EU law takes precedence over national law in the event of conflict.[46] National law needs to be interpreted in conformity with EU law and, if this is not possible, it needs to be set aside, and the national judge needs to ensure that the obligations deriving from EU

[41] There are cases where guidance can be so close that the actions of the national judge are clearly directed towards a specific outcome in the national dispute. For a personal account of the need to closely guide the national judge as part of judicially constructing the legal system see the article by the former member of the Court G Federico Mancini, 'The Making of A Constitution For Europe' (1989) 26 Common Market Law Review 595.

[42] Neil Walker, 'Opening or Closure? The Constitutional Intimations of the ECJ' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 41.

[43] Joseph Weiler, 'Deciphering the Political and Legal DNA of European Integration, An Exploratory Essay' in Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press 2012); See also Daniel Augenstein (ed), *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate Pub 2012) revisiting the 1980s Integration through Law Project coordinated by Mauro Cappelletti, Monica Seccombe and Joseph Weiler.

[44] On the provisions establishing the Court Arnull (n 39); Weatherill, 'The Beauty and the Beast: Is European Union Internal Market Law "Over-Constitutionalised"?' in Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022); Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) for an analysis of the core free movement case-law pushing the limits of the Treaties.

[45] Cf Daniel Kelemen, 'The EU Rights Revolution: Adversarial Legalism and European Integration' in Tanja A Börzel and Rachel A Cichowski (eds), *The State of the European Union, 6: Law, Politics, and Society* (Oxford University Press 2004) on the role of individuals as decentralized enforcers of EU law.

[46] Established in Judgment of 15 July 1964 *Costa/ E.N.E.L.*, 6/64, ECLI:EU:C:1964:66.

law are respected. This principle establishes the precedence of any provision of EU law over any form of national law, including general principles of national constitutional law. As Rasmussen notes, the principle of supremacy introduced a conflict rule, giving precedence to Community law, but it also established a notion of integration: the EU legal system is an integral part of the legal systems of Member States.[47]

Next to the principle of supremacy, the principle of direct effect was equally important for the transformation of the EU legal system.[48] Direct effect has been central in the construction of a legal order that creates rights not only for states, but also for individuals, who are thereby given 'a direct stake in the promulgation and implementation of this legal order'.[49] Direct effect dictates that individuals may rely on EU law as a source of rights that should be enforced directly in national legal orders.[50] It exists when an EU law provision is sufficiently clear, precise and unconditional, and confers rights on individuals. It applies not only to national courts, dealing with cases including EU law norms, but also to national administrations.[51] Direct effect is established by the Court on a case-by-case basis and has been acknowledged in relation to provisions of Treaties, Regulations, Directives and International Agreements concluded between the EU and/or its Member States and third countries.[52] Bruno de Witte has suggested that the major doctrinal novelty of *Van Gend en Loos* was not the discovery of direct effect, but rather the affirmation that whether a provision has direct effect was to be decided centrally by the Court.[53]

The autonomy of the EU legal order also dictates that EU law has its own concepts and principles, which are distinct from those of national legal systems, and should

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[47] Morten Rasmussen, 'From Costa v ENEL to the Treaties of Rome: A Brief History of a Legal Revolution' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 64.

[48] Established in Judgment of 5 February 1963, *Van Gend en Loos / Administratie der Belastingen*, 26/62, ECLI:EU:C:1963:1. For a detailed overview of the different scholarly views on the relation of primacy and direct effect see Elise Muir, 'Of Ages in and Edges of EU Law' (2011) 48 Common Market Law Review 39, 42-44.

[49] Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2008) 1 European Journal of Legal Studies 137, 147.

[50] Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021).

[51] ibid 13 and Judgment of 22 June 1989, *Fratelli Costanzo / Comune di Milano*, 103/88, ECLI:EU:C:1989:256.

[52] ibid 11 where de Witte identifies the extension of direct effect to provisions other than Treaty provisions as the second major expansion of the doctrine.

[53] ibid 10; *Van Gend en Loos / Administratie der Belastingen*, 26/62.

be understood uniformly when applied in national disputes.[54] In this context, the Court has developed the term 'autonomous concept of EU law' in the interpretation of primary and secondary law. By this, the Court means that a legal concept, which might have specific meaning under national law, enjoys a distinct meaning under EU law and needs to be applied consistently by Member States. The meaning is clarified on a case-by-case basis by the Court itself.

In addition, when the same language terms are used in legal provisions found in different areas of EU law, the Court has applied the technique of equivalent interpretation. To proceed in equivalent interpretation, that is to transpose the interpretation of a provision from an area of EU law to another, the Court looks into the wording, context and objectives of the relevant provisions in order to determine whether the case-law principles should be extended and to thereby ensure the internal coherence of the legal system. It is of particular importance to remember this later in the investigation, when the analysis examines how the Court has interpreted the use of the same language terms in provisions found in the free movement framework and in International Agreements.

At this stage, the reader should also note that, in the interpretation of EU law, the Court uses a mixture of the classic techniques of interpretation.[55] It usually examines the wording of the relevant provisions, the context in which they were adopted, and the objectives they were intended to achieve 'with a view to filling any normative lacunae, either in primary or secondary EU law, whose persistence would "lead to a result contrary both to the spirit of the Treaty [...] and to its system"'.[56] Throughout the development of EU law, the Court has primarily used teleological interpretation, which has been justified by different scholars on the basis of the purpose-driven functionalism of the Treaties,[57] or of the gap between the broad formulation of primary law and the highly technical nature of secondary law. In that context,

[54] For a more detailed examination of the function of the principle of autonomy for EU law cf Niamh Nic Shuibhne, 'What Is the Autonomy of EU Law, and Why Does That Matter' (2019) 88 Nordic Journal of International Law 9 who has argued that it is an existential principle of EU law.

[55] Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) Working Paper AEL 2013/9 5.

[56] ibid 3 with reference to Judgment of 23 April 1986, *Les Verts / Parliament*, 294/83, ECLI:EU:C:1986:166 para 25.

[57] Lenaerts and Gutiérrez-Fons (n 55) 25 with reference to Pierre Pescatore, 'Les Objectifs de La Communauté Européenne Comme Principe d'interprétation Dans La Jurisprudence de La Cour de Justice', *Miscellanea W.J. Ganshof van der Meersc* (Bruylant 1972) 325–363. In more recent years, the Court has also taken the preparatory works of the EU legislature into account when interpreting provisions of secondary law. The more recent focus has many explanations identified by Søren Schønberg and Karin Frick, 'Finishing, Refining, Polishing: On the Use of Travaux Préparatoires as an Aid to the Interpretation of Community Legislation' (2003) 28 European Law Review 149. In the early years, such preparatory texts were not generally public, see Lenaerts and Gutiérrez-Fons 21–22 who also engage with literature on why the Court should not use such works.

Lenaerts and Gutiérrez-Fons have suggested that the Court 'has no choice but to take into account the objectives pursued by the Treaties'.[58] Then, as the authors mention, depending on the objectives a provision pursues, it may be subject to strict or broad interpretation.[59] When a provision constitutes a derogation from the Treaties, or is contained in a provision of secondary law, the Court will interpret strictly.[60] If the objectives pursued by an EU act cannot be achieved unless the provisions are interpreted broadly, then the Court will opt for a broad interpretation. The same broad interpretation is applied in relation to EU law provisions that give expression to principles of constitutional importance for the objectives set out in the Treaties.[61]

Former Advocate General Poiares Maduro has suggested that the Court goes further than the teleological interpretation and that it builds its reasoning through a systemic understanding of the EU legal order by identifying a constitutional *telos.*[62] He called this a meta-teleological interpretation.[63] Weiler has referred to this as normative supranationalism.[64] On a similar note, Craig has suggested that the Court has been using judicial review as 'the medium through which to construe Community policy in a teleological manner so as to best attain its objectives'.[65] The emphasis of the Court on teleological interpretation has not been without criticism. Different authors have referred to its effects on national sovereignty and on political democratic processes of decision-making.[66] Among the different criticisms, Somek stands out

[58] Lenaerts and Gutiérrez-Fons (n 55). The authors refer to Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press; Oxford University Press 1993) who identifies three types of teleological interpretation. The first type aims to secure the *effet utile* of the EU law provision. It is a mixture of teleological and systematic interpretation. The second refers to teleological interpretation *stricto sensu* when an EU law provision is ambiguous or incomplete. The third type is called consequentialist interpretation and focuses on the consequences that would flow from a specific interpretative choice.

[59] Lenaerts and Gutiérrez-Fons (n 55) 26.

[60] ibid.

[61] ibid.

[62] Poiares Maduro (n 49) 140.

[63] ibid.

[64] Joseph Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 267 examining the legal order at the early years of Community law.

[65] Craig (n 6) 70.

[66] Cf Michelle Everson, 'A Very Cosmopolitan Citizenship: But Who Pays the Price?' in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) for a critique focused on the interpretation of the Court in EU citizenship case-law.

for capturing a paradox in the chosen mode of reasoning of the Court, which he calls irrational interpretations driven by judicial self-confidence. As he suggested,

> The irrational element that is to be captured has its roots in the paradoxical shape of a case law that takes innovation and pushing the envelope as a chief means of being faithful to the law of European integration. Fidelity to the law by moving beyond existing law is, unless we are confronted with real gaps, a decidedly irrational commitment, at any rate from the perspective of the values and maxims of traditional legal scholarship.[67]

This brief overview of the different scholarly approaches to the Court's techniques of adjudication shows that different authors have tried to understand and theoretically explain the Court's approach as a key actor in the process of integration, pushing the limits of a literal understanding of legal provisions. More recently scholars have also tried to explain the tendency of the Court to stick to more formalist textual understandings of the relevant law, and to avoid the broad use of teleological interpretation.[68] Chapter 7 will reflect more on this matter and it will suggest that the Court is actually using the economic and social objectives behind migrant's rights during different time periods in order to perfect the constitutional structure of the EU. Before doing that, however, I provide an overview of the more specific areas of substantive law which I examine in this dissertation, including their historical evolution and the central concepts that are specific to each. These specific areas, that is free movement, regulation of migration from third countries, Accession Treaties and International Agreements will be investigated subsequently in Chapters 4, 5 and 6.

2.2 The Free Movement Framework

The free movement framework is the central EU legal area which perfects a structure of sustainable migration by conditioning the rights of EU migrants in view of balancing economic and social considerations, as the investigation will show.

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[67] Alexander Somek, 'Pragmatism, Innovation and Prophecy: Conjectures Concerning the Grounds of Belief in an Inventive Court' in Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) 67 reference omitted.

[68] See Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) for contributions with many different scholarly accounts, from authors emphasising the legal coherence of the Court's methods of interpretation throughout these years, to those who identify a different role for the Court of Justice of the EU in the politics of Europe, to contributions that identify shifts from activism to passivism in interpretation. See also Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

Since the Treaty of Rome, primary law demanded the free movement of goods, services, workers and capital in the common market as a means to contribute to economic expansion and social progress. [69] Primary law imposes positive and negative obligations on the Member States, meaning both that free movement should be guaranteed by those actions that promote it, and that Member States should refrain from creating obstacles to such freedom of movement.

Free movement of workers is provided under Article 45 TFEU, and the wording of the provision has remained unchanged throughout the evolution of the Treaties. Article 45(1) TFEU stipulates that free movement of workers must be secured within the EU. Under 45(2) TFEU, this movement is taken to entail the abolition of discrimination on the basis of nationality between workers of the Member States regarding employment, remuneration and other conditions of work and employment. Article 45(3) TFEU provides that free movement means the right to accept offers of employment, the right to move freely within the Member States for the purpose of accepting offers of employment, the right to stay in a Member State for the purpose of employment, and the right to remain there after having been employed, subject to conditions and limitations determined by secondary law. Limitations to free movement can be introduced on the grounds of public policy, public security and public health, whereas under Article 45(4) TFEU this freedom must not apply to employment in the public service.

The text of Article 45(1) TFEU makes no reference to the nationality of the workers. Scholars have thus argued that the provision could cover any migrant employed as a worker in the territory of the Member States.[70] The first explicit reference to Member State nationals as beneficiaries of free movement of workers was made in Article 1 of Regulation 1612/68. O'Leary referred to this as a legal and political choice expressed in secondary legislation, in order to leave competence to Member States to determine their own nationals.[71] Later, the case-law confirmed that free movement of workers required both the nationality of a Member State and the status of worker.[72]

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[69] See already Articles 2 and 3(e) Treaty establishing the European Coal and Steel Community, and to this day with an updated, though similar phrasing in Article 3 TEU.

[70] Christopher Greenwood, 'Nationality and the Limits of the Free Movement of Persons in Community Law' (1987) 7 Yearbook of European Law 185, 185; Siofra O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows' (1992) 12 Yearbook of European Law 353; See also DF Edens and Schelto Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 Common Market Law Review 322 with a focus on Overseas Territories; Allan Campbell, *Common Market Law* (Supplement 2/71, Longmans 1971) 226.

[71] O'Leary (n 70) 357.

[72] ibid and Judgment of 5 July 1984, *Caisse d'allocations familiales v Meade*, 238/83, ECLI:EU:C:1984:250 .

The function of the free movement provisions for the advancement of economic integration led to interpretation of free movement rights in a way that ensured the most extensive protection under EU law.[73] At the same time, exceptions to the free movement provisions were strictly construed. Free movement of workers was not special in this regard. The Court confirmed this approach and applied the Treaty derogations to free movement of workers in a narrow way.[74]Already in the 1960s, in *Hoekstra,* the Court attributed an autonomous meaning to the concept of worker, and as a result, set the ground for expanding its adjudicatory power in interpreting who can be a migrant worker, and relatedly, who falls within the scope of Community law.[75] Then in the 1970s the Court established the direct effect of the relevant article, which could thus be invoked by individuals against Member States without the need for other implementing measures.[76] In *Walrave and Koch*, the Court confirmed the horizontal application of the free movement provision and of non-discrimination on grounds of nationality regarding the employment of Community workers.[77] In the 1980s, and on the basis of *Hoekstra*, the Court extended the personal scope of application of free movement. More categories of people became protected as Community workers, despite national categorizations. This led to the extension of EU law protection to migrant workers in vulnerable or precarious work.[78] The broad interpretation was grounded in a link to economic activity, which was intended to promote the development of both the worker and

[73] David O'Keeffe and Esther Johnson, 'From Discrimination to Obstacles to Free Movement; Recent Developments Concerning the Free Movement of Workers 1989-1994' (1994) 31 Common Market Law Review 1313.

[74] Public Policy: Judgment of 4 December 1974, *Van Duyn v Home Office*, 41/74, ECLI:EU:C:1974:133; Judgment of 26 February 1975, *Bonsignore v Oberstadtdirektor der Stadt Köln*, 67/74, ECLI:EU:C:1975:34; Judgment of 27 October 1977, *Regina v Bouchereau*, 30/77, ECLI:EU:C:1977:172; Judgment of 18 May 1982, *Adoui and Cornuaille v Belgian State*, 115 and 116/81, ECLI:EU:C:1982:183. On employment in the public service Judgment of 12 February 1974, *Sotgiu v Deutsche Bundespost*, 152/73, ECLI:EU:C:1974:13; Judgment of 3 July 1986, *Lawrie-Blum v Land Baden-Württemberg*, 66/85, ECLI:EU:C:1986:284; Judgment of 26 May 1982, *Commission v Belgium*, 149/79, ECLI:EU:C:1982:195.

[75] Judgment of 19 March 1964, *(Hoekstra) Unger v Bedrijfsvereniging voor Detailhandel en Ambachten*, 75/63, ECLI:EU:C:1964:19

[76] Judgment of 4 April 1974, *Commission v France*, 167/73, ECLI:EU:C:1974:35.

[77] Judgment of 12 December 1974, *Walrave and Koch v Association Union Cycliste Internationale and others*, 36/74, ECLI:EU:C:1974:140.

[78] See for example Judgment of 23 March 1982, *Levin v Staatssecretaris van Justitie*, 53/81, ECLI:EU:C:1982:105 on part-time workers. Judgment of 3 June 1986, *Kempf v Staatssecretaris van Justitie*, 139/85, ECLI:EU:C:1986:223 on migrant workers who have recource to social assistance. Judgment of 3 July 1986, *Lawrie-Blum v Land Baden-Württemberg*, 66/85, ECLI:EU:C:1986:284 on trainees. Judgment of 26 February 1991, *The Queen v Immigration Appeal Tribunal, ex parte Antonissen*, C-292/89, ECLI:EU:C:1991:80 on job-seekers

the Member States' economies.[79] It is important to understand that this interpretation was not based on a broader conception of free movement of persons as the ultimate objective of the EU legal order. Rather, the Court emphasized whether a type of work could be considered as an 'effective and genuine' engagement in an economic activity.[80]

Even under this broad definition, as construed by the Court,[81] work which served no economic function would not come within the protection of Community law.[82] What is more, under specific circumstances regular employment 'insulated from normal competitive market forces' was not considered to come within the scope of free movement.[83] This was the case in *Bettray*, where a German national and drug addict employed under a social employment scheme was not found to be a worker.[84] The Court recognized that the essential feature of an employment relationship, that is, performing services under the direction of another person in return for remuneration, was indeed present.[85] Nevertheless, it held that such work, which constituted 'merely' a means of rehabilitation, could not be regarded as an effective and genuine economic activity.[86] In order to reach this conclusion and to exclude rehabilitation schemes from Community law, the Court introduced new criteria to the notion of work.[87] This case met with criticism since the Court did not contest that the migrant provided work in the Netherlands.[88] Rather, it found that this work was abnormal to the extent that there was no direct commerciality of the labour performed. In light of this, O' Brien commented that

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[79] Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making The ECJ's Migrant Worker Model' (2009) 46 Common Market Law Review 1107, 1140 who has referred to an internal logic of the Court that uses economic tools to fulfil social objectives.

[80] Judgment of 23 March 1982, *Levin v Staatssecretaris van Justitie*, 53/81, ECLI:EU:C:1982:105 paras 21-22.

[81] See Judgment of 5 October 1988, *Steymann v Staatssecretaris van Justitie*, 196/87, ECLI:EU:C:1988:475 where the Court held that work performed by a member of a religious community, which is engaged in commercial activities, also falls under the scope of free movement in so far as the services offered by the religious community to its members can be regarded as indirect payment for their genuine and effective work

[82] O'Brien (n 79) 115 suggesting that unpaid work and volunteering are clearly excluded.

[83] ibid 1131.

[84] Judgment of 31 May 1989, *Bettray v Staatssecretaris van Justitie*, 344/87, ECLI:EU:C:1989:226 para 4.

[85] ibid paras 14-15.

[86] ibid para 17.

[87] ibid para 19, whether the workers are selected based on their capacity to perform, whether the associations created perform any other activity or not.

[88] O'Brien (n 79) O'Keeffe and Johnson (n 73).

> [T]he Court has leant upon a pared down capitalist vision - economic activity, if it is to be effective must serve a more directly productive function, a vision which presumes that "[in] the normal employment situation" according to Advocate General Jacobs, "the purpose is the production of goods or services, and the job is a means to that end".[89]

Overall, the personal scope of free movement provisions was judicially broadened to protect atypical working relations. Nevertheless, even the broad interpretation of the relevant provisions necessitated that an individual migrant could prove a sufficient link with market activities.

In parallel to these judicial developments, and to complement economic cooperation, Member States began exploring the possibility of political cooperation towards the end of the 1970s and 1980s.[90] At that time, there was an aspiration to create a political link between nationals of the Member States and the Community and to extend free movement rights to nationals of all Member States.[91] The Treaty of Maastricht established the citizenship of the Union as a status held by every Member State national. Article 8a provided that 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'[92] This Treaty evolution, together with the extensive judicial interpretation of free movement of workers by the Court, led to scholarly investigation into free movement of workers as an embryonic form of an EU citizenship, as well as to critical scholarship on those excluded from the protection of the Treaty.[93] The analysis of the potential and of the limitations of EU

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[89] O'Brien (n 79) 1131.

[90] The European Defense Community was the first such attempt, though it failed.

[91] Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council. (1976) Bulletin of the European Communities, Supplement 1/76

[92] The rights of EU citizens are now enshrined in Articles 20-24 TFEU.

[93] On free movement as an embryonic form of citizenship see Richard Plender, 'An Incipient Form of European Citizenship' in Francis Geoffrey Jacobs and University of London (eds), *European law and the individual* (Elsevier/North-Holland 1976); Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 Common Market Law Review 1137; Chapter 5 in Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004); Miguel Poiares Maduro, 'Europe's Social Self: "The Sickness Unto Death"' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 332. On more critical investigations see Heinz Werner, 'Migration and Free Movement of Workers in Western Europe' 22; Noreen Burrows, 'The Promotion of Women's Rights by the European Economic Community' (1980) 17 Common Market Law Review 191; O'Brien (n 79); Tamara Hervey, 'Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law' in Jo Shaw and Gillian More (eds), *New legal dynamics of European Union* (Clarendon Press 1995); Clare McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and

citizenship status as an independent source of residence rights continues with the same vigour to this day.[94]

The analysis above has sought to provide an overview of the historical evolution and main concepts of the free movement framework. Chapter 4 will investigate the development of this framework in the early years of the Community while Chapters 5 and 6 will explore in depth the evolution of the free movement of workers framework, the development of free movement of persons and EU citizenship and the interrelation of residence rights for EU migrants with persistent economic limitations in secondary law. The examination of the free movement framework will take place in parallel with the framework regulating migration from third countries. The joint examination of the development of these legal areas offers unique insight into the way in which the economic and social pillars of sustainability have been constantly driving EU migration law. In preparation for this, the next section will turn to the regulation of migration from third countries and present the specificities of this legal area necessary for assessing the historical investigation of the following chapters.

2.3 Regulation of Migration from Third Countries

Contrary to the free movement of workers, which has been part of the EU legal order from its inception, competence to regulate migration from third countries entered the framework a lot later and with a very different formulation. It was not until the Maastricht Treaty that provisions related to migration became part of primary law. Prior to Maastricht, cooperation between the Member States on migration from third countries took place through Treaty provisions on social policy, in relation to family reunification for EU migrants, as well as in the context of development cooperation by International Agreements as the investigation undertaken in Chapter 4 will show.

The Maastricht Treaty created a pillar structure regarding decision-making procedures in the EU in different areas of cooperation. Migration formed part of the Justice and Home Affairs Pillar, which was meant to develop by intergovernmental cooperation mechanisms. Intergovernmental initiatives of different kinds operated

Policy' (2001) 7 Columbia Journal of European Law; Isabella Moebius and Erika Szyszczak, 'Of Raising Pigs and Children' (1998) 18 Yearbook of European Law 125.

[94] Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 European Law Review 477; Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937; Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Dimitry Kochenov and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019).

between the 1980s and 1990s, both in preparation of what areas of cooperation would come into the Treaty, and in order to decide what technical measures should be adopted to give form to these new areas of cooperation.[95] In the Maastricht Treaty, Article K.1 provided that Member States were to regard immigration policy on TCNs as a matter of common interest for the purposes of achieving the objectives of the EU, in particular free movement of persons. It included three areas related to immigration policy: (a) conditions of entry and movement by nationals of third countries on the territory of Member States; (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; and (c) combatting unauthorized immigration, residence, and work by nationals of third countries on the territory of Member States. While these areas fell under the intergovernmental structure as a rule, Article K.9 provided that the Council, by unanimous decision, could apply Article 100c TEC to action related to these three areas. This meant that, by virtue of a Council decision, immigration policy could become a legal area subject to the classic Community method decision-making process and hence, legislative initiatives could be adopted by a Commission proposal, and after consultation with the Parliament.

This possibility never materialized, due to the sensitivity of migration in national politics at the time. As a result, at least until the adoption of the Amsterdam Treaty, cooperation on migration continued by the adoption of instruments produced in a mix of structures.[96] During this period, most of the scholarly analysis engaged with the deficits and potentials of the changing Treaty framework for third-country nationals.[97] Few authors argued for the need to extend free movement rights to TCNs and for the creation of a consistent Community migration policy.[98]

The Treaty of Amsterdam, which followed in the end of the 1990s, created a specific competence basis for the adoption of EU legislation on migration under Title IV.

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[95] Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004) for a critique of lack of transparency and coherence.

[96] See analysis in Chapter 5.

[97] David O'Keeffe, 'Recasting the Third Pillar' (1995) 32 Common Market Law Review 32; Giuseppe Callovi, 'Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle' (1992) 26 The International Migration Review 353; Kay Hailbronner, 'Perspectives of a Harmonization of the Law of Asylum after the Maastricht Summit' (1992) 29 Common Market Law Review 917; WR Böhning and J Werquin, *Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market* (International Labour Office 1990).

[98] David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 European Law Review 3; Thomas Hoogenboom, 'Integration into Society and Free Movement of Non-EC Nationals' (1992) 3 European Journal of International Law 36; Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 European Journal of International Law 65.

Article 61 EC Treaty provided for the creation of an Area of Freedom, Security and Justice. To establish this area, the Council had to adopt measures to ensure the free movement of persons in the EU, in connection with flanking measures related to border controls, asylum, migration and combatting crime within five years from the entry into force of the Treaty under Article 61(a). In parallel, the adoption of measures on immigration and safeguarding the rights of nationals of third countries were also included under Article 61(b) as means to establish the Area of Freedom, Security and Justice. Article 63 provided that the Council had the competence to adopt measures in the following areas: conditions of entry and residence, standards and procedures for long-term visas and residence permits, family reunification, illegal migration, and measures to define the rights of third-country nationals to reside in another Member State. This competence was shared with the Member States under Articles 63(3) and (4). Despite the clear competence basis, adopting legislation on regulating labour migration did not prove so easy, as will be shown in Chapter 5. At the same time, judicial review by the Court was limited substantively and procedurally pursuant to Articles 62(1)-68(3) EC Treaty for the transitional period prescribed in Article 67 EC Treaty. Contrary to the other transitional arrangements of Amsterdam, the limitation to the Court's jurisdiction was only abolished with the Treaty of Lisbon.

The Lisbon Treaty introduced the final version of the relevant provisions, drawing many elements from the failed constitutional treaty. Title V includes the provisions on the Area of Freedom, Security and Justice. Under Article 67(2) TFEU, the Union must ensure the absence of internal border controls, and must frame a common policy on asylum, immigration, and external border control, based on solidarity between Member States, and which is fair towards third-country nationals. Chapter 2 of the Title includes more general provisions on border checks, asylum, and immigration. In this chapter, Article 79 TFEU provides that the Union must develop a common immigration policy aimed at ensuring efficient management of flows, fair treatment of third-country nationals and the prevention of illegal migration and trafficking. To this end, legislation may be adopted on the conditions of entry and residence, the rights of third-country nationals and the conditions of free movement and residence in another Member State, illegal migration and removal and repatriation and combatting trafficking. Article 79(3) TFEU provides that the Union may conclude agreements on readmission of TCNs, whereas 79(4) TFEU provides that legislation may be adopted to support the action of Member States to promote integration of legally resident third-country nationals. Nevertheless, it excludes harmonization of laws as a means thereto. Article 79(5) TFEU stipulates that this article must not affect the right of Member States to determine the volumes of admission of third-country nationals entering their territory for the purpose of seeking work either as employee or as self-employed. Finally, Article 80 TFEU requires that the implementation of the policies of the Union in this chapter must be governed by the principles of solidarity and fair sharing of responsibility, including its financial implications.

A characteristic of the Area of Freedom Security and Justice, which Thym calls 'institutional idiosyncrasy' are the opt-outs of Ireland and Denmark (and before Brexit also of the UK).[99] These opt-outs refer to the possibility for these specific Member States not to participate in and be bound by instruments adopted in this area.[100] They are the outcome of political compromises and, as Thym has rightly pointed out, they have not established a model of differentiated law-making.[101] Recitals of secondary legislation indicate whether these Member States are bound by the relevant instruments.[102]

From the above overview of the primary law framework on migration, it becomes clear that the Treaty provisions leave a lot of discretion as to how harmonization should proceed compared to the free movement framework. Specifically, the Treaty provisions on free movement are framed in terms of obligations of the Member States to implement action with specific substantive content (guarantee free movement, secure rights to reside) and they refer to secondary legislation that can be put in place to define how such action should be achieved. In contrast, primary law on migration from third countries does not refer to action with specific content, but rather to subject areas in which harmonization may take place. This leaves a lot of discretion as to the substance of secondary law that will guide harmonization, and this can explain the tension behind the adoption of all the instruments that will be reviewed in Chapters 5 and 6. Nevertheless, Article 80 TFEU, as well as Article 67 TFEU, provide the principles on which such action must be based, that is on solidarity between Member States and fairness towards third-country nationals. These principles have attracted academic attention in the areas of asylum law, but have not been theorized in migration law.[103] A full discussion on how they could frame future migration law in light of sustainability is developed in Chapter 7.

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[99] Daniel Thym, 'Institutional and Constitutional Framework' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 72.

[100] Articles 1 and 2, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/295; Articles 1 and 2, Protocol (No 22) on the position of Denmark, Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/298.

[101] Thym (n 99) 72 reference omitted.

[102] Ireland and Denmark are not bound by the legal migration acquis.

[103] Eleni Karageorgiou, 'Rethinking Solidarity in European Asylum Law: A Critical Reading of the Key Concept in Contemporary Refugee Policy' (PhD, Faculty of Law, Lund University 2018); Violeta Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law' in Evangelia (Lilian) Tsourdi and Philippe De Buycker (eds), *Research handbook on EU migration and asylum law* (Edward Elgar Publishing 2022); Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in

At this stage, it should also be mentioned that the open Treaty formulation should not confuse us. Despite the intention of Member States in the negotiation of different instruments, the Court has confirmed that secondary law adopted in the area of regular migration does create EU law rights for individuals (on entry and family reunification) and that exceptions to such rights should be strictly construed, as will be demonstrated in Chapter 6. So far we have seen that the two main legal areas creating EU law rights for migrants are the free movement framework and the regulation of migration from third countries under the Area of Freedom, Security and Justice. Historically however, EU law rights for migrants have been also created in the framework of International Agreements concluded by the EU with third states, which will be examined next.

2.4 International Agreements

International Agreements concluded with third countries is another legal area examined in this dissertation with a view to investigating the role of economic and social considerations in the attribution of migrants' rights. The reason for including this legal area in the investigation is that in the early years of Community law migrants from associated countries drew a significant set of social rights from Association Agreements. Since the Treaty of Rome, Article 238 has provided that the Community may conclude agreements with third countries, groups of countries or international organization which create an association characterized by reciprocal rights and obligations, common procedures, and special procedures. Under the current framework, the legal basis is provided in Article 217 TFEU. In light of this provision, the EU has adopted Association Agreements which create a framework for cooperation with third countries in different matters.

Association Agreements are bilateral agreements between the EU and third countries, or mixed agreements between the EU, the Member States and a third country which create a framework of external cooperation in different matters. Some Association Agreements were concluded with a view to eventual accession, while others never foresaw such accession – instead, they aimed at fostering closer economic cooperation between the EU and third countries.[104] Such agreements

Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021).

[104] For example, the Association Agreement with Greece, the Europe Agreements with the Central and Eastern European Countries and the Stabilisation and Association Agreements with the Western Balkan countries were concluded with a view to accession A similar intention existed in the Association Agreement with Turkey, but it has failed to materialize. See also Peter Van Elsuwege and Merijin Chamon, *The Meaning of 'association' under EU Law: A Study on the Law and Practices of EU Association Agreements* (Publications Office of the European Union 2019) where the authors put forward a typology of Association Agreements based on the *finalité*

create special privileged links with third countries, allowing them to take part in the EU system.[105] While such agreements were thought of as falling exclusively within the scope of international law, the Court established jurisdiction and determined the limits of Community action in that field early on. Butler and Wessel emphasize that the *ERTA* ruling of the Court is as significant as other foundational rulings of this legal order.[106] In that case, the Court held that the Community could proceed in commitments towards non-Member States within the fields of competence it has under the Treaties. [107]

While the Court differentiates between the EU framework and international law, with International Agreements signed by the EU falling within the scope of the latter, it has established jurisdiction to interpret the provisions of International Agreements in order to ensure that they are applied in a manner consistent with EU law.[108] On this matter, the Court has held that when the provisions of an International Agreement are similarly or identically worded to provisions of the Treaty, this does not imply the automatic extension of the interpretation of the Treaty provision to the provision of an International Agreement.[109] Instead, the objective and the context of the Agreement should also be taken into account in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[110] To the extent that the objective pursued by an International Agreement signed by the EU is similar to that pursued by a Treaty provision, the Court extends the interpretation of EU law to the provisions of International Agreements.[111]

What is more important for the present inquiry is that the Court has found the direct effect of provisions of International Agreements and the direct effect of the Decisions adopted by institutions set up under International Agreements in order to

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of the established relationship. They distinguish between three types of Association Agreements: agreements which are conceived as pre-accession instruments, as alternatives for EU membership, or as instruments which create privileged relationships with non-European countries.

[105] Judgment of 30 September 1987, *Demirel / Stadt Schwäbisch Gmünd*, 12/86, ECLI:EU:C:1987:400 para 9,

[106] Graham Butler and Ramses A Wessel, 'EU External Relations Law and Navigating the Case Law of the Court of Justice of the European Union' in Graham Butler and Ramses A Wessel (eds), *EU external relations law: the cases in context* (Hart Publishing 2022). Judgment of 31 March 1971, *Commission / Council*, 22/70, ECLI:EU:C:1971:32

[107] See also *Demirel / Stadt Schwäbisch Gmünd*, 12/86, para 9.

[108] Judgment of 25 October 1972, *Haegemann / Commission*, 96/71, ECR 1972 ECLI:EU:C:1972:88.

[109] Craig (n 6).

[110] Vienna Convention on the Law of Treaties of 23 May 1969 UNTS, vol. 1155, p.331.

[111] The so-called Polydor principle established in Judgment of 9 February 1982, Polydor and others / Harlequin and others, 270/80, ECLI:EU:C:1982:43. This principle has been applied to the interpretation of the EEC-Turkey Agreement.

implement them.[112] This type of Agreements was used extensively by the Community before the new millennium, and they had labour-related clauses with regard to cooperation with countries that traditionally supplied migrant labour to the EU. The content and interpretation of the relevant Agreements will be analysed in Chapters 4 and 5. The analysis will highlight the economic considerations driving the attribution and limitation of rights to migrants of associated states. These considerations related to the existence or not of labour demand in different periods, as well as the development level of the associated states. The investigation shows that very similar considerations existed behind the transitional arrangements devised in different Accession Treaties, whose general framework will be presented in the following section.

2.5 Expansion by Accession

Next to the evolution of the Treaty framework and case-law in the areas of free movement, migration from third countries and International Agreement, the EU has also developed territorially since the establishment of the European Coal and Steel Community in the 1950s with different legal arrangements guiding the accession of different Member States. The European Coal and Steel Community started with six founding Member States, and the Lisbon Treaty was concluded between 28 Member States. Currently, the EU comprises 27 Member States, and, in the course of these waves of territorial expansion, it has shaped a specific legal framework regulating accession. The procedure of accession is open to all European states that respect the common values of the Member States and undertake to promote them.[113]

Countries that wish to join the EU apply for EU membership. Eventual accession depends on the capacity of the candidate country to meet the accession criteria, which were crystallized at the Copenhagen European Council in 1993. According to these criteria,

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competition and market forces within the Union … the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[114]

[112] See for example decisions of the EEC-Turkey Association Council examined in Chapter 5.

[113] Now under Article 49 TEU. Initially Article 237 EEC and then, in Article O TEU.

[114] European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency 7(iii).

The capacity of the EU to absorb new Member States 'while maintaining the momentum of European integration' is also considered.[115] In light of these criteria, the Commission draws up an Opinion, following which the European Council opens accession negotiations. Negotiations are of intergovernmental nature, and they focus on the conditions and time period within which the country in question has to adopt and implement the EU *acquis*. The conclusion of the negotiations is marked by the signing of an Accession Treaty, which contains the terms of the membership, transitional arrangements, deadlines for the full application of EU law in different fields, as well as safeguard clauses. Overall, the accession process allows for differentiation in the treatment of different candidate countries and for the incorporation of different considerations that will eventually allow the smooth transition of candidate countries in the EU, without jeopardizing the EU's ability to continue functioning effectively.

Accession to the EU creates not only obligations for the acceding state, but also rights that are attributed to its nationals by the EU legal order. These include free movement rights for the nationals of the Member State that accedes to the EU. The idea is that when accession is concluded, the nationals of the Member State become subject of the EU legal order and enjoy the corresponding rights. In practice, this means that after every accession, the amount of population entitled to migrate and work within the EU under the liberal conditions of free movement of workers is increased by the number of nationals of the acceding states. Such an increase in population that has the potential to migrate was felt very differently during the accession of countries that had no emigration patterns (like the UK, Denmark, Sweden, Austria, Ireland, Cyprus, Malta) as opposed to the accession of countries that had historically supplied migrant labour to the Member States (Greece, Spain, Portugal) and the accession of countries with lower socioeconomic development levels which significantly increased the EU population (Central and Eastern European Countries).

In this regard, the Accession Treaties signed by the EU have included different provisions to subject the free movement of workers framework to transitional arrangements. Nationals of the acceding Member States did not always automatically enter the privileged labour migration regime of free movement. The evolution of law in the context of enlargement has been thoroughly analysed in legal scholarship.[116] Each enlargement process will be more closely investigated in Chapters 4, 5 and 6, with a specific focus on the free movement of workers provisions. Through the examination of archival material, the analysis will

[115] ibid.

[116] See Andrea Ott and Kirstyn Inglis, *Handbook on European Enlargement: A Commentary on the Enlargement Process* (TMC Asser press 2002) with different contributions on the enlargement process and a focus on the more recent enlargements from the Europe Agreements to the Accession Treaties.

reconstruct the historical context behind the choice of different transitional arrangements, and it will highlight that differentiation in Accession Treaties was framed in light of economic and social sustainability demands. The limitation of rights for soon-to-be EU migrants only took place when these migrants were perceived as a risk to the functioning of Member States' economies. In contrast, when such risks were not assumed (due to similar economic development levels of acceding countries), nationals of the acceding states enjoyed the immediate attribution of EU free movement rights. Finally, in all Accession Treaties, regardless of the assumed risks by migration, safeguard clauses were always included to ensure that potential economic effects could be addressed from within the legal framework.

Having provided an overview of the central elements of the EU law areas whose specific legal development and case-law will be examined in subsequent chapters, I now turn to the substantive analysis of the project. Investigating the historical development of all these four legal areas from the 1950s to the present will highlight the central position of economic and social objectives behind the attribution, limitation, and extension of migrants' rights during all the different periods of EU law. Relatedly, it will show that while the objective of an EU sustainable migration might be a recent one, the economic and social pillars of sustainability have been the key drivers of EU migration law with very specific implications for migrants' rights.

Chapter 3. The Indeterminacy of EU Sustainable Migration

According to the dictionary definition, sustainability means 'the quality of being able to continue over a period of time'.[1] A literal understanding of sustainability hints at the qualities of maintenance or continuity that are embedded in any application or interpretation of sustainability. However, this literal meaning is of little help in assisting the reader in understanding the legal implications of the objective of shaping EU sustainable migration. This is especially so, considering the many sectors that have been linked to sustainability and the many nouns that have followed the adjective 'sustainable' from the 1970s onwards.

This chapter zooms in on sustainability and maps the history of the concept, as well as its relevance for EU law and policy. Drawing on the work of Foucault, Anne Orford has suggested a turn to description as a mode of legal writing.[2] Following Orford, by describing what is visible, rather than by discovering what is hidden,[3] this chapter grounds the necessity of the in-depth study carried out in the remainder of this dissertation for understanding the legal implications of sustainability.

To do so, the chapter first provides an overview of the concept of sustainability in Section 3.1. Section 3.2 maps the appearance of sustainability in EU law and policy documents since the 1990s and presents the relevant scholarly examination of the concept in EU law. This section highlights the utter absence of migration from the broader EU Sustainable Development Strategy. Section 3.3 turns to EU migration, presenting the diverse ways in which sustainability appears in EU migration policy, which do not allow for a uniform understanding of the sustainable migration objective. Section 3.4 looks at scholarly research on sustainable migration and presents how migration studies and human geography have approached the concept of sustainable migration. This section problematizes if and how these definitions could be applied in EU law, and if they could inform the EU legal framework.

[1] See Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/sustainability.

[2] Anne Orford, 'In Praise of Description' (2012) 25 Leiden Journal of International Law 609.

[3] ibid 617, where the author cites excerpts from Michel Foucault, 'La philosophie analytique de la politique' in Daniel Defert, François Ewald and Jacques Lagrange (eds), *Dits et écrits, 1954–1988* (vol 3, Gallimard 1994), 534, at 540–1.

Section 3.5 presents different theoretical frameworks that have been developed to explain sustainability. It considers how these frameworks could relate to the objective of an EU sustainable migration, and whether they could inform EU migration law. Finally, Section 3.6 concludes this chapter and restates the need for the historical approach undertaken in the chapters that follow.

3.1 Sustainability: an Overview

The first recorded use of the term sustainability dates to the Enlightenment period. In what is considered the first comprehensive treatise on forestry, Hans Carl von Carlowitz mentioned sustainability in relation to forest management and conservation.[4] According to von Carlowitz, new methods of cultivation were to offer the potential to maintain forest stocks and address timber shortages, which were caused by mining activities in Saxony.

Sustainability became popularized in the 1970s as a central part of environmental ethics, which at that time emerged as a distinct philosophical discipline.[5] The emergence of the concept in this form was linked to concerns over the finite nature of planetary resources and the danger posed by human activities to the preservation of the environment.[6]

This understanding of sustainability became popularized by the Brundtland report. In 1983, the Secretary General of the UN established the World Commission on Environment and Development,[7] which was tasked with producing a report that would form the basis of the UN strategy on environment for 2000 and beyond.[8] The Brundtland Report did not present any specific understanding of sustainability. Rather, it proposed a form of development that would address the risks faced by humanity, which it called sustainable development. Sustainable development was

[4] Hans Carl von Carlowitz, *Sylvicultura Oeconomica, Oder Haußwirthliche Nachricht Und Naturmäßige Anweisung Zur Wilden Baum Zucht* (Leipzig 1713); Margaret Robertson, *Sustainability Principles and Practice* (Third Edition, Routledge 2021) 3; Marc Brightman and Jerome Lewis (eds), *The Anthropology of Sustainability: Beyond Development and Progress* (Palgrave Macmillan 2017) 3.

[5] Andrew Brennan and Lo Y.S. Norva, 'Environmental Ethics' in Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition) https://plato.stanford.edu/archives/spr2023/entries/ethics-environmental/.

[6] Donella Meadows et al, *The Limits to Growth: A report for the Club of Rome's Project on the Predicament of the Mankind* (Universe Books 1972).

[7] UN General Assembly, Process of preparation of the Environmental Perspective to the Year 2000 and Beyond, 19 December 1983, A/RES/38/161.

[8] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987).

defined by the report as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[9] Some years later, the Caring for the Earth Strategy for Sustainable Living defined sustainable development as 'improving the quality of human life while living within the carrying capacity of supporting ecosystems'.[10] These two definitions are the starting point in literature related to sustainability. As Jacobs has noted, these definitions are 'generally deemed sufficient to express the concept; argument can then proceed as to what must be done to achieve it in practice'.[11]

On the matter of implementation, the Brundtland report recognized that there was 'no single blueprint'[12] for sustainability and that the policy implications of this concept would have to be developed *ad hoc.* Hence, the report paved the way for a more open application of sustainability, based on the needs and aspirations of individual societies. The 'no single blueprint' wording was rooted in the conflicting ideas of development and their implication for the Global North and the Global South. [13] Additionally, the report suggested that 'human survival and well-being could depend on success in elevating sustainable development to a global ethic'.[14] The report failed to clarify which qualities might underlie such an ethic, and, as a result, this question has formed the basis of many analyses of what sustainable development or sustainability should entail, as well as how the concept can connect to considerations of justice and ethics.[15] Finally, the Report identified links between

[9] ibid Part I Common Concerns. The report was welcomed, and the definition was adopted by the United Nations General Assembly 42/187 – Report of the WCED, A/RES/42/187, 11 December 1987.

[10] International Union for Conservation of Nature United Nations Environment Programme World Wide Fund For Nature, *Caring for the Earth: A Strategy for Sustainable Living* (Gland Switzerland 1991)14.

[11] Michael Jacobs, 'Sustainable Development as a Contested Concept' in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) 23.

[12] World Commission on Environment and Development (n 8) Part I Common Concerns.

[13] On this matter see Federico Demaria and Ashish Kothari, 'The Post-Development Dictionary Agenda: Paths to the Pluriverse' (2017) 38(12) Third World Quarterly 2588. See also Jane Briant Carant, 'Unheard voices: a critical discourse analysis of the Millennium Development Goals' evolution into the Sustainable Development Goals' (2017) 38(1) Third World Quarterly 16 who has proceeded in discourse analysis of the Millenium Development Goals and the Sustainable Development Goals and presented the divergent views on sustainable development under Keynesianism, neoliberalism, liberal feminism and World social forum to identify what the goals indicate.

[14] World Commission on Environment and Development (n 8) Part III, para 2.

[15] It would be hard to provide a conclusive analysis. See section 3.5 and Felix Ekardt, *Sustainability: Transformation, Governance, Ethics, Law* (Springer International Publishing 2020); Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (Oxford University Press 1998).

what were considered the major challenges faced by humanity at the time: poverty, injustice, environmental degradation, and conflict.[16] These served as a basis for a conception of people, economies, and the environment as a whole system of interdependent entities.[17]

The open approach of the Brundtland report resulted in the perception of sustainability and sustainable development as almost tautological.[18] As a result, sustainability and sustainable development have often been used almost interchangeably, leading to research output where both terms are used to signify the same concept. While there are scholars who distinguish the two, the distinction is not uniform or consistent.[19] The convergence of these terms also appears in EU policy documents. For this reason, this work also addresses sustainability and sustainable development as entailing the same demands and considerations.

In international policy, sustainable development was further fleshed out in the Rio Declaration.[20] Operationalised in the form of 27 principles, sustainable development became connected to the economic and environmental sectors. Subsequently, during the Earth Summit +5, the social sector was included as a third pillar of the concept.[21] The 2030 Agenda for Sustainable Development provides the most recent articulation of the concept in international policy.[22] The Agenda linked

[16] World Commission on Environment and Development (n 8) Part III, Common Endeavors.

[17] William M Lafferty and James Meadowcroft (eds), *Implementing Sustainable Development: Strategies and Initiatives in High Consumption Societies* (Oxford University Press) 338; Kristen Magis and Craig Shinn, 'Emergent Principles of Social Sustainability' in Jesse F Dillard, Veronica Dujon and Mary C King (eds), *Understanding the social dimension of sustainability* (Routledge 2009) 16.

[18] However, there is literature that draws distinctions, see Andrew Dobson, *Justice and the Environment, Conceptions of Environmental Sustainability and Dimensions of Social Justice* (OUP 1998) who sees sustainable development as a form of theory of environmental sustainability or Klaus Bosselman, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008) addressing sustainability as an ethical principle predating sustainable development.

[19] For an overview see Margherita Pieraccini and Tonia Novitz, 'Sustainability and Law: A Historical and Theoretical Overview' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020) 11.

[20] Rio Declaration on Environment and Development, 13 June 1992, adopted by the UNCED at Rio de Janeiro, UN Doc A/CONF. 151/26, Vol.1, August 1992, ILM 874.

[21] Special Session of the UN General Assembly to Review and Appraise the Implementation of Agenda 21, 23-27 June 1997, New York.

[22] Tonia Novitz and Margherita Pieraccini, 'Agenda 2030 and the Sustainable Development Goals: "Responsive, Inclusive, Participatory and Representative Decision-Making"?' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020); For a closer overview of the policy developments see Pieraccini and Novitz (n 19). UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

sustainability with all the major challenges currently faced by humanity (from environment and economy to gender equality, peace and justice) and set 30 goals through which sustainability should be achieved. According to Novitz and Pieraccini, the Agenda offers an opportunity for a more inclusive understanding of sustainability.[23]

By now, it is widely accepted that sustainability is a three-pillar concept involving considerations related to the economy, the environment and society. The relationship between the three pillars, however, is rather less clear. For example, earlier literature suggested that social and economic objectives would have to promote environmental objectives to be deemed sustainable.[24] The focus was on sustainable development or sustainability as an environmental concept. The evolution of the policy discourse discussed above set the basis for theoretical conceptions of sustainability as a more general concept 'describing a new goal of economic and social (and, by implication, political) life'.[25]

Relatedly, in the past decade, we have witnessed the proliferation of works suggesting that 'the environmental, economic, social and cultural dimensions of sustainability need to be jointly and severally enforceable as the component parts of development.'[26] The three pillars are interrelated, but they represent 'independent dimensions and equally important goals in themselves'.[27] Much like sustainable development, there is no uniform understanding of the elements of social sustainability.[28] Nevertheless, all the relevant works engage with questions of equity and social justice. As Jacobs mentioned already in the 1990s, 'inequitable societies are prone to social conflict, they are therefore likely to be socially unsustainable'.[29] Despite these debates, it is agreed that sustainability definitely has three pillars (economic, social and environmental) and is concerned with inter-generational (justice between present and future generations) and intra-generational justice

[23] Novitz and Pieraccini (n 22) 39.

[24] Such an understanding appears under what the author identifies as conservative approaches to sustainable development Jacobs (n 11). See Tonia Novitz, 'Social Sustainability, Labour and Trade: Forging Connections' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020) who has looked at different connections forged between the pillars of sustainability.

[25] Jacobs (n 11) 37 with reference to a broad conception of sustainable development.

[26] Novitz and Pieraccini (n 22) 50.

[27] Henrik Åhman, 'Social Sustainability – Society at the Intersection of Development and Maintenance' (2013) 18 Local Environment 1153, 1155.

[28] Beate Littig and Erich Griessler, 'Social Sustainability: A Catchword between Political Pragmatism and Social Theory' (2005) 8 International Journal of Sustainable Development 65; Åhman (n 27); Magis and Shinn (n 17).

[29] Jacobs (n 11) 38.

(justice between peoples of the present generations) in terms of fair allocation of resources.[30]

International law scholarship has provided numerous contributions elaborating on the notion of sustainability, its legal value, the different degrees of normativity under which the concept appears in soft-law documents and case-law, as well as its potential to become a general principle of international law.[31] Most of the relevant literature engages with sustainability and sustainable development in relation to economic growth and environmental considerations.[32] In the past decade, scholarly work has also paid attention to social considerations and their interplay with sustainable development.[33] In disciplines other than law, authors have also systematized sustainability-related research in their fields, and have developed theoretical frameworks for analysis of sustainability. Before presenting these frameworks in Section 3.5, the next sections turn to the EU policy field and examine how sustainability has appeared in EU policy both as an autonomous objective (Section 3.2), and in relation to migration (Section 3.3).

[30] Pieraccini and Novitz (n 19) 16; See also Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) bringing theoretical discussion on justice and sustainability to the fore.

[31] Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) suggesting that there is no concrete legal obligation stemming from sustainable development at the time of writing; Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan E Boyle and David Freestone (eds), *International law and sustainable development: Past Achievements and Future Challenges* (Oxford University Press 1999) identifying sustainable development as a meta-principle; Ian Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press 2008) 283; Vaughan Lowe, *International Law* (Oxford University Press 2007) identifying sustainable development as an interstitial norm; Pieraccini and Novitz (n 19) 22–24 for a recent overview of how sustainable development appears in litigation; Nicolas de Sadeleer, 'Environmental Principles, Modern and Post Modern Law' in Richard Macrory, Ian Havercroft and Ray Purdy (eds), *Principles of European Environmental Law, Proceedings of the Avosetta Group of European Environmental lawyers* (Europa Law Publishing 2004).

[32] See, however, Demaria and Kothari (n 13) for a critique of the centrality of growth; See also Giacomo D'Alisa, Federico Demaria and Giorgos Kallis (eds), *Degrowth: A Vocabulary for a New Era* (Routledge, Taylor & Francis Group 2015).

[33] See Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020); Littig and Griessler (n 28) is considered as a turning point for the beginning of engagement with social sustainability.

3.2 The Disconnect of Migration from Sustainability in EU Policy and Scholarship

Sustainability as a concept pertinent to law and policy considerations first appeared in the EU legal order in the 90's. Sustainable development has formed part of EU primary law since the Maastricht Treaty.[34] Specifically, the Maastricht Treaty referred to sustainable development in the field of development cooperation in Art. 130u TEC. The notion of sustainable development was also alluded to in Article B TEU and Article 2 TEC, by reference to the economic, environmental, and social pillars of the notion being connected *in abstracto* with progress and growth. The Amsterdam Treaty was the first instrument to explicitly introduce sustainable development as an EU objective, encompassing all the pillars of the notion and adding a special reference to the relation of the concept to environmental protection.[35] The reference to and inclusion of sustainable development as a primary law objective that relates to economic growth, social progress, environmental protection and external action was maintained in the Lisbon Treaty and creates a link between this treaty and virtually every area of EU policies. According to de Sadeleer, the reference to all three pillars of sustainability in Article 3(3) TEU points more to reconciliation rather than opposition between the three pillars.[36] Section 3.2.1 outlines the institutional evolution of policies related to sustainable development as pursued by the EU. The analysis highlights the absence of links between sustainability and migration in EU policy discourse. Subsequently, Section 3.2.2 will review EU law scholarship on sustainability, demonstrating that scholars have not engaged in research on the relation of sustainability to migration.

3.2.1 The EU Sustainable Development Strategy Devoid of Links with Migration

In 2000, the EU Council in Lisbon announced that,

[34] Treaty on European Union, together with the complete text of the Treaty establishing the European Community [1992] OJ C 224/1.

[35] Preamble, Article 2, Treaty on European Union (Amsterdam consolidated version) [1997] OJ C 340/145; Article 2, Article 6 and Article 177, Treaty establishing the European Community (Amsterdam consolidated version) [1997] OJ C 340/173.

[36] Nicolas de Sadeleer, 'Sustainable Development in EU Law: Still a Long Way to Go' (2015) 6 Jindal Global Law Review 39, 45.

> The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.[37]

From that time, the EU began shaping its autonomous Sustainable Development Strategy. In 2001, the Commission drafted the first Communication aimed at providing a more concrete plan of action on the implementation of sustainability.[38] The Communication adopted the Brundtland definition of sustainable development, while at the same time opening up the concept to include diverse nuances by suggesting that,

> Sustainable development offers the European Union a positive long-term vision of a society that is more prosperous and more just, and which promises a cleaner, safer, healthier environment – a society which delivers a better quality of life for us, for our children, and for our grandchildren. Achieving this in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance**,** and that environmental policy is cost-effective.[39]

To be more effective in the Strategy it proposed, the Commission identified specific key challenges and suggested concrete measures with emphasis on policy coherence. The Strategy was endorsed by the Gothenburg EU Council in 2001, which welcomed the incorporation of an environmental dimension to the Lisbon process, while recognizing that an external dimension, related to third countries, should also be developed.[40]

Thereafter, the Commission developed the external action elements of the EU Sustainable Development Strategy, emphasizing what had already been implied in previous policy documents – coherence.[41] That is, apart from the three pillars of sustainable development (economic, social and environmental), the Commission found it necessary for coherence of EU policies, improved governance, and increased resources to implement these policies to also form part of the interpretation and application of sustainability in the EU sphere. This approach aimed at the introduction of a new hybrid concept of sustainable development regarding its implementation in this *sui generis* hyper-state level.

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[37] European Council, Presidency Conclusions, Lisbon, 23-24 March 2000.

[38] Communication from the Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, EU Sustainable Development Strategy, (Commission's proposal to the Gothenburg European Council COM(2001)264 final.

[39] ibid.

[40] European Council, Presidency Conclusions, Gothenburg, 15-16 Juned 2001, SN 200/1/01 REV 1.

[41] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a global partnership for sustainable development COM(2002)82 final.

The 2002 Barcelona EU Council endorsed this position and focused on the link between the external and internal dimensions of sustainability,[42] that is, on how the EU should promote sustainability both within its region and as a leader on the global level. In 2005, the strategy expanded through the identification of 10 policy-guiding principles. These principles framed sustainability as broadly as possible, in an attempt to encompass the economic, environmental and social pillars of the concept, while incorporating elements of good governance and democracy.[43]

The gradual evolution and conceptual opening of sustainability took a completely different turn under the Barroso Commission. In 2010, the Council adopted the Commission's proposal on the EU2020 Strategy which, while including sustainable growth as a priority, framed the concept in terms of competitiveness, climate change and resource efficiency, hence completely stripping it of its social pillar.[44] The next evolution came with the 2030 Agenda on Sustainable Development which coincided with the Juncker presidency of the Commission.[45] Under the Juncker Commission, the priorities set for EU action were far more socially oriented. In this regard, the EU response to the evolution of the concept of sustainable development shifted.[46] Instead of framing an EU policy to address sustainability challenges, the EU now looked at how what had already been achieved internally was in line with the Sustainable Development Goals. The perception of the concept also changed, and it suddenly moved towards aid to third countries so that they too might achieve sustainable development.

The most recent evolution of the EU Sustainable Development Strategy to date came under the Von Der Leyen Commission. The new political agenda of the Commission ended the autonomy of the sustainable development strategy. Specifically, Von Der Leyen's political programme aimed at integrating the 2030 Agenda in all commission proposals, thus streamlining sustainability in EU policy.[47] In a working document issued in 2020, the Commission elaborated on the different policies adopted with the aim of implementing the Sustainable Development Goals at EU level. In that working document, and in the Sustainable Development Goals

[42] European Council, Presidency Conclusions, Barcelona, 15-16 March 2002, SN 100/1/02 REV 1.

[43] European Council, Presidency Conclusions, Brussels, 16-17 June 2005, 10255/1/05 REV 1.

[44] European Council, Conclusions, Brussels, 13 July 2010, EUCO 13/1/10 REV 1; Communication from the Commission, 'EUROPE 2020 A strategy for smart, sustainable and inclusive growth' COM(2010)2020 final.

[45] UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development', 21 October 2015, A/RES/70/1.

[46] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Next steps for a sustainable European future, European action for sustainability COM(2016)739 final.

[47] Commission Staff Working Document, Delivering on the UN's Sustainable Development Goals-A comprehensive approach SWD(2020)4000 final.

mapping tool developed by the Commission,[48] it appears as if all the EU policies currently pursued, and all the legal acts adopted by the EU, relate to one or more Sustainable Development Goals. Among all the different policies, the Commission mentions the New Pact on Migration and Asylum as linked to sustainability.[49]

Despite this recent link, over the previous twenty years, the EU Sustainable Development Strategy had evolved in silo from the EU migration policy. The recent connection of sustainability with every aspect of EU action, and thus also with migration, obfuscates the concept's meaning and implications. A similar siloed approach exists in EU scholarly research in sustainability, as the next section will show.

3.2.2 The Examination of Sustainability in EU Legal Scholarship

Sustainability-related research in EU law has not hitherto engaged with the links between sustainability and migration. Rather, EU law scholars have investigated sustainability in relation to environmental law, economic law and more recently labour law. In the literature, there have been two broad ways of engagement of EU law scholars with sustainability over the last twenty years. The first is scholarship that looks at how EU law could be used as a tool to address environmental challenges. Second, in more recent years, we see a shift in the perception of sustainability, such that more recent works discuss how EU law can be used as a tool to achieve more sustainable societies. In this second strand, scholars engage with all three pillars of sustainability and their relation to EU law.

In the first strand of scholarship, we find authors who investigated the legal implications of sustainability as a concept focused on environment. By emphasizing the need to equip the EU legal system with the tools that can address environmental challenges, scholars looked at if and how EU law could be interpreted or applied to address such challenges. This strand includes research related to the fields of environmental law and competition law. In environmental law, scholars examine how sustainable development is understood in EU law, and whether the concept has any normative implications in this field.[50] Such literature either provides definitions of sustainability that would allow for the operationalization of the concept in EU

[48] See SDG policy mapping tool available at https://knowsdgs.jrc.ec.europa.eu/intro-policy-mapping.

[49] Commission Staff Working Document SWD(2020)4000 final, Box 1 at 6.

[50] See Richard Macrory, Ian Havercroft and Ray Purdy (eds), *Principles of European Environmental Law, Proceedings of the Avosetta Group of European Environmental Lawyers* (Europa Law Publishing 2004); Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002); Christina Voigt and Hans Christian Bugge (eds), *Sustainable Development in National and International Law, What Did the Brundtland Report Do to Legal Thinking and Legal Development, and Where Can We Go from Here?* (Europa Law Publishing 2008).

law,[51] or suggests application or interpretation of primary law provisions with a focus on different elements of sustainability.[52] To put it simply, environmental law scholars either look for a meaning of sustainability that would make it legally relevant for EU law, or look at how rules of EU law can achieve the objectives of sustainability through an emphasis on promoting environmental protection.[53] Similar research has taken place in competition law; authors put forward different ways to interpret and apply EU competition law as a tool to promote environmental protection and thereby achieve sustainable development.[54] Some also engage with the challenges that could be posed from such argumentation against the background of EU constitutional law.[55]

The second strand of EU law scholarship developed later in time and is tied to the conceptual evolution of sustainability during the 2000s, the evolution of EU law itself, especially after the Lisbon Treaty, and different events that have taken place in the European region. Sustainability as a concept that includes three pillars (economic, social and environmental) finds explicit expression in Article 3(3) TEU.

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[51] These include Sander RW Van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10 Utrecht Law Review 60; Maria M Kenig-Witkowska, 'The Concept of Sustainable Development in the European Union Policy and Law' (2017) 1 Journal of Comparative Urban Law and Policy 64.

[52] Ludwig Kramer, 'Sustainable Development in EC Law' in Christina Voigt and Hans Christian Bugge (eds), *Sustainable development in national and international law, What did the Brundtland report do to legal thinking and legal development, and where can we go from here?* (Europa Law Publishing 2008) has focused on the integration requirements; Christina Voigt, 'Article 11 TFEU in the Light of the Principle of Sustainable Development in International Law' in Beate Sjåfjell and Anja Wiesbrock (eds), *The greening of European business under EU law: Taking Article 11 TFEU seriously* (Routledge 2015) has argued for an emphasis on the ecological core of sustainable development; Gerd Winter, 'Fundament and Two Pillars; The Concept of Sustainable Development 20 Years after the Brundtland Report' in Christina Voigt and Hans Christian Bugge (eds), *Sustainable development in national and international law, What did the Brundtland report do to legal thinking and legal development, and where can we go from here?* (Europa Law Publishing 2008) 40–42 has elaborated on the way EU law perceives sustainable development in order to identify the core elements of the notion.

[53] de Sadeleer (n 31); Matthew Humphreys, *Sustainable Development in the European Union: A General Principle* (Routledge 2017).

[54] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354; Simon Holmes, Dirk Middelschulte and Martijn Snoep, *Competition Law, Climate Change & Environmental Sustainability* (Institute of Competition Law 2021); Marios C Iacovides and Christos Vrettos, 'Falling through the Cracks No More? Article 102 TFEU and Sustainability: The Relation between Dominance, Environmental Degradation, and Social Injustice' (2022) 10 Journal of Antitrust Enforcement 32.

[55] See for example Edith Loozen, 'Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability' (2019) 56 Common Market Law Review; For an overview of the different arguments in the relevant literature see Oles Andriychuk, 'The Concept of Sustainability in EU Competition Law: A Legal Realist Perspective' (2021) 23 Yearbook of Antitrust and Regulatory Studies 11.

After the adoption of the Lisbon Treaty, many different crises have been experienced at EU level (economic/financial crisis, Brexit, migration crisis, public health crisis more recently) which have pointed to the inability of the existing system to achieve sustainability objectives.[56]

In light of the above, different scholars have addressed how different fields of EU law should be developed or applied as means to achieve more just and sustainable societies. This strand of scholarship continues to investigate the meaning of sustainability.[57] While most of these works are focused on fields related to economic law, some research has also emerged in the field of labour law. In the relevant literature, various contributions by Novitz have investigated how labour law can play a part in forging social and economic sustainability.[58] Additionally, Polomarkakis has zoomed in on labour law as part of the EU social *acquis,* suggesting that social sustainability in EU law should be perceived as

> [T]he set of policies, rules and principles laid down in the EU legal order, and which aim to reinforce the social dimension of the EU as a long-term solution, ring-fencing it from any relapse into a position of hierarchical subordination to the markets, so that Social Europe can unequivocally be perceived an equal counterpart to the economic constitution.[59]

In this way, he addresses sustainability as an internal objective of the EU legal system which can lead to the 'realization of the more holistic visions of the Union as a supranational entity'.[60]

To sum up, the evolution of EU law scholarship through accounting for a broader conception of sustainability and opening up research by the addition of the social pillar is to be welcomed. Such a broadening of the field of enquiry follows the

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[56] Takis Tridimas, 'Foreword' in Beate Sjåfjell, Georgina Tsagas and Charlotte Villiers (eds), *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises* (Cambridge University Press 2022).

[57] Alexandros Kyriakidis, 'Sustainability and Eurozone 2.0: Still Impossible?' in Beate Sjåfjell, Charlotte Villiers and Georgina Tsagas (eds), *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises* (Cambridge University Press 2022); Pieraccini and Novitz (n 22).

[58] Tonia Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31 International Journal of Comparative Labour Law & Industrial Relations 243; Pieraccini and Novitz (n 22); Tonia Novitz, 'Addressing Social Dumping and Unfair Competition - an Analysis of EU Pillar Initiatives from a Sustainability Perspective' in Ann-Christine Hartzén, Andrea Iossa and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe* (Edward Elgar Publishing 2022); Novitz, 'Social Sustainability, Labour and Trade' (n 24).

[59] Konstantinos Alexandris Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' (2020) 29 Social & Legal Studies 183, 186.

[60] ibid.

evolution of sustainability in international and EU policy as a concept related to many aspects of human life. However, this conceptual opening of sustainability still does not provide much clarity as to the meaning or implications of the concept. Three key lines of argument can be identified in the relevant research. First, sustainability is viewed as a concept comprised of economic, environmental, and social pillars, although not all scholarship agrees on whether these pillars are interdependent or autonomous. Second, sustainability demands the continuity or maintenance of something for the future, although not all scholars agree on what is the value to be maintained. Third, sustainability involves considerations of inter- and intra-generational justice, which take differentiated expression in different areas of law.

In spite of the above, the relevant scholarship has not yet addressed the relation of sustainability to EU migration law. The next section thus engages with the connection between sustainability and migration in EU policy. As will be argued below, the lack of coherence in the way this connection is made renders the scholarly gap particularly salient.

3.3 The Incoherent Appearance of Sustainability in EU Migration Policy

Migration was first linked to sustainability in the 2030 Agenda on Sustainable Development. Among the 17 Sustainable Development Goals and under the umbrella of reducing inequalities, goal 10.7 targets the facilitation of 'orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.[61] While several Sustainable Development Goals could be of relevance to migration, goal 10.7 is the 'cornerstone of the migration component' of the Agenda.[62]

Following the adoption of the Agenda, the UN Global Compact on Migration was adopted in December 2018.[63] The Compact was the first intergovernmental effort to holistically address migrant protection. Specifically, and building on already

[61] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, Goal 10.7.

[62] Michele Klein Solomon and Suzanne Sheldon, 'The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration' (2019) 30 International Journal of Refugee Law 584, 584.The authors also referred to the relevance of goal no 8.6 on the eradication of forced labour, modern slavery and human trafficking and 8.8 on protecting labour rights for all, including migrant workers.

[63] Points 3 and 6, Preamble, UN General Assembly, Compact for Safe, Orderly and Regular Migration, 19 December 2018, A/RES/73/195.

binding human rights obligations, it addressed issues of migrant protection at all stages of their journey (origin, transit, and destination countries).[64]

The EU discourse on sustainable migration predated the adoption of the Compact. Specifically, after 2015, sustainable migration became the new buzzword describing the future of EU migration policy. In different documents issued by the Commission from 2015 to this day, sustainability appears as a central part of EU migration. Nevertheless, the connection made between sustainability and migration is nowhere elaborated in a manner which would clarify its legal implications.

By reviewing EU policy and legislative documents on migration from 2015 to the present, I have categorized the diverse and inconclusive ways in which sustainability appears in Table 1 below, based on some indicative phrasing used in the relevant texts.

Table 1, Indicative appearances of sustainability in EU migration policy

Literal meaning	Abstract meaning	Specific policies
Sustainable reduction of numbers of persons	1. Sustainable migration 2. Sustainable approach/solutions to migration	1. Sustainable returns and reintegration 2. Sustainable legal pathways 3. Sustainable sharing of responsibility

From the table, we see that sustainability appears in some documents in its literal meaning, implying the maintenance of something for the future. References to sustainability in a literal manner exist in documents regarding the implementation of the EU-Turkey agreement that refer to the 'sustainable reduction of numbers of persons irregularly crossing the border from Turkey into the European Union as a result of Turkey's actions'.[65] The same holds true for documents related to the

[64] As to the general Human Rights Obligation see point 2, Preamble to the Compact mentioning all the core international human rights treaties on which it is based. On countries of origin, see objectives 2 and 4 of the Compact. On transit countries, see objectives 5, 8, 9 of the Compact. On destination countries, see objectives 16-20 of the Compact, which are built on the importance of migration for inclusive growth and sustainable development.

[65] Commission Recommendation of 11 January 2015 for a voluntary humanitarian admission scheme with Turkey C(2015)9490; Report from the Commission to the European Parliament and the Council, 'EU-Turkey Joint Action Plan - Third implementation report' COM(2016)0144 final. Similarly, in Report from the Commission to the European Parliament, the European Council and the Council, Fifth Report on the progress made in the implementation of the EU-Turkey statement COM(2017)0204 final; Report from the Commission to the European Parliament, the European Council and the Council, Sixth Report on the progress made in the implementation of the EU-Turkey statement COM(2017)0323 final; Report from the Commission to the European

Schengen area that mention 'the sustainability of the substantial reduction of the migratory flow'.[66] These references mean that a situation of decreasing arrivals, referred to as sustainable, is capable of being maintained in the future.

Next to this literal reference to sustainability, I have identified references to sustainable migration as an abstract characteristic of EU migration policy. It seems to be an overarching goal for the Commission to achieve an 'integrated, sustainable and holistic EU migration policy';[67] 'a responsible and sustainable migration policy';[68] an 'efficient, responsible and sustainable migration policy';[69] or as the New Pact suggested 'fair, efficient and sustainable' EU migration policy.[70] However, it is not clear what this policy would entail in terms of legal measures.

On an equally abstract level, sustainability appears as adaptability or resilience of EU policies in the face of crisis. In different documents, there are mentions such as '[a] sustainable resolution of the crisis needs a step change in the Union's migration policies'[71] or '[t]he 2015 migration and refugee crisis exposed the limitations of our asylum system … it also demonstrated that a future-proof policy requires a more predictable, cooperative and sustainable approach.'[72] The resilience of EU

Parliament, the European Council and the Council, Seventh Report on the progress made in the implementation of the EU-Turkey statement COM(2017)0470 final.

[66] Proposal for a Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk COM(2016)0275 final; Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen - A Roadmap COM(2016)0120 final.

[67] Communication from the Commission to the European Parliament and the Council, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe COM(2016)0197 final; Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) no 516/2014 of the European Parliament and the Council COM(2016)0468 final.

[68] Communication from the Commission to the European Parliament, the European Council and the Council, Commission contribution to the EU Leaders' Thematic Debate on a Way Forward on the External and the Internal dimension of Migration Policy COM(2017)820 final.

[69] Proposal for a Regulation of the European Parliament and of the Council Establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management And Visa Policy COM(2018)473 final.

[70] New Pact on Migration and Asylum COM(2020)609 final 28.

[71] Communication to the European Parliament, the European Council and the Council, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European agenda on migration COM(2015)0490 final.

[72] Communication from the Commission to the European Parliament, the European Council, and the Council, Managing migration in all its aspects: Progress under the European Agenda on Migration COM(2018)798 final. See also Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration COM(2019)126 final.

migration policy in the face of crisis is intimately connected to the demand of shaping an EU asylum and migration system through long-term planning and solutions as opposed to *ad hoc* measures.[73] Such declaratory demands for an EU sustainable migration capable of addressing future crises do not point to concrete legal measures that are premised on specific legal principles. While presenting the promise of better migration management, the Commission does not provide any information on what legal principles sustainable migration should follow.

Finally, sustainable migration appears closely related to specific policies. These are partnerships with third countries and returns and reintegration, the creation of sustainable legal pathways, and sustainable sharing of responsibility. Even if we were to accept that these policies form part of an EU sustainable migration, they lack coherence and create challenges for the EU legal order, making them unsuitable to use as a basis for a sustainable EU migration**.**

The reference to sustainable migration when it comes to partnerships with third countries does not add anything novel to the existing EU policy on the matter. Even after the adoption of the Pact, the relevant partnerships built on what was already on the table since the 2011 EU Global Approach to Migration.[74] It is an approach to migration that, instead of focusing on regulation of entry and stay of incoming individuals, addresses the reduction of root causes of migration to ensure a sustainable future for people in third countries and outsources EU border controls to third countries.[75] Sustainable migration is understood in this context as a means to address the root causes of migration by ensuring better living conditions for people in third countries.[76] A similar understanding of sustainability was central also

[73] New Pact on Migration and Asylum COM(2020)609 final 41.

[74] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, The Global Approach to Migration and Mobility COM(2011)0743 final.

[75] Outsourcing in this context refers to partnerships which include instruments offered to third countries i.e. visa facilitation, funding, legal migration channels in exchange for facilitated readmission of irregular migrants and border control amelioration. See Joint Communication to the European Parliament, the European Council and the Council, Migration On The Central Mediterranean Route Managing Flows, Saving Lives JOIN(2017)04 final; Action Plan on Measures to Support Italy, Reduce Pressure Along The Central Mediterranean Route And Increase Solidarity SEC(2017) 339. Report from the Commission to the European Parliament, the European Council and the Council, Fifth Progress Report on the Partnership Framework with Third Countries under the European Agenda on Migration COM(2017)0471 final; Report from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration COM(2017)669 final.

[76] See Report from the Commission to the European Parliament, the European Council and the Council, Fifth Progress Report on the Partnership Framework with Third Countries under the European Agenda on Migration COM(2017)0471 final; Joint Communication to the European Parliament, the European Council and the Council, Migration On The Central Mediterranean Route Managing Flows, Saving Lives JOIN(2017)04 final.

in connection with the EU's responsibility for the 2030 Agenda for Sustainable Development.[77]

It is not clear, however, what constitutes a sustainable return and reintegration policy. Nor is it clear what framework should be put in place to implement such policies with full respect to fundamental rights and the principle of non-refoulement. Partnerships with third countries and returns and reintegration reinforce the link of migration policies as part of the Area of Freedom, Security and Justice and the EU Common Foreign and Security Policy and Development Cooperation. As a result, the instruments used to pursue such policies come with significant challenges for the EU constitutional structure that have already been explored in the relevant literature.[78] In brief, such practices raise issues with respect to the horizontal division of competences, the division of powers between the EU and the Member States and the limitation of judicial review by the Court of Justice of the EU.[79] It is hard to imagine a sustainable EU migration grounded in informal partnerships and soft law that can comply with EU constitutional guarantees (such as democratic accountability and access to justice).

Beyond this, there is a demand for sustainable legal pathways both for people in need of protection and to attract talent to the EU.[80] Two rationales currently underpin sustainable legal pathways: preventing deaths at sea and connecting migration to the EU economic growth. In the first, safe legal pathways are presented as means to tackle unsafe and irregular routes, which create more deaths at sea.[81]

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[77] Communication from the Commission to the Parliament the European Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration COM(2016)385 final; Communication from the Commission to the European Parliament and the Council, The Protection of Children in Migration COM(2017)0211 final, Chapter 2.

[78] Sergio Carrera, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019); Juan Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019).

[79] Articles 49 TEU and 275 TFEU. See also Emilio De Capitani, 'Progress and Failure in the Area of Freedom, Security and Justice' in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020). See also Paula García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 Common Market Law Review 15; Claudio Matera, 'An External Dimension of the AFSJ? Some Reflections on the Nature and Scope of the Externalisation of the AFSJ Domains' in Ester Herlin-Karnell, Maria Fletcher and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2019).

[80] New Pact on Migration and Asylum COM(2020)609, Section 1.

[81] ibid 3–4.

On this matter, a Recommendation was made by the Commission in 2020 on continuing the resettlement schemes in place, while the Regulation Establishing a Union Resettlement and Humanitarian Admission Framework will soon be adopted.[82] Contrary to what might be imagined, the proposed Regulation harmonizes the procedure that should apply to resettlement and humanitarian admission, but does not create any obligation for Member States to create such pathways.[83] Overall, it is unclear how the Commission envisions tackling unsafe routes and preventing deaths at sea, while continuing to adopt policies which promote Member State discretion and undermine human rights.[84] The lack of innovative proposals should not come as a surprise if we also consider the CJEU and ECtHR case-law on humanitarian visas, both of which found no obligation of creating a humanitarian corridor to EU Member States stemming from either EU law or human rights.[85]

In parallel with protection related pathways, labour related pathways link migration to the economic needs of the EU. In the relevant references, migration policies, especially those targeting highly skilled workers, are mentioned as a means to ensure growth and address the long-term economic and demographic challenges faced by the EU.[86] In these mentions, it is the EU welfare and economic system that

[82] Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways [2020] OJ L 317/13 2020. Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM(2016)0468 final; European Commission Factsheet, A New Pact on Migration and Asylum, State of Play, 23 March 2023, FS/23/1850. According to the Factsheet, political agreement has been reached on the Resettlement Framework Regulation.

[83] See Recital 19 of the proposed Regulation; Recital 19, Article 1(2) and (2a) Amended Proposal.

[84] For more analysis see Alezini Loxa, 'Complementary Pathways: Pledging Protection at the Edges of EU Law' (2023) 25(2) European Journal of Migration and Law 225; Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) 32 International Journal of Refugee Law 54.

[85] Judgment of 7 March 2017, *X and X*, C-638/16 PPU, ECLI:EU:C:2017:173 16; *MN and others* v *Belgium,* app No 3599/18.

[86] See Recital 3, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European Agenda on Migration COM(2015)240 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action plan on the integration of third country nationals COM(2016)0377 final. See also Proposal for a Regulation of the European Parliament and of the Council Establishing The Asylum And Migration Fund COM(2018)471 final.

is to be sustainable, thanks to specific labour needs covered by migrants.[87] After the adoption of the recast Blue Card Directive in 2021, the Commission issued a communication where different measures were suggested as means to achieve the objective of an EU sustainable migration policy.[88] On the legislative side, the Commission referred to the revision of the Long-Term Residents Directive and the Single Permit Directive in order to enhance the rights and mobility of third-country nationals in the EU.[89] At the same time, Talent partnerships to attract workers from specific third countries, a European Youth Mobility scheme that could create rights to reside, travel and work for a limited time in the EU, a framework to facilitate access to innovative entrepreneurs, and the possibility of harmonizing admission for care workers were also discussed.[90]

Finally, there are also references to 'sustainable and fair distribution of applications' or 'sustainable sharing of responsibility'.[91] Behind such references lies the idea that the Dublin system is unsustainable, and that EU asylum policy should be revisited to ensure its functioning for the future. And yet, references to sustainable sharing of responsibility under the Pact, and the attempt to shape EU asylum law accordingly, have not delivered results. The agreement reached at the Council on the proposed Regulation on Asylum and Migration management did not change the responsibility rules under Dublin, whereas a flexible solidarity mechanism was put in place as

[87] New Pact on Migration and Asylum COM(2020)609 final 25; Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment COM(2016)378 final.

[88] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Attracting skills and talent to the EU COM(2022)657 final.

[89] Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final. Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final.

[89] Attracting skills and talent to the EU COM(2022)657 final 18.

[90] ibid.

[91] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) no 439/2010 COM(2016)0271 final; Proposal for a regulation of the European Parliament and of the Council Establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast) COM(2016)270 final ; Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM(2016)0465 final.

means to ensure sustainable migration.[92] Mixing sustainability with sharing of responsibility through solidarity owed by the Member states only serves to undermine the principle of solidarity under Article 80 TFEU.[93]

Overall, we can see how the goal of sustainable migration appears both at an abstract and a specific level. It is tied to many areas of EU migration law that have different objectives and are based on different rationales. Specifically, sustainability with regard to the development of third countries refers to policies that develop across different areas of EU law, which come with different levels of fundamental rights guarantees. The references add nothing to the existing policies and reinforce the model of outsourcing migration control and evading responsibility for asylum seekers.[94] Moreover, safe legal pathways are presented as means to ensure the protection of asylum seekers, who should not be forced to embark on perilous journeys. However, when it comes to binding measures that can create rights for migrants, legal instruments related to labour migration are prioritized. Finally, sustainable sharing of responsibility serves to further blur the principle of solidarity under Article 80 TFEU and does not seem to have any concrete legal implication. Having shown the incoherence and indeterminacy of sustainable migration in EU policy documents, the next section engages more closely with literature on the concept of sustainable migration to examine whether scholarly analysis can provide insight into the potential implications of this concept.

[92] Council Document 10084/23, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] General Approach, 6 June 2023. See also European Council on Refugees and Exiles, Editorial: Migration Pact Agreement Point by Point, at https://ecre.org/editorial-migration-pact-agreement-point-by-point/ .

[93] For a detailed analysis of the flexible solidarity mechanisms as presented in the Commission Proposal on a Regulation on asylum and migration management COM(2020)610 final and their constitutional implications see Alezini Loxa and Vladislava Stoyanova, 'Migration as a Constitutional Crisis for the European Union' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022). On the attempts of Member States to circumvent solidarity it and its normative status see Judgment of 6 September 2017, *Slovakia v Council and Hungary v Council,* C-643/15 and C-647/15, ECLI:EU:C:2017:631; See also Eleni Karageorgiou, *Rethinking Solidarity in European Asylum Law: A Critical Reading of the Key Concept in Contemporary Refugee Policy* (PhD, Faculty of Law, Lund University 2018).

[94] Maarten den Heijer, Jorrit Riijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Comnon Market Law Review 607.

3.4 Attempts to Define Sustainable Migration

The link between sustainability and migration under the Global Compact has resulted in literature focused on the nature of the compact as a soft law instrument and its interaction with international human rights law.[95] Despite the references to sustainable migration in EU and international policy, however, scholarship has not engaged in research on the legal implications of this objective.

Some authors have used the term 'sustainable migration' in a declaratory manner, as a demand for a type of migration policies, without any clear definition of what these should entail.[96] De Lange has suggested that EU labour migration law should employ a new narrative for sustainable migration by looking at the revision of the Blue Card Directive.[97] De Lange's suggestion is not connected to the evolution of EU migration policy reviewed in the previous section. Rather, she employs the term 'sustainable migration' to signify migration for economic growth, arguing that EU labour migration should be steered towards achieving sustainability objectives by supporting green growth, foreign investment and social inclusion of migrants.[98]

Outside legal scholarship, migration studies have been investigating the relation between development and migration for a long time.[99] From the 1960s to this day, migration has been connected to development by outlining how the flow of people and, consequently, of money (through remittances) as well as of knowledge (acquired in the host country and employed in the country of origin upon return) can impact the development of host countries and countries of origin of migrants.[100]

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[95] See Alan Desmond, 'A New Dawn for the Human Rights of International Migrants? Protection of Migrants' Rights in Light of the UN's SDGs and Global Compact for Migration' (2020) 16 International Journal of Law in Context 222; Elspeth Guild and Raoul Wieland, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Does It Mean in International Law?' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2019* (Oxford University Press 2020); Peter Hilpold, 'Opening up a New Chapter of Law-Making in International Law: The Global Compacts on Migration and for Refugees of 2018' (2020) 26 European Law Journal 226.

[96] Klein Solomon and Sheldon (n 62); Eva Dick and others, 'Regional Migration Governance: Contributions to a Sustainable International Migration Architecture' (2018) Briefing Paper Deutsches Institut für Entwicklungspolitik (DIE).

[97] Tesseltje de Lange, 'A New Narrative for European Migration Policy: Sustainability and the Blue Card Recast' (2020) 26 European Law Journal 274.

[98] ibid 282.

[99] See Thomas Faist, Margit Fauser and Peter Kivisto (eds), *Migration-Development Nexus: A Transnational Perspective (Migration, Diasporas and Citizenship Series)* (Palgrave Macmillan 2011).

[100] For an overview of the evolution of the scholarly analysis throughout the years see Thomas Faist and Margit Fauser, 'The Migration–Development Nexus: Toward a Transnational Perspective' in

In this regard, it should not come as a surprise that research into potential definitions of the term 'sustainable migration' have been explored outside the field of legal science and with an emphasis on development considerations.[101] Specifically, the Peace Research Institute of Oslo produced two papers, which offered definitions of sustainable migration from the perspective of migration studies and human geography. In these papers, it was acknowledged that the concept of sustainable migration, especially without an established definition, is a powerful one, in the sense that its rhetorical effects can be seen as fitting both liberal and restrictive migration agendas.[102]

The first definition, proposed by Bivand Erdal *et al*, suggested that sustainable migration is 'migration that ensures a well-balanced distribution of costs and benefits for the individuals, societies and states affected, today and in the future'.[103] The second definition, proposed by Betts and Collier, took a different stance, suggesting that sustainable migration is 'migration that has the democratic support of the receiving society, meets the long-term interests of the receiving, sending society, and migrants themselves, and fulfils basic ethical obligations'.[104]

These definitions offer a starting point for conceptualizing sustainable migration policies, but they cannot provide much guidance as to the legal implications of the concept. Apart from the fact that the distribution of costs and benefits and the evaluation of long-term interests of different societies cannot be easily translated

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Thomas Faist, Margit Fauser and Peter Kivisto (eds), *The Migration-Development Nexus* (Palgrave Macmillan 2011).

[101] See for example Pierre Picard and Tim Worrall, 'Sustainable Migration Policies' (Université catholique de Louvain, Center for Operations Research and Econometrics (CORE) 2011) 2011/40 where sustainability of migration is examined in light of the development of formulas examining the costs and benefits of labour migration under different schemes; Judith Janker and Susan Thieme, 'Migration and Justice in the Era of Sustainable Development Goals: A Conceptual Framework' (2021) 16 Sustainability Science 1423 have tried to develop a framework for sustainable migration based on trade-offs between costs and benefits at different levels (individual, household, community/regional, national); Mohammed Al-Husban and Carl Adams, 'Sustainable Refugee Migration: A Rethink towards a Positive Capability Approach' (2016) 8 Sustainability 451 where alternative governance models are proposed on the basis of ethnographic field studies.

[102] Jørgen Carling and Marta Bivand Erdal, 'Is "Sustainable Migration" a Valuable Concept?' (PRIO Policy Brief 2018) 5. This can be seen in parallel to arguments raised in the context of environmental justice. See for example Christina Voigt, 'From Climate Change to Sustainability: An Essay on Sustainable Development, Legal and Ethical Choices' (2005) 9 Worldviews 112, 120; See also John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Third Edition, Oxford University Press 2012) 132 where sustainable development is mentioned as a 'rhetoric of reassurance'.

[103] Marta Bivand Erdal and others, 'Defining Sustainable Migration' (PRIO Paper 2018) EMN Norway Occasional Papers 9.

[104] Alexander Betts and Paul Collier, 'Sustainable Migration: A Framework for Responding to Movement from Poor to Rich Countries' (2018) EMN Norway Occasional Papers 9.

into law, these definitions encounter another obstacle, namely the position of individuals and their agency as rights-bearers in law.

On this matter, Guild has highlighted the risk that arises from linking sustainable development and migration, by reviewing the link of the Global Compact on Migration to the 2030 Sustainable Development Agenda.[105] The risk arises due to the fact that 'The economic objectives of development that are not framed in legal terms are extended to migration, framing migration as a development tool.'[106] However, migration involves individuals who have rights protected under the international human rights law framework. As she discusses,

> These rights are human rights to make decisions about their destinies in accordance with their appreciation of their best interests, not necessarily those of their states of origin or destination. Negotiating between state interests and an individual's rights is already a complex subject in the field of migration. When development objectives are added into the mix, the rights of people tend to be the first to be side-lined.[107]

In the same article, Guild also examines how policies linking migration to development (i.e., addressing brain drain, remittances and circular migration) could potentially lead to conflict with human rights, suggesting that the Global Compact on Migration should be applied within the framework of human rights standards rather than Sustainable Development Goals.[108]

Similarly, the EU legal system is centred on individual agency, and human dignity is at the core of this legal order under Article 2 TEU and the Charter of Fundamental Rights. The caveats regarding migrants' rights relate more to the (intended or unintended) creation of spaces of liminal legality, which exclude migrants legal protection of migrants, rather than to the provisions of the EU legal framework. In such a context, viewing migrants as transactional tokens whose value is measured by their capital contribution to the country of origin and the country of destination could hardly inform the legal implementation of an EU sustainable migration, in that such a view would conflict with the centrality of human dignity in its legal order.

The above analysis highlights the difficulty of identifying elements that can inform a legal framework structured around the objective of sustainable migration. What is more, it shows that the fuzziness of sustainability allows for different types of

[105] Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: To What Extent Are Human Rights and Sustainable Development Mutually Compatible in the Field of Migration?' (2020) 16 International Journal of Law in Context 239.

[106] ibid 248.

[107] ibid.

[108] ibid 249.

migration policies and for different underlying notions of human rights protection: from utmost respect for all to cost-benefit analysis of human lives under the pretext of realism. This difficulty in operationalizing sustainable migration in EU migration law calls for closer analysis which is the objective of the remainder of the study. The next section elaborates on more theoretical understandings of sustainability, which guide the conclusions of this work, presented in detail in Chapter 7.

3.5 Approaching EU Sustainable Migration through Different Theoretical Lenses

Drawing on the idea of planet-people-prosperity as interdependent parts of a whole, different disciplines have produced a range of research outputs as to how environmental-social-economic sustainability might be understood.[109] As a result of the many and multidimensional definitions proposed, scholars have time and again attempted to offer more theoretical accounts of sustainability that can inform the application of the concept. Some of this literature conceptualizes sustainability as a political concept, discussed in Section 3.5.1 below. Other scholars, who engage with sustainability under systems theory and suggest that the concept should be understood as the quality of a system, are considered in Section 3.5.2. I then reflect on how these theoretical understandings relate to the research carried out in the dissertation, before concluding this chapter in Section 3.6.

3.5.1 Sustainability as a Political Concept

Many authors have suggested that sustainability should be understood as a political concept to explain the many divergent views offered by scholarship on the meaning of sustainability and its core elements. Already in the late 1990s, Jacobs argued that sustainable development was a contested concept.[110] Based on Gallie's analysis of 'essentially contested concepts', he suggested that sustainable development should be seen in line with other political terms like democracy, liberty and justice.[111] Such concepts have two levels of meaning. The first level is 'unitary but vague … defined

[109] Economic sustainability refers primarily to sustaining growth for future generations. Environmental sustainability refers primarily to sustaining the environment for future generations. Social sustainability refers primarily sustaining social structures or communities of people for future generations. Gary Larsen, 'An Inquiry Into the Theoretical Basis of Sustainability, Ten Propositions' in Jesse Dillard, Veronica Dujon and Mary C King (eds), *Understanding the Social Dimension of Sustainability* (1st edn, Routledge 2008) 48.

[110] Jacobs (n 11) 25.

[111] Walter B Gallie, 'Essentially Contested Concepts' 56 (1955-1956) Proceedings of the Aristotelian Society, New Series 167; Jacobs (n 11) 25.

by a number of "core ideas"'.[112] The second level is characterised by political contestation over the concept's practical interpretation.[113] Regarding sustainable development, Jacobs identified the Brundtland Report and the Caring for the Earth definitions presented in Section 3.1 as a first level meaning.[114] The second level is then where 'political struggle over the direction of social and economic development' takes place.[115] Regarding this political struggle, Jacobs went on to distinguish between radical and conservative approaches to sustainable development, based on what he identified as the core ideas of sustainable development.[116]

On the same matter, and in relation to the Brundtland Report, Baker and others argued that it was the Report's flexibility which was key in framing sustainable development as a political construct.[117] The vagueness of the Brundtland definition should be seen as embodying neutrality, which allows sustainable development to incorporate many different notions and approaches.[118] The authors point out that

> [T]he flexibility of the term sustainable development is theoretically problematic but of immense policy significance: it can help forge a consensus or commitment to promote sustainable development, while at the same time allowing individual policy-makers a great deal of flexibility in their interpretations of the policy imperatives associated with that commitment. Sustainable development is thus a powerful tool for political consensus.[119]

Baker and others developed a sustainable development ladder categorizing the different meanings attributed to the term, based on different philosophical

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[112] Jacobs (n 11) 25.

[113] ibid.

[114] ibid.

[115] ibid.

[116] ibid 25–28. Jacobs suggested that the core ideas of sustainable development are environment-economy integration, futurity, environmental protection, equity, quality of life and participation. He referred to conservative sustainable development as characterized by non-egalitarian, weak, top-down, and narrow interpretations of sustainable development and radical sustainable development characterized by egalitarian, strong, bottom-up and broad interpretations of sustainable development.

[117] Susan Baker and others (eds), 'Introduction: The Theory and Practice of Sustainable Development in EU Perspective', *The politics of sustainable development: theory, policy and practice within the European Union* (Routledge 1997) 18.

[118] ibid.

[119] ibid 28.

perceptions of nature and the material world.[120] The rungs of the ladder moved on a spectrum from anthropocentric to bio/ecocentric views.[121] The anthropocentric perspective is 'based on a more interventionist approach to nature, because the wealth of nature is seen only in relation to what it can provide in the service of humankind'. Ecocentrism/biocentrism is 'based on a view about nature in which nature is used as a metaphor for unity, interdependence and a new moral order'.[122]

In a later work, Baker examined the relevant discourses in the EU and argued that the EU Sustainable Development Policy, reviewed in section 3.2.1, should be understood in a similar manner. Specifically, she suggested that sustainable development was an essential political concept, central in 'the flow of European intellectual history'.[123] The many uses of sustainability, coupled with a lack of uniform understanding, make sustainability a declaratory political statement through which the EU is shaping a common EU identity.[124] Additionally, she argued, the connection of the concept to so many sectors, from growth and economy to tourism and health, serves to promote the EU as a soft power in the field, without, however, pushing for operational outcomes.[125]

Jacobs and Baker developed their frameworks based on the many different understandings of the environment vs. economy pillar of sustainability. Indeed, environmental limits and economic growth more or less monopolized the debate on sustainability at least until the past decade. The social pillar of the concept, in contrast, has been the least popular, and only recently attracted scholarly discussion.[126] Social sustainability has been understood around multiple bases and concepts revolving around development, basic needs, human rights, equity, justice, integration, social cohesion, participation, well-being, democracy, and resilience among others.[127] The understanding of social sustainability in the relevant

[120] ibid 9. They identified the following rungs in the ladder: Treadmill, Weak Sustainable Development, Strong Sustainable Development and the Ideal Model.

[121] Similarly on three alternative conceptions by Dobson (n 15) 35–39.

[122] Baker and others (n 117).

[123] Susan Baker, 'Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union' (2007) 16 Environmental Politics 297, 312 quoting Joseph HH Weiler, 'Ideals and Idolatry in the European Construct' in Bill McSweeney (ed), *Moral Issues in International Affairs: Problems of European Integration* (Macmillan 1998).

[124] Baker (n 123) 311.

[125] Dick Richardson, 'The Politics of Sustainable Development' in Susan Baker and others (eds), *The politics of sustainable development: theory, policy and practice within the European Union* (Routledge 1997); Baker (n 123) with reference to Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 Journal of Common Market Studies 235.

[126] Literature on social sustainability unfolds mostly from 2000 onwards. Cf Åhman (n 27).

[127] ibid 1156–1158.

scholarship is as diverse as it is in the scholarship related to the economic and environmental pillar of the concept.

This is paradigmatically apparent in the volume *Understanding the Social Dimension of Sustainability,* where various contributors offer a wide range of definitions.[128] The editors themselves identify the social dimension of sustainability as 'both (a) the processes that generate social health and well-being now and in the future, and (b) those social institutions that facilitate environmental and economic sustainability now and for the future'.[129] In contrast, Magis and Shinn understand social sustainability as premised on an Aristotelian *euzen* and hence on the conditions of human well-being, equity, democratic government and democratic civil society.[130] Finally, Larsen proposed that

> Social sustainability must, as a beginning point of departure, (a) build inclusion at the level of the individual, groups, and society; (b) provide for basic human dignity, which includes at least basic human sustenance, freedom from tyranny, freedom of association, and basic human liberty; (c) provide a means for people to influence their governance; and (d) create the capacity for learning at the level of individuals, groups, collectives, governments, corporations, and society.[131]

This breadth of different understandings, all found in a single volume, is characteristic of the inconclusive literature on the matter. An attempt has been made, by Åhman, to structure these different approaches to social sustainability.[132] After reviewing literature he suggested that social sustainability appeared as a dually structured concept around the three dyads of development-maintenance, needs-rights and traditional-emerging themes.[133] By trying to categorize and conclusively analyse a very diverse body of literature, Åhman concludes by situating social

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[128] Jesse Dillard, Veronica Dujon and Mary C King (eds), *Understanding the Social Dimension of Sustainability* (1st edn, Routledge 2008).

[129] ibid.

[130] Magis and Shinn (n 17).

[131] Gary Larsen, 'An Inquiry Into the Theoretical Basis of Sustainability, Ten Propositions' in Jesse Dillard, Veronica Dujon and Mary C King (eds), *Understanding the Social Dimension of Sustainability* (1st edn, Routledge 2008).

[132] Åhman (n 27) refers to the search for meta-level approaches as 'trying to find values, visions or conceptual constructs that can guide us in understanding social sustainability'.

[133] ibid. Maintenance refers to an understanding of social sustainability as maintaining societies in the face of change. Development understanding is found in what he calls the 'brown agenda' which focuses on development aspects for underprivileged communities. On the needs-rights the author suggests that there are scholars who present sustainability as related to the maintenance of primarily physiological needs like water, health and safety, while the rights agendas are linked to more neoliberal ideas of self-actualization. Finally, on the traditional-emerging themes he identifies a 'shifting focus from themes such as equity, poverty reduction, employment and social justice to themes such as participation, identity, pride and sense of place'.

sustainability within the political discourse. [134] Framing sustainability as a political concept fits well with the references to sustainable migration presented in section 3.3. Indeed, as I have argued elsewhere, sustainable migration can be understood as a political concept that aims to create consensus in EU politics at a time when there is none.[135] Yet such a framing cannot inform us as to how sustainable migration would be channeled into legal measures, especially those related to migrants' rights.

To return to the work of Baker, she suggested that the symbolic commitment to sustainable development was a political act, within which lay a set of choices about the future political and economic direction of the EU.[136] She pointed out that the function of symbols in politics is as 'stimulators of change' which have transformative potential for the *status quo*.[137] In order to explore the transformative potential (if any) of sustainable migration, we need to first explore how the *status quo* under EU law engages in balancing economic and social considerations in the regulation of migration. Only after doing so in chapters 4, 5 and 6, can we evaluate if the symbolical commitment of the EU to sustainable migration has potential of transformation or continuity with past policies.[138]

3.5.2 Sustainability as the Quality/State of a System

Among the multidisciplinary and multidimensional understandings of sustainability, there is a string of scholarship where the focus is no longer put on the object of sustainability (what is to be sustained) or on the prevalence of a dimension of sustainability (environmental, social, or economic); rather, these authors address sustainability as a quality or state of a system. Sustainability is seen as entailing a balancing exercise between conflicting demands. In this conception, sustainability exists does not relate to conflict avoidance, but rather to a long-term preservation and amplification of the desirable characteristics of areas which, while they potentially conflict, are at the same time interdependent parts of a whole system. Most of these authors understand sustainability as entailing that humanity, environment and the economy are interlinked parts of a greater system (the

[134] ibid 1166.

[135] Alezini Loxa 'Den Nya Migrations- Och Asylpakten Och Löftet Om En Hållbar EU-Migration' [2022] Europarättslig Tidskrift 175.

[136] Baker (n 123) 314.

[137] ibid.

[138] Cf Natasja Reslow, 'Transformation or Continuity? EU External Migration Policy in the Aftermath of the Migration Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019).

whole).[139] The larger system, in this case the planet, can only exist as long as each of the parts functions properly. Hence sustainability is based on interdependence.[140]

Building on this, Lélé has developed a theoretical framework for understanding sustainability by building on ecology and systems theory.[141] He addresses sustainability 'as a multi-dimensional characteristic of a socio-environmental system', arguing that sustainability encompasses the attributes of dynamic equilibrium, reliability, resilience and adaptability.[142] Similarly, in ecological economics sciences, Constanza has proposed that sustainability of an ecosystem is the system's ability to maintain its structure (organization) and function (vigor) over time in the face of external stress (resilience).[143]

This system-theoretical understanding of sustainability has been applied at EU level in the field of the European Social Policy. According to Barbier and others, a system theoretical understanding

> analyses conditions at the supranational level and is concerned with sustaining the achievement of the ESM [European Social Model] at this level. The thesis of the system-theoretical discourse is that successful sustainability of the ESM is linked to reflexive governance. The question of sustainability has to be applied to sustainable policies pursued by the ESM itself.[144]

This approach sees sustainability as a quality of the European Social Model, the system in question. By suggesting that the European Social Model is the system in question, this approach fails to conceptualize sustainability in the overarching way in which it appears as an EU primary law objective. Following the demand set by primary law that sustainability is the objective of this legal order, I argue in this dissertation that sustainable migration can be perceived as being connected to EU law as the system in question. For migration to be sustainable, EU migration law would need to align with the sustainability objective of the EU legal order. Plainly put, it would need to respect the structure of the EU legal system in terms of horizontal and vertical division of competences, the function of the system in delivering the promised objectives of growth and social progress, and to have

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[139] Magis and Shinn (n 17).

[140] Littig and Griessler (n 28) 71.

[141] Sharachchandra M Lélé, 'Sustainability: A Plural, Multi-Dimensional Approach' [1993] Working Paper, Pacific Institute for Studies in Development, Environment, and Security.

[142] ibid.

[143] Robert Costanza and Michael Mageau, 'What Is a Healthy Ecosystem?' (1999) 33 Aquatic Ecology 105.

[144] Jean-Claude Barbier, Ralf Rogowski and Fabrice Colomb (eds), *The Sustainability of the European Social Model: EU Governance, Social Protection and Employment Policies in Europe* (Edward Elgar Pub 2015) 9.

resilience against external stress. Reflection on how this theoretical understanding might inform the future framing of EU migration law is presented in Chapter 7.

3.6 EU Legal History as a Precondition for Further Engagement with Sustainable Migration

This chapter has provided an overview of sustainability as a concept of relevance to law and policy, tracing its concept's appearance in EU policy and scholarship and its connection to EU migration policy. From the analysis it becomes apparent that the numerous inconsistencies and divergent objectives of EU migration policy all huddle together under the umbrella of sustainable migration. These inconsistencies suggest the need to reach back into the past in the chapters that follow, in order to problematize for the future.

To put it in simply, looking at EU policy documents does not allow us to understand what sustainable migration is or how it would be different from the action that was already shaped under the EU Agenda on Migration, and previously under the Global Approach to Migration and Mobility. Yet turning to law and legal scholarship does not help either, as there is no apparent link between migration law and sustainability, contrary to the link between sustainability and environmental law, competition law and more recently labour law. Extra-legal scholarship on sustainable migration hints at a balancing of costs and benefits on the design of migration policies, yet cannot provide guidance as to how such balancing could take place in EU law or what implications it would have for migrants' rights. In one way or another, we are in unchartered territory.

However, as suggested in Chapter 1, this unchartered territory relates specifically to how to achieve the objective of an EU sustainable migration. EU migration law has been developing under very specific legal structures and principles over the course of many years. It can thus hardly be expected that in shaping sustainable migration, the EU would proceed in such a way as to completely change the underlying considerations and legal structures regulating migration. For this reason, the next three chapters will chronologically investigate how economic and social objectives have shaped the rights of migrants to this day. The analysis will demonstrate the persistence of economic and social objectives behind law-making and case-law throughout the evolution of the EU legal order. It will also highlight the unequal weight attributed to economic and social considerations at different periods depending on the economic circumstances in Member States. Short term considerations in EU migration law have led to the limitation of rights in periods of recession, and the attribution of rights at times of growth. The continuous emphasis on the function of migrants for growth paired with the diverse economic circumstances of an enlarged EU have led to a fragmented migration framework

that can no longer achieve the social and economic objectives dictated by EU primary law. Chapter 7 will reflect on the findings of the historical analysis, connecting them with the theoretical conceptions of sustainability presented in this chapter, so as to discuss if and how EU law can deliver the objective of sustainable migration.

Chapter 4. Aligned Paths from the Treaty of Paris to the Single European Act

This chapter investigates how economic and social objectives shaped the regulation of migration in the period from the Treaty of Paris to the Single European Act. In doing so it proves that while the concept of sustainable migration is a recent one, the social and economic pillars of sustainability have been constantly guiding the development of EU migration law. Specifically, the balancing between economic and social considerations shaped the regulation of migration already from the establishment of Community law. The analysis further shows that during the years of post-war growth, the EU institutions' approach to the regulation of migration was aligned for both Community and Third-Country National (TCN) migrants. Contemporary analyses of EU migration law emphasize the different rationales behind free movement and regulation of migration from third countries. In contrast to this, the investigation shows that during the early years of the Community law all migrants were perceived as having the same function for the collective project of growth.

The demand for labour necessary for economic development in the Member States conditioned the extensive attribution of social rights at least until the 1970s. Following the 1970s oil crisis, the disruptive potential of surplus migrant labour for the economy lay behind the limitation of rights for migrant workers. Looking more closely at the regulation of migration in light of the economic and social objectives of Community law and the economic circumstances in the Member States until the end of the 1980s, one thing becomes clear. The attribution or limitation of rights to migrants is dictated by the need to ensure the smooth functioning of the economy in the Member States. In parallel, social progress is pursued in the form of equal rights for all migrant workers and their families. During this period, the regulation of migration could be found in four legal areas: in the free movement of workers framework as regards Community workers; in Accession Treaties regulating how migrants from acceding states should become part of the free movement framework; in Association and Cooperation Agreements with specific countries granting rights to their nationals; and, finally, through the Community labour and employment policy aiming to generally raise the living standards of all population within the

Community territory. This legal framework of migration, which is analysed in detail in this chapter, developed at a time of shifting economic and social circumstances. The 1950s and 1960s were characterized by rapid economic development and increased need for labour migration.[1] During that time, migration movements mainly comprised guest workers, and these were regarded by Member States as a short-term phenomenon, regulated by the demands of the market.[2] In contrast, during the 1970s, the Community underwent a period of economic crisis and a declining need for manpower. After the 1973 oil crisis, the economic situation in most Member States was characterized by stagnation, unemployment and inflation.[3] This led to a decline in migration flows from third countries, and many Member States tried to completely ban migration.[4] However, a significant number of migrants remained on Community territory.[5] What is more, while in 1959 TCN workers accounted for 51.9% of the migrant working population, by 1973, and despite the persistent economic stagnation, the share of TCN workers had risen to 73% of the migrant working population in the Community.[6] This created the impetus to coordinate national migration policies.[7]

Perhaps the hope of return to the 1950s and 1960s paradigm, or the resilience of the legal framework to quickly shifting circumstances, meant that the considerations behind the legal instruments adopted during this period did not immediately reflect the bleak economic realities on the ground. Rather, the effects of the recession and national unemployment for Community legal instruments were felt later, during the 1990s when it became clear that growth would never again achieve the levels enjoyed during the initial years of the Community project.[8]

The scholarly analysis conducted during this period was mostly doctrinal and did not extend to all the areas reviewed in this chapter. The initial examination of the

[1] Programme de politique économique à moyen terme (1966-1970) [1967] OJ 79/1513; Commission of the European Communities, Bulletin of the European Communities (1969) 6 23.

[2] Commission Communication to the Council and the European Parliament on Immigration, SEC (91) 1855 final para 9; James F Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Harvard Univ Press 1992) 72.

[3] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final, Annex para 5.

[4] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final point 6; Commission Communication Transmitted to the Council on March 1985, Guidelines for a Community Policy on Migration, COM(85)48 final, II.5.

[5] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final, Annex para 4 estimates 6 million, which could be around 12,5 million with their families.

[6] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final, Annex para 5.

[7] See also point 10 of the Communique of European Summit in Paris on 9/10 December 1974, which calls for a 'stage by stage harmonization of legislation affecting aliens'.

[8] See Chapter 5.

free movement framework consisted of purely doctrinal studies until the late 70s, providing an overview of the relevant primary and secondary law of the field in this novel supranational area.[9]At this stage, certain authors suggested that free movement could also include third-country national workers.[10] In light of judicial and legislative evolution from the 1980s onwards, scholarship in the field of free movement of workers became theoretically denser and started to explore the rights attributed to workers as an incipient form of European citizenship.[11] At the same time, while these evolutions clarified the personal scope of free movement to Community nationals, they spawned limited output on the relation of Community law to migrants from third countries.[12] As a result, scholarly research identifies the beginning of an EU migration policy in the late 1980s or early 1990s, starting with the intergovernmental cooperation of Member States discussed in Chapter 5.

Regarding accession, the elements of flexibility and differentiation introduced in the 2004 enlargement enjoyed considerable academic attention, which is reviewed in Chapter 6. Before that point, there is little literature on the issue of regulating migration in the context of accession. The only work that stands out is a book published by Böhning, who engaged with the Community rules on migration to diffuse misconceptions about the potential threats to the UK economy posed by foreign workers during the period of UK accession.[13] Similarly, on international agreements and the rights they created for migrant workers, scholarly attention was only drawn later to the extensive interpretations of the Court on the rights of

[9] ED Brown, 'Regent Developments in the Social Policy of the European Economic Community' (1966) 3 Common Market Law Review 184; K Lewin, 'The Free Movement of Workers' (1965) 2 Common Market Law Review 300; H ter Heide, 'The Free Movement of Workers in the Final Phase' (1969) 6 Common Market Law Review 466; Jean-Claude Séché, 'Free Movement of Workers under Community Law' (1977) 14 Common Market Law Review 384; David O'Keeffe, 'Practical Difficulties in the Application of Article 48 of the EEC Treaty' (1982) 19 Common Market Law Review 35; Derrick Wyatt, 'The Social Security Rights of Migrant Workers and Their Families' (1977) 14 Common Market Law Review 411.

[10] DF Edens and Schelto Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 Common Market Law Review 322 with a focus on overseas territories; Allan Campbell, *Common Market Law* (Supplement 2/71, Longmans 1971).

[11] Richard Plender, 'An Incipient Form of European Citizenship' in Francis Geoffrey Jacobs and University of London (eds), *European law and the individual* (North-Holland Pub Co ; distributors for the USA and Canada, Elsevier/North-Holland 1976); Louis H Singer, 'Free Movement of Workers in the European Economic Community: The Public Policy Exception' (1977) 29 Stanford Law Review 1283, 1284.

[12] Peter Oliver, 'Non-Community Nationals and the Treaty of Rome' (1985) 5 Yearbook of European Law 57.

[13] WR Böhning, *The Migration of Workers in the United Kingdom and the European Community* (Oxford University Press for the Institute of Race Relations 1972).

migrants under the EEC-Turkey Association Agreement.[14] Migrants from third countries and the potential of their enjoyment of rights during this period were largely overlooked.

Against this backdrop, this chapter looks at the period before the adoption of the Single European Act to investigate how economic and social objectives shaped the regulation of migrants' rights under Community law. Specifically, I examine Community primary and secondary law, as well as Accession Treaties and Association Agreements that include provisions regulating labour movement in order to investigate how economic and social considerations appeared in their negotiation and eventual adoption. In doing so, I show how economic considerations conditioned the attribution or limitation of rights for migrants across different instruments already in the early years of Community law. The Community institutions had a clear view on the function of Community and TCN migrants for the project of growth, and relatedly they also considered the rights that migrants should enjoy because of their contribution to growth. The material examined in this chapter was selected chronologically, and includes legal instruments, agreements and case-law that were in place before the Single European Act was signed as is shown in the timeline in Figure 1 below.

Figure 1. Timeline of Community Law and International Agreements regulating labour movement from 1951 to 1986

[14] The first judgment was issued in 1987, Judgment of 30 September 1987, *Demirel / Stadt Schwäbisch Gmünd*, 12/86, ECLI:EU:C:1987:400. The relevant case-law and scholarly engagement will be examined in Chapter 5.

The apparent clarity of this timeline hides a chronological overlap in the negotiation of instruments of different nature. For example, the first Agreements with Morocco, Tunisia and Algeria, which did not include labour clauses, were negotiated in parallel with the Association Agreements with Greece and Turkey. Then the second generation of Agreements with Morocco, Tunisia and Algeria, which eventually included provisions on labour migration, were negotiated in parallel with the Greek accession. During the same period, the EEC-Turkey Agreement Association Council was negotiating the Decisions that would operationalize its provisions.[15] These implementing Decisions were negotiated at the same time as negotiations were taking place on Spanish and Portuguese Accession. These examples show how challenging it would be to proceed on the assumption of a linear chronological presentation of the relevant instruments.

Instead, this chapter develops as follows. In Section 4.1, I present how free movement of workers was included in the Treaty of Paris and the Treaty of Rome, outlining the framework that was put in place to operationalize it for the completion of the internal market. In Section 4.2, I provide an overview of (mostly) soft law material by Community institutions to highlight the aspiration of the period to extend the protection offered by Community law to all migrants legally resident in the Community. In that section, I also examine a Decision adopted by the Commission with the aim of coordinating national migration policies in order to align them with the objectives of the Community. Section 4.3 turns to different arrangements regarding labour migration that were set in place by the Community via International Agreements and that created rights for migrant workers, whose power was only felt later, through the interpretation of the Court in the 1990s.[16] Turning from the legislative framework to the case-law of this period, Section 4.4 investigates how the CJEU took into account economic and social considerations in its adjudication of rights of Community workers.

Using this structure, enables me to capture the way in which economic and social objectives (while specific to relations developed among the Members States, and between the Member States and the rest of the world) affected the Community instruments in specific ways. From the analysis, it will become clear that the attribution and/or limitation of migrants' rights under Community law followed a single logic across the different instruments adopted in this period. According to this logic, migrant workers, regardless of origin, contributed to the Community development project. For this reason, they were to be granted rights. At the same time, the wide-ranging attribution of rights (with an emphasis on residence rights) could lead to market distortions and hinder growth. Thus, the legal framework needed to include clauses allowing for the smooth distribution of labour force in the

[15] These were Decision 2/76 and 3/80 and 1/80 of the EEC-Turkey Association Council.

[16] See Chapter 5, Section 5.3.

Member States, while limiting potential distorting effects. In parallel, the attribution of social rights to all legally resident migrants was without question. Granting social rights was the central means to guarantee social progress to the population engaged in the Community development project, and to ensure that no unfair competition took place between the Member States, which were all involved in the same project. Thus, I show that across the different periods and shifts that took place in different areas of EU law, the attribution or limitation of rights to migrants did not follow a single logic based on the origin of the migrant. It rather followed a logic based on the function of the migrant for the Community project. Behind this logic lies a balancing act between economic and social considerations aimed at shaping a sustainable migration framework that could support Community growth.

4.1 Migrant Workers Finding their Way into Community Law

Free movement of all factors of production (worker, goods, capital and services) is so fundamental to our understanding of Community law that it is scarcely questioned whether the inclusion of migrant workers in the Treaties was an automatic element of the intended closer cooperation between the founding Member States. On this matter, Christian had suggested that free movement found its way into the Treaty framework due to Italy's pressure for the use of Italian workers in the rest of the Member States.[17] The countries negotiating the European Project in the aftermath of World War II joined with different interests and posed different threats to the stability of the European future.[18] Italy was the only emigration country of the founding six, and, at that time, was experiencing problems related to overpopulation and unemployment.[19] Positioning its overpopulation problem in combination with the political threats of this period, Italy managed to secure labour positions for its unemployed population in the form of free movement of workers within the European Coal and Steel Community under Article 69 ECSC.[20] In this

[17] David E Christian, 'Resistance to International Worker Mobility: A Barrier to European Unity' (1955) 8 Industrial and Labor Relations Review 379, 379–389; Daniel Thym, '"Citizens" and "Foreigners" in EU Law. Migration Law and Its Cosmopolitan Outlook' (2016) 22 European Law Journal 296, 300; Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Liz Waters tr, Yale University Press 2013) 256.

[18] David Arter, The Politics of European Integration in the Twentieth Century (Dartmouth 1993).

[19] Francesca Fauri (ed), The History of Migration in Europe: Perspectives from Economics, Politics and Sociology (Routledge 2015).

[20] Christina Blanco Sío-López and Paolo Tedeschi, 'Migrants and European Institutions, A Study on the Attempts to Address the Economic and Social Challenges of Immigration in EU Member

initial framework, free movement was not open to all workers, but only to qualified workers in the coal and steel industries, and under a specific procedure on vacancies.[21] By limiting the personal scope of free movement, the founding Member States wanted to ensure that no massive migratory waves would be caused by this concession to Italian interests.[22]

The abolition of the requirement of qualifications as a prerequisite for enjoying the right to free movement came with the Treaty of Rome.[23] Under this Treaty, the optimal allocation of manpower and its integration in the national societies was the objective of free movement, which was focused on abolishing the hardships deriving from the migrant status of the workers in the European industries [24] Member States did not perceive the Treaty of Rome as creating an obligation for them to employ Community migrants.[25] Instead, the prevailing understanding was that nationals should always be chosen first to fill vacancies. If nationals were not in need of employment or were not sufficient, then a Member State could turn to Community migrants through a specifically designed procedure. If Community migrants did not suffice, then Member States could resort to third-country nationals. This national perception of the Treaty framework is not very different from what is in place today regarding the principle of Union preferences in the labour market.[26] At the same time, this perception of free movement was nowhere close to a teleological reading of a scheme that would eventually foster a true political community. On the contrary Member States perceived free movement as a labour migration framework that created obligations of preferential treatment to

States' in Francesca Fauri (ed), *The history of migration in Europe: perspectives from economics, politics and sociology* (Routledge 2015).

[21] Articles 69 (1) and (4) Treaty establishing the European Coal and Steel Community. Under Article 69 (2) and (3) of the ECSC Treaty, Member states would also draft a list of the skilled trades and their qualifications which could be revisited in case of labour shortage. Also van Middelaar (n 17) 256.

[22] Blanco Sío-López and Tedeschi (n 20) 118. Hence, we see that Italy's success in opening up the free movement of workers was not as beneficial to its population as it had originally hoped, in that most of Italy's unemployed workers were unskilled and thus could not benefit from the scheme of the ECSC.

[23] Article 48 Treaty establishing the European Economic Community 25 March 1957.

[24] Bertrand M.A. (1957) Rapport complémentaire fait au nom de la Commission des Affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957-1958 Première session extraordinaire, Document 5 et 11; Communauté Européenne du Charbon et de l'Acier (1956), *Obstacles à la mobilité des travailleurs et problèmes sociaux de réadaptation.*

[25] European Community Information Service, Press Notice, Common Market takes initial step toward free mobility for workers, 15 June 1961.

[26] See 1994 Resolution, discussed in more detail in Chapter 5, Section 5.2.1.

Community migrant workers only as long as national workers were not sufficient to fulfill labour needs.

What is more, at that point in time, there was nothing distinguishing migrant workers employed in the Member States depending on whether or not they held Community nationality. On this matter Thym points out that,

> It would be wrong, however, to assume that the Rome Treaty wanted to establish universal free movement irrespective of nationality. During negotiations, there was agreement that only nationals of the member states should be covered; an explicit nationality clause was discarded in reaction to Franco-Italian disputes about the status of workers from Algeria and German concerns about the status of citizens from communist East Germany.[27]

Regardless of the intentions of the drafters, institutional practice pointed to a uniform approach towards both TCN and Community migrants. Specifically, the first Commission reports on free movement of workers generally discussed the number of labour migrants employed in Community Member States, regardless of their origin.[28] Even after the adoption of a framework that prioritized Community workers, the relevant Commission Reports looked at the labour market situation in Member States and examined how national manpower demand was covered by migrant workers in general, and not exclusively by Community migrants.[29]

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[27] The quote appears *verbatim* both in Thym, '"Citizens" and "Foreigners" in EU Law.' (n 17) 303; and in Daniel Thym, 'Institutional and Constitutional Framework' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 57. The same point is also raised in Daniel Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law : Rights, Roles, Identities* (Hart Publishing 2016) 122; In all works the author refers to Simone AW Goedings, *Labor Migration in an Integrating Europe: National Migration Policies and the Free Movement of Workers; 1950-1968* (Sdu Uitgevers 2005).

[28] See Bertrand M.A. (1957), Rapport fait au nom de la Commission des affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957-1958, Première session extraordinaire, Document 5.

[29] See Communauté Économique Européenne, Commission (1965), Libre circulation et migrations des travailleurs dans la Communauté. Bilan annuel des activités de compensation et de placement au sein de la Communauté (art. 25 § 4 du règlement no 15/61 art. 36 § 4 du règlement no 38/64, 48ff; Communauté Économique Européenne, Commission (1966), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs, 36 ff; Communauté Économique Européenne, Commission (1967), La libre circulation de la main-d'œuvre et les marches du travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs à l 'intérieur de la CEE, 16-19; Communauté Économique Européenne, Commission (1968), La libre circulation de la main-d'œuvre et les marches du

At the time, the importance of labour mobility as a means to increase the production capacities of national industries was so prominent that there were discussions on including third-country nationals in the Community scheme of mobility in order to meet Community labour needs.[30] Any opening up of the Community labour markets in this way would always take place with oversight, so as to not risk the unlimited access of foreign workers to national markets, which was seen as possibly limiting the quality of life for nationals.[31] The relevant soft-law material is analysed in more detail in Section 4.2

Below, I turn instead to the secondary law adopted in successive steps in 1961, 1964 and 1968 to operationalize the free movement provisions. The analysis shows that free movement was structured as a labour mobility scheme aimed at addressing the uneven distribution of manpower between the Member States. The economic expansion of the Community was pursued through the 'optimum valorization of the technical abilities of human beings' residing in the Member States.[32] At the same time, the social aims of the Community, namely improving living standards, were to be realised through strategies related to achieve the full potential of labour mobility in order to maximise productive activities in Community industries,[33] and were not reflected in an extensive attribution of rights in legal instruments.

4.1.1 The 1961 Framework

The original framework regulating free movement in the Community was provided in Regulation 15/1961 and the Directive of the same year.[34] The 1961 Regulation

travail dans la CEE, Rapport établi en application des dispositions des articles 29 et 36 du règlement n° 38/64 relatif à la libre circulation des travailleurs à l 'intérieur de la CEE, 34 ff.

[30] Bertrand M.A. (1957) Rapport complémentaire fait au nom de la Commission des Affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957-1958 Première session extraordinaire, Document 11*;* Communauté Économique Européenne, Commission (1960), Synthèse des rapports établis en 1960 sur la situation actuelle du service social des travailleurs migrants dans les six pays membres de la C.E.E.

[31] Bertrand, Document 11, para 55.

[32] Professor Giuseppe Petrilli, Member of the Commission, Chairman of the Social Affairs Group, The Social Policy of the Commission European Economic Community, 'Bulletin de La Communauté Économique Européenne' (1959) 2 6.

[33] An example is mass unemployment, to which the response was rapid occupational training to maximise labour mobility. See Commission of the European Economic Community, Bulletin of the European Economic Community (1960) 10 40.

[34] Règlement n° 15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté [1961] *OJ 57/1073;* Directive du Conseil en matière de procédures et pratiques administratives relatives à l'introduction, l'emploi et le séjour des travailleurs d'un État membre, ainsi que de leur famille, dans les autres États membres de la Communauté [1961] OJ 80/1513.

was adopted with an emphasis on prioritising national markets. Specifically, the 1961 Regulation gave preference to free movement of workers towards Member States that could not satisfy their labour needs by recourse to national workers.[35] Simply put, Community workers could take up work in another Member State if such work could not be carried by national workers.[36] What is more, they could exercise their free movement rights only after obtaining a specific job offer.[37] This was in order to avoid an 'invasion of workers from other countries' that could 'upset the economic and the social order of the national markets'.[38]

The scheme initiated by the 1961 Regulation was based on cooperation between national authorities and the Commission to ensure that national vacancies would be occupied by Community workers. In this regard, national employment offices were tasked with sending information to the Commission on such vacant positions in each Member State as needed to be filled by international labour.[39] Simultaneously, the Community set up a European Office on the coordination of this scheme.[40] Migrant workers moved following authorization to work in another Member State. Such authorization could be prolonged for one year in case of employment in the same profession.[41] After three years, the workers were provided with the possibility of exercising another profession for which they were qualified, while after four years they had the possibility to pursue regular employment in any profession.[42]

The aim of this Regulation was to replace the traditional migratory schemes between Member States based on bilateral or multilateral agreements.[43] In this regard, it granted migrant workers the right to equal treatment with respect to their working conditions and the right to vote in their respective trade unions.[44] In addition,

[35] Preamble, Regulation 15/1961.

[36] Articles 1(1) and 2. The non-fulfilment of positions by the national labour market was considered to exist three weeks after a vacancy was registered with the manpower office.

[37] Article 2, Regulation 15/1961.

[38] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1961) 6, 5-9.

[39]Cf Articles 3, 16 Regulation 15/1961.Interestingly Article 18 of the Regulation mentions 'les informations concernant le nombre d'offres et de demandes d'emploi par profession, enregistrées par leurs services en vue d'une *compensation internationale* [emphasis added]'.

[40] Articles 22, 23 Regulation 15/1961.

[41] Article. 6 (1) Regulation 15/1961.

[42] Article 6(2) and (3) Regulation 15/1961.

[43] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1961) 6 5.

[44] Article 8 Regulation 15/1961.

migrant workers could be joined by their spouses and children under the age of 21, who were also given access to the labour market.[45]

The right to equal treatment was introduced as a necessary part of the Community framework. It was not based on considerations regarding human rights guarantees for migrant workers, but rather derived from the 'new spirit of European solidarity'.[46] It was presented as a concession made by the Member States with a view to creating a labour market that would ensure the best use of the 'Community's human potential'.[47] It was the capacity of migrants as workers (not as human beings, or as nationals of the Member States) that ensured them the right to equality of treatment. This also ensured that native workers would be protected from unfair competition that could be caused from migrants taking up work for lower wages and less favourable working conditions.[48]

This first regulation was pronounced by Levi Sandri as 'an element of economic integration in its own right' and an 'important step towards the integration of Europe'.[49] The rights attributed to Community workers reflected a vision of social progress going hand-in-hand with economic development. These rights 'without representing such a direct return for progress in the individual worker's productivity, are nevertheless useful on a broader view, and satisfy requirements which progressive societies cannot evade'.[50] These words reflect the continuous balance of economic and social considerations behind the attribution of rights for Community migrants. They are attributed to migrants because of their function for growth, but also with a view to raising living standards for both nationals and migrants within the Member States. The Commission's vision of free movement was guided by the interdependence of economic growth and social progress in a way that today we would call economic and social sustainability of migration.

[45] Article 11 Regulation 15/1961.

[46] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1961) 6, 6

[47] ibid.

[48] ibid 9.

[49] ibid 5-6.

[50] Commission of the European Economic Community, Bulletin of the European Economic Community (1964) 9/10, Introduction to the survey of social developments in the Community in 1963 (Included in the Seventh General Report on the activities of the Community, in accordance with Article 122 of the Treaty) 6.

4.1.2 The 1964 Framework

At the second stage, Regulation 38/64 and Directives 220 and 221/64 were adopted.[51] The 1964 framework abolished the clauses on the priority of the national labour market. It did, however, maintain Member State discretion to restrict free movement rights, 's'il existe un excédent de main-d'œuvre ou si l'équilibre du marché de l'emploi est mis en grave danger'.[52] This possibility was used by the Netherlands, Belgium and France with respect to specific regions of their countries or specific professions.[53] The scheme put in place by the 1961 Regulation, whereby vacant positions were notified and coordinated by national employment offices in cooperation with the Commission, was maintained.[54] However, the rights of Community workers were now assimilated with those of national workers after two years of employment following their original entry to another Member State.[55] Migrant workers under the 1964 Regulation maintained the equal treatment rights with respect to their working conditions. In parallel, their rights to participation in trade unions were extended to include the right to be elected as well, upon condition

[51] Règlement n° 38/64/CEE du Conseil du 25 mars 1964 relatif à la libre circulation des travailleurs à l'intérieur de la Communauté [1964] OJ 62/965; Council Directive 64/240/EEC of 25 March 1964 on the abolition of restrictions on the movement and residence of Member states' workers and their families within the Community [1964] OJ 62/981. See also Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850.

[52] Preamble to Regulation 38/64. Such suspension took place upon notification under Articles 2, 4-6, which also provided for exceptions.

[53] Communauté Économique Européenne, Commission (1965), Libre circulation et migrations des travailleurs dans la Communauté. Bilan annuel des activités de compensation et de placement au sein de la Communauté, 48-50; Communauté Économique Européenne, Commission (1966), La libre circulation de la main-d'oeuvre et les marches du travail dans la CEE, 57-58; Communauté Économique Européenne, Commission (1967), La libre circulation de la main-d'oeuvre et les marches du travail dans la CEE, Rapport 1967, 24-25; Communauté Économique Européenne, Commission (1968), La libre circulation de la main-d'oeuvre et les marches du travail dans la CEE. Rapport 1968, 65-67.

[53] Bertrand M.A. (1957) Rapport complémentaire fait au nom de la Commission des Affaires sociales sur la migration et la libre circulation des travailleurs dans la Communauté, Exercice 1957-1958 Première session extraordinaire, Document 11*;* Communauté Économique Européenne, Commission (1960), Synthèse des rapports établis en 1960 sur la situation actuelle du service social des travailleurs migrants dans les six pays membres de la C.E.E.; H ter Heide, 'The Free Movement of Workers in the Final Phase' (1969) 6 Common Market Law Review 466,467.

[54] Articles 1, 24 and 32 Regulation 38/64.

[55] Article 1 Regulation 38/64.

of employment in the same company for at least 3 years.[56] The conditions on family admission also evolved to include all dependent relations of the worker.[57]

At this stage, human mobility between the Member States was restricted in an instrumental use of people as a resource on the path to economic development of Europe. In a report on the economic situation of the Community in 1964 and the outlook for 1965, this instrumentality is pronounced as follows 'It is of course essential that each worker should have a job, but it is also necessary that he should be employed where the economy most needs his contribution, and where he can make the best use of his abilities.'[58] In addition, the Commission Advisory Committee for free movement of workers and for employment drafted an opinion as to the basis of a policy for free movement in the Community. Therein, free movement was pronounced as a fundamental right of workers, 'corollary of the principle of dignity and liberty'.[59] This fundamental right was not tied to the individual agency of the people of Europe, but was rather conditioned by the prospect of improving one's living conditions and contributing to social betterment by being engaged in a process of economic development.[60]

4.1.3 The 1968 Framework: the Final Phase of Harmonization

The third and final phase of harmonization came with Regulation 1612/68 and Directive 68/360.[61] The 1968 Regulation, in its preamble, points to the links between mobility and development both for the individual and for the states involved:

> [W]hereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working

[56] Articles 8 and 9(2) Regulation 38/64.

[57] Article 17 Regulation 38/64.

[58] Commission of the European Economic Community, Bulletin of the European Economic Community (1965) 3 11.

[59] Commission of the European Economic Community, Bulletin of the European Economic Community (1965) 4

[60] ibid 18; Commission of the European Economic Community, Bulletin of the European Economic Community (1966) 8, Address introducing the Ninth General Report on the activities of the Community 7.

[61] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2; Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member states and their families [1968] OJ L 257/13.

> conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States.[62]

The connection of mobility to national economies further implied that such mobility should be restricted in cases where Member States experienced or foresaw disturbances in their labour market which could threaten the standard of living and level of employment in a specific region or industry.[63] In any case, the phrasing of this Regulation was more open and guaranteed access to the labour market of Member States to every Community worker under the same conditions as nationals of the host Member States.[64] The 1968 framework also provided more enhanced protection for workers against potential discriminatory practices. [65]

Despite the right to access Community labour markets, the scheme was still based on a mechanism of exchange of information between Member States and the European Co-ordination office regarding vacancies that could not be filled by the national labour market, but also applicants who were willing to undertake employment in another Member State.[66] The scheme thus aimed to match vacancies in one Member State to the surplus of manpower in another.[67] Vacancies could also be announced to non-Member States, if it was considered that Member States could not provide a sufficient number of workers.[68] This further serves to point out that labour migration under the free movement framework was intimately connected to the production needs of the time.

Even though the 1968 Regulation was a lot more progressive in terms of workers' rights compared to the previous ones, the extension of free movement rights was still balanced by the mechanism foreseen in Title III of the Regulation. This mechanism provided for an analysis to be carried out by the Member States and the Commission twice per year on the labour positions occupied by third-country nationals, the expected developments of the labour market and the manpower movements in the Community. [69] Member States had to give priority to Community workers in order to ensure a balance between vacancies and employment applications.[70] Nevertheless, Article 20 of the 1968 Regulation provided that, upon

[62] Preamble to Regulation 1612/68.

[63] ibid.

[64] Preamble and Article.1 Regulation 1612/68.

[65] Articles 3,4,7-9, Regulation 1612/68.

[66] Article 15 Regulation 1612/68.

[67] Article 16 Regulation 1612/68.

[68] Article 16 para 2 Regulation 1612/68.

[69] Article 19 (1) Regulation 1612/68.

[70] Article 19 (2) Regulation 1612/68.

approval by the Commission, Member States could partially or totally suspend the mechanisms provided for vacancy clearance, in case of existent or expected disturbances in the national labour market that could threaten the standard of living or level of employment in a specific region or occupation. [71] It should be noted, however, that unlike the 1964 Regulation, Member States could not adopt these measures unilaterally.

4.1.4 The Initial Free Movement Framework Aimed at the Optimal Allocation of Manpower

The analysis of secondary law in the preceding sections shows that free movement was progressively opened to ensure orderly migration of workers and to avoid negative effects to national economies. The demand of primary law to ensure free movement of workers was gradually achieved via secondary law that evolved through the incorporation of clauses related to national labour market priority and the possibility to restrict free movement for economic reasons. This shows that economic considerations shaped the applicable legal framework that operationalized Article 48 EEC.

The three phases of liberalization of movement were all connected to different concerns as to how national labour markets operate in relation to a Community-wide free movement objective. In essence, the institutional buildup of free movement was shaped with a view to addressing manpower mismatches between the national labour markets, mismatches which posed dangers for the unhindered pursuit of growth.[72] At that stage of industrialization, the productive capacities of Member States and availability of manpower were codependent.[73] The Commission therefore had to set up a system that could address the disequilibrium between national labour markets (shortage of labour in Germany and the Netherlands which had greater productive capacities and surplus of unskilled labour in Italy) to make the best of the human capital of the Community Member States.[74]

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[71] Articles 15-17 and 20(1) Regulation 1612/68.

[72] Commission of the European Economic Community, Bulletin of the European Economic Community (1960) 5.

[73] Commission of the European Economic Community, Bulletin of the European Economic Community (1960) 3 39.

[74] Commission of the European Economic Community, Bulletin of the European Economic Community (1960) 10 40; Commission of the European Economic Community, Bulletin of the European Economic Community (1960) 5 35; Commission of the European Economic Community, Bulletin of the European Economic Community (1960) 4 43. See also Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1961) 6.

The adoption of the 1968 Regulation marked the end of the transitional period provided under Article 8 EEC for the establishment of the common market. According to the Commission, the provisions of this Regulation along with the Directive of the same year would serve to create European awareness by attributing identical rights to all Community migrants.[75] Moreover, the Commission envisioned the extension of these rights with the eventual purpose of making the free movement framework an element of geographic and vocational mobility for a single Community labour market.[76] In this setting, migration was perceived as a means of a functioning common market, which should be able to cover shortages in the respective national markets. Community workers were first and foremost manpower, and their movement was directed towards the optimal allocation of resources within the common market. Even though there was an attempt to present free movement 'as something more important and more exacting than the free movement of a factor of production',[77] the attribution of rights to migrants in this context was dictated by their economic contribution. At this stage, there was no perception of migrant workers as Europeans with connected historical and political identities.

In what was presented as an achievement towards the final end of a political union Levi Sandri stated that 'all the citizens of the Member States are placed on an equal footing and therefore possess the same status'.[78] This equal footing, however, was framed in the pursuit of what he called 'man's most important practical activity' – work, and not on the basis of their political existence in the Community.[79] At this stage of liberalization of free movement, we see an unlimited emphasis on worker status as the core source of the social and human rights tied to migration. With this in mind, the next section engages with the material related to migrants from third countries and investigates whether and how similar considerations drove the Commission's and the Council's agenda to coordinate national labour migration policies.

[75] Commission of the European Communities (1968), Complete freedom of movement for workers now a reality. Information Memo P-50/68, July 1968.

[76] ibid.

[77] Lionello Levi-Sandri, Vice-President of the Commission, Free movement of workers in the European Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1968) 11 7.

[78] ibid.

[79] ibid 6.

4.2 The Ambition of Extending the Scope of Protection to all Migrants

By the time of the completion of the common market by the adoption of Regulation 1612/68, it was clear that the Community's manpower would not be enough to cover its labour needs and to ensure the productive capacity of Member States. Member States continued to employ manpower from non-member countries at high rates to fill their vacancies. The First Medium-term Economic Policy Programme issued by the Commission in 1967 showed that recourse to manpower from non-member countries would become necessary as the years passed.[80] Essentially, it was at this stage that the Commission started pushing for comparison of national recruitment policies to establish whether there existed common interests that could form the basis for closer cooperation in this field.[81]

The change in the economic situation and the declining need for manpower in the 1970s did not alter the Community approach. In this regard, the first explicit articulation of the need for a Community migration policy appeared in the 1974 Action Programme in Favour of Migrant Workers and their Families.[82] In this Programme, the Commission emphasized the benefits of migration for the economies of the Member States:

> The influx of migrant workers on this scale has profound consequences for the economics of the Member States. First, their presence has contributed to a *faster rate of economic growth* than would otherwise have been attainable – least without much greater rates of capital investment. Second, they have given the system a greater degree of *flexibility* than it would otherwise have had. The fact that migrants are available in such large numbers and are usually engaged in short term-contracts – typically one year – has facilitated the adjustment of the labour force, both in individual enterprises and in the economy as a whole, to short-term changes in demand, and has therefore, facilitated anti-cyclical policies. Third there is evidence that the ready availability of a relatively cheap source of unskilled manpower *has retarded the search for greater productivity* in Community industries.[83]

Despite the economic problems that co-occurred with migration during a period of stagnation, the Commission highlighted what should be the driver of a Community

[80] Programme de politique économique à moyen terme (1966-1970) [1967] OJ 79/1513; Commission of the European Communities, Bulletin of the European Communities (1969) 6 23.

[81] Commission of the European Communities, Bulletin of the European Communities (1969) 6 23; Commission of the European Communities, Bulletin of the European Communities (1970) 3 39.

[82] Action Programme in Favour of Migrant Workers and Their Families COM(74)2250 final.

[83] Action Programme in Favour of Migrant Workers and Their Families COM(74)2250 final 11, emphasis in the original.

migration policy. In this, the 1974 Action Programme mentions that '[t]hese solutions must take account of the migrant workers' needs and their rightful place in a society to whose prosperity and well-being they contribute.'[84] The contribution of the migrant workers to the economic development of the host society set the basis for the need to attribute rights. In this alignment between the treatment of Community and TCN workers we see the implicit attempt of the Commission to frame a sustainable migration policy, that is, a migration policy that supports the economic development of the Community and attributes rights to migrants in view of securing their social progress and relatedly social cohesion.

Against this backdrop, Section 4.2.1 presents and evaluates the first binding measure adopted by the Community on coordination of national migration policies in 1985. The measure was devised with economic aims in mind and should be seen as the prelude to a Community policy on admission that was completed a lot later, in the new millennium.[85] Around this time, the groundwork was laid for a set of rights for migrant workers. The analysis of soft-law instruments and legislative measures in Section 4.2.2, will show that, in this early period, emphasis was placed on shaping a migration policy characterized by full extension of equal treatment to TCN workers. Overall, this section shows the desire of the Community, as expressed via its institutions, to fully coordinate labour migration policies and to assimilate the rights of migrant workers, so as to support economic growth in the Member States and to raise the living standards of the population legally resident in the Community, regardless of their nationality.

4.2.1 The Prelude to an Admission Policy: Coordination of National Positions on TCN Migration

In 1979, the Commission started encouraging the coordination of national migration policies in order to ensure the better functioning of the labour market, as well as the harmonious development of Member States. The attempt was initiated by presenting the coordination of admission of migrants from third countries as corollary to the Community free movement framework:

> Insofar as the terms and conditions under which Third Country citizens are admitted to a State, the decision on admission is related fundamentally to labour market policy, at national as well as at Community level. It is, in fact, labour market policy which generally determines the conditions and terms under which a non-Community migrant is admitted or allowed to remain, and, in this regard, consultation on

[84] Action Programme in Favour of Migrant Workers and Their Families COM(74)2250 final.

[85] See Chapter 6 on what is the policy today and Chapter 5 on the failed attempts of the 1990s.

> migration policies vis-a-vis Third Countries, constitutes a corollary to the Community policy of free movement of Community workers.[86]

In this light, the Commission presented the need for action to maximise the effects of migration for economic growth. As it suggested, the lack of coordination of national migration policies did not allow for the most effective use of manpower, while at the same time the lack of central planning had led to the concentration of migration in the central industrialised areas of the Community and to the creation of economic and social problems for the periphery.[87] The Council also recognized the need for a policy that would allow consultation between the Member States on their national migration policies with third countries.[88]

In a Resolution on the matter, the Council mentioned Article 117 of the EEC Treaty, which referred to the need to promote improved working and living conditions for all the workers in the Community as a legal basis for such action.[89] Eventually, Commission Decision 85/381/EEC was adopted, which set up a prior communication and consultation procedure on national migration policies in relation to third countries.[90] The legal basis used was Article 118 EEC, which provided that the Commission should promote the close cooperation of Member States in the social field and particularly with regard to employment and working conditions. The Decision required Member States to inform the Commission on draft measures and agreements related to migration from third countries and provided for consultations with the Commission, to coordinate common positions and ensure that national action does not compromise the Community labour market policy.

This Decision was met with resistance from Member States for fear of encroachment on national competences. Several turned against it and requested that it be declared void. In *Germany a.o. v Commission*, five Member States claimed that the Commission did not have competence to adopt a binding decision in the field of migration, which field fell within the exclusive competence of States.[91] Matters related to migration from third countries were, they argued, part of their sovereign

[86] 1979, Consultation on Migration Policies vis-à-vis Third countries COM(79)115 final para 3.2.

[87] Action Programme in Favour of Migrant Workers and Their Families COM(74)2250 final 22.

[88] Council Resolution of 9 February 1976 on an Action Programme for Migrant Workers and Members of Their Families [1976] OJ C 34/2 recital 6 and point 5 (a).

[89] Council Resolution of 16 July 1985 on Guidelines for a Community Policy on Migration [1985] OJ C 186/3, 1st recital.

[90] Commission Decision 85/381/EEC.

[91] Judgment of the Court of 9 July 1987*, Federal Republic of Germany and others v Commission of the European Communities*, Joined cases 281, 283, 284, 285 and 287/85, ECLI:EU:C:1987:351.

core and went beyond the social field mentioned in Article 118 EEC.[92] The Court found that

> [M]igration policy is capable of falling within the social field within the meaning of Article 118 only to the extent to which it concerns the situation of workers from non-member countries as regards their impact on the Community employment market and on working conditions.[93]

In this finding, the Court aligned the rationale behind the Community competence with the points of Commission Communication of 1979, which mentioned that the coordination of migration policies is corollary to free movement.[94] As AG Mancini noted on the same matter,

> The admission of foreigners, which is haphazard and ill-planned and often implemented illegally, seriously risks jeopardizing that policy. A series of measures should therefore be studied jointly with a view to adopting a coherent approach to the immigration of workers from non-member countries by safeguarding and strengthening the 'priority for Community nationals' in the Community labour market.[95]

The Court confirmed the Commission's competence to legislate and held that national migration policies should take into account action at Community level and specifically in the context of the labour market policy in order to not undermine its results.[96] It further held that such competence had the nature of procedural coordination. This means that Community action had be restricted in coordination and could not involve the adoption of substantive measures that would create obligations for Member States or rights for TCN workers. The Court upheld Article 118 EEC as the basis of the Decision; however, it declared the decision void as regards two specific provisions extending Community powers.[97] The Commission

[92] ibid para 8.

[93] ibid para 23.

[94] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final para 3.2.

[95] ibid; Opinion of Advocate General Mancini delivered on 31 March 1987 in *Federal Republic of Germany and others v Commission of the European Communities*, Joined cases 281, 283, 284, 285 and 287/85, ECLI:EU:C:1987:169 p 3225.

[96] *Federal Republic of Germany and others v Commission of the European Communities*, Joined cases 281, 283, 284, 285 and 287/85 para 16.

[97] One related to the scope of consultation extending to matters of cultural integration and one related to the objective of the consultation to ensure that draft measures are in conformity with Community policies.

then adopted Decision 88/384/EEC, which reproduced the provisions of Decision 85/381/EEC and included amendments to comply with the Court's judgement.[98]

In this early case-law, the Court confirmed both the Community competence on TCN migration and the rationale for such competence. In line with the Commission's reasoning for the need for such a Decision, it became clear that national migration policies were not only related to the sovereign core of Member States and their right to control population movement; they also played a significant function at Community level. That is, they served the economic objective of ensuring the harmonious development of economic activities in the Community through a functional Community labour market. Both the EU institutions, in preparing and adopting the Decision, and the Court, confirmed the corollary nature of migration to free movement. This is apparent in the need to ensure that Community workers are not in a less competitive position because of national (lack of) planning. But most importantly, it appears in the alignment of objectives between free movement and migration coordination; they are both necessary means to ensure the economic objective of the Community.

In what follows, we shall see how similar objectives appear in parallel with social considerations in a series of attempts to grant rights to migrant workers. Unlike Community workers, TCN workers who did not fall under Association Agreements did not enjoy rights under primary or secondary law. However, by looking at soft-law instruments issued at that time, we will see that the progressive achievement of equal treatment between Community workers and TCN workers as regards their working and living conditions was the constant goal of the Community migration policy before the Single European Act.[99] TCN workers and Community workers were thought of as facing the same problems in their social and working life.[100]

4.2.2 The Case for Abolition of Discrimination Between all Migrant Workers

As early as the 1974 Action Programme, the Commission had suggested that discrimination between TCN workers and Community workers as regards living and

[98] Commission Decision 88/384/EEC of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries [1988] OJ L 183/35.

[99] This goal continued on the part of the Commission at least until the late 1990s, and was later watered down due to the more the restrictive approach of the Council. More on this will follow in Chapters 5.

[100] Guidelines for a Community Policy on Migration COM(85)48 final; Council Resolution of 16 July 1985 on Guidelines for a Community Policy on Migration [1985] OJ C 186/3; Commission Decision 85/381/EEC para 3.

working conditions should be eliminated.[101] In the 1979 Communication that predated the Decision reviewed above, the Commission stated that,

> The social situation which arises from inequality of treatment, and the failure to insert migrant workers and their families into the economic and social life of the host country, leads to tensions and discriminations which are potentially dangerous.[102]

This shows the interdependence of economic and social considerations behind the Commission's approach. The demand for labour migration necessary to achieve economic growth would need to be paired with social rights to ensure what we would call today social sustainability. Relatedly, it was considered self-evident that TCN migrants who live and work in the Community should enjoy equal treatment.[103]

The 1985 Commission guidelines for a Community Policy on migration set the goal of horizontal equality between Member States nationals, Community and TCN migrants, and required the extension of equal treatment to the social security field. In this regard, the Commission noted that 'From the social standpoint, workers in the same objective situation cannot be treated differently on the sole basis of nationality.'[104] Even though the Commission realized that, especially as regards social security, this would also require the involvement of third countries (for aggregated periods of insurance and transfer of benefits), it still promoted the establishment of such agreements based on Community principles.[105] Similarly to the Commission, the Parliament was also insistent on achieving full equality between Community workers and TCN workers.[106]

Aside from the economic contribution of migrant workers as the basis for equal treatment, the need for active measures to advance their social position also appears in the relevant material. During the rapid economic development of the 1950s and 1960s, Community institutions focused solely on employment policy as means to ensure the social advancement of migrant workers. Nevertheless, in the context of the economic stagnation and unemployment that persisted throughout the 1970s and

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[101] Action Programme in Favour of Migrant Workers and Their Families COM(74)2250 final 13.

[102] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final para 2.3.

[103] See also Vredeling Henk, Migrants and the E.E.C Full Text and Summary of a Speech by the Vice-President of the Commission of the E.C. for the Conference of the National Council of Social Services, London, 27 March 1971.

[104] Guidelines for a Community Policy on Migration, COM(85)48 final para 40.

[105] Guidelines for a Community Policy on Migration, COM(85)48 final para 40.

[106] See European Parliament resolution on migrant workers from third countries adopted on 14 June [1990] OJ C 175. See also European Parliament Working Documents 1983-1984, Document 1-811/83, Report drawn up on behalf of the Committee on Social Affairs and Employment on the problem of migrant workers, Rapporteur: Mrs Tove Nielsen, PE 84.870/fin

1980s, it became clear that the social advancement of migrant workers would need to go further than employment policies to be successful.[107] In this context, more emphasis was put on equal treatment as a principle that should guide integration policies related to access to residence, education, vocational training, housing and working environment.[108] Social advancement via integration was also connected to the civic rights of migrant workers. During the period under review, the Commission, the Parliament and the Economic and Social Committee were demanding the granting of the right to vote in local elections for all migrant workers and their families living and working on the Community territory, regardless of nationality.[109]

However, this ambition of securing equal treatment was met with resistance from the Council. Under a more restrictive approach, the 1985 Council resolution on the Guidelines for a Community Policy on Migration confirmed the desire that 'everyone within it [the Community] should have an equal opportunity of deriving advantages and making a contribution'.[110] A right of TCN migrant workers to equal opportunity is far from the Commission and the Parliament vision of full application of the free movement regime to TCN workers, voting rights in local elections and equal access to the social security systems of Member States. The different approach of the Council can be explained by its proximity to national politics. After all, this was a time characterized by national bans on migration due to prevailing unemployment. The sensitivity of extending rights to migrants in such a national political climate will be seen more clearly in Chapter 6, where the analysis focuses on how national fears sealed the fate of many Commission's plans to promote the rights of migrant workers.[111]

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[107] Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final, para 101.

[108] ibid para 19.

[109] Opinion of the Economic and Social Committee on Migrant Workers 84/C 343/07. point 3.2.9; Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final, paras 76-79; Parliament Resolution Doc. B2-881/86 on Community Policy on Migration of 9 October [1986] OJ C 283; Report Drawn up on Behalf of the Committee on Social Affairs and Employment on the Communication from the Commission of the European Communities to the Council (Doc. C2-6/85- COM(85)48 Final) on Guidelines for a Community Policy on Migration Together with a Draft Council Resolution, Working Documents 1985-86, Document A2-4/85, points 2, 3(b); Guidelines for a Community Policy on Migration, COM(85)48 final, para 19; Resolution on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers (Doc. A 2-261/88)[1989] OJ C 69 point 9.

[110] Council Resolution of 16 July 1985 on Guidelines for a Community Policy on Migration [1985] OJ C 186/3 point 5.

[111] See also David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 European Law Review 3 who criticizes the intergovernmental initiatives in the Council and acknowledges the political and nationalistic overtones migration was subject to during this period.

In any case, a review of the relevant soft-law instruments shows that both economic and social objectives were tied to the demand of equal treatment for TCN workers. Equal treatment was linked to the contribution of the individual migrant to the project of growth. At the same time, we see an emphasis on the need to advance the living conditions of the population resident in the Community and to maintain social cohesion. The social considerations behind the promotion of migrant rights will become clearer in the next section, which considers measures devised to ensure equal access to education for children of migrant workers.

4.2.3 The Social Imperative of Granting Access to Education to Migrant Children

Access to education for children of migrant workers was one of the first migration-related measures adopted at the Community level. The issue had been on the agenda since the 1960s, and gained the attention of Member States during the 1970s and 1980s. At this point it was becoming clear that migrant workers had set up family lives in the host countries, leading to a new generation of migrant children that had to be integrated in Member States to ensure their social advancement and avoid marginalization.

In 1975, the Commission published a proposal for a Directive on the education of children of migrant workers.[112] The considerations behind the proposal were twofold. First, the 1974 Council Resolution concerning a social action programme prioritized actions related to the reception and education of children in order to improve free movement of workers.[113] And second, in the same resolution, the Council set the objective of achieving equal treatment between EC and TCN workers and their families as regards their living and working conditions.[114] In this context, the proposed Directive would establish a right to tuition-free compulsory education in the host country, and promote the teaching of the language and culture of origin. The system was conceived to improve the living and working conditions in the Community, and it was suggested that the right to education provided in the proposal should cover all migrant children residing in the Community, regardless of their country of origin.[115] The Directive sought on the one hand to assist in the social and personal advancement and integration in the host country; and on the other to ensure the maintenance of the possibility of repatriation. Specifically, the Commission wanted to ensure that, by having access to courses in their mother

[112] Proposal for a Council Directive on the Education of the Children of Migrant Workers [1975] OJ C 213/2.

[113] ibid 1st recital.

[114] ibid 2nd recital.

[115] ibid 7th recital and Article 1(2) of the proposed Directive.

tongue and their national culture, migrant children would maintain the possibility of reintegration in the country of origin.[116]

This proposal was approved by the European Parliament, which considered it an essential part of the educational aspects of the Community's Social Policy.[117] Showcasing the interdependence of economic and social objectives behind the proposed instrument, the Parliament Committee on Cultural Affairs and Youth suggested that migrant recruitment to cover labour demands should also be followed be measures that ensure the social well-being of the migrants.[118] The European Economic and Social Committee also welcomed the inclusion of all migrant children in the scope of the directive.[119]

The initial proposal was based on Article 49 and Article 235 EEC. Article 49 EEC concerned the adoption of Directives or Regulations on measures necessary to ensure the realization of free movement of workers. Article 235 EEC, on the other hand, was a general clause providing for the adoption of measures necessary to achieve the objectives of the Community in cases where the Treaty did not provide necessary powers. Due to this, the Commission put forward Article 49 EEC as the legal basis for social measures concerning Community workers. Then, in line with the Council resolutions that provided for the objective of gradually establishing equal treatment for all migrant workers, the Social Action Programme and the objective of Article 117 EEC to promote an improved standard of living of workers, the Commission argued that Article 235 EEC should be used as a legal basis to extend protection to TCN workers.[120]

The proposal of the Commission was not welcomed by the Member States for various reasons. The Danish, Italian and French delegations in the Council disagreed

[116] ibid 6th recital.

[117] Resolution embodying the Opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Directive on the education of the children of migrant workers [1975] OJ C 240/48, point 2.

[118] European Parliament, Working Documents 1975-1976, Document 375/5, Report drawn up on behalf of the Committee on Cultural Affairs and Youth on the proposal from the Commission of the European Communities to the Council (Doc. 224/75) for a directive on the education of the children of migrant workers, Rapporteur: Mrs T. CARETTONI ROMAGNOLI, PE 471.807 fin p 12, para 6.

[119] Opinion on the proposal for a Council Directive on the education of the children of migrant workers [1976] OJ C 45/6 point 3.1.2.

[120] HAEU, CM2/1977-634.3, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Outcome of the discussions of the Working Party on Social Questions, Brussels, 31 March 1976 377/76 (SOC 97) p 3; HAEU, CM2/1977-634.5, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 18 May 1976 R/1230/76 (SOC 131), B. Statement by the Commission Representative

with the choice of legal basis. The Danish delegation insisted that the Community had no jurisdiction in matters affecting TCNs, and as a result, that no binding instrument could be adopted on the matter.[121] The Italian delegation objected to the joint use of Articles 49 and 235 EEC. The Italians did not contest the Community competence on TCNs. Rather, they suggested that the Directive should only cover EC nationals and be based on Article 49 EEC, whereas a different binding measure should be put forward under Article 235 EEC for TCN workers.[122] Eventually, the French delegation joined the opposition, and suggested that Article 49 EEC could not serve as the basis for covering TCN workers, but that similar measures could be extended to TCN workers by means of a non-binding act.[123] Besides these countries, Luxembourg, the UK and Germany were in favour of a single instrument for both Community and TCN workers, but suggested that such an instrument should be non-binding.[124] Their disagreement did not relate to the personal scope of the instrument but with its material one. These states considered educational policy to be part of national competence.

Eventually, a compromise was reached: the Directive maintained Article 49 as its sole basis, and excluded children of TCN workers from its scope. At the same time a declaration was added to the minutes of the Council Meeting of 25 July 1977. The declaration confirmed the Council's intention that the measures adopted in compliance with the Directive should also apply to children of TCN migrants. This would allow the delegations that were in favour of a single instrument for all migrant children to introduce higher standards of protection while implementing the Directive.[125]

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[121] HAEU, CM2/1977-634.5, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 18 May 1976 R/1230/76 (SOC 131) C. Delegations' Position

[122] HAEU, CM2/1977-634.4, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 26 April 1976 R/987/76 (SOC 116) Annex- Attitude of the Italian delegation.

[123] HAEU, CM2/1977-634.5, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 18 May 1976 R/1230/76 (SOC 131) C. Delegations' Position

[124] HAEU, CM2/1977-634.5, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Report from the Working Party on Social Questions to the Permanent Representatives Committee, Brussels, 18 May 1976 R/1230/76 (SOC 131) C. Delegations' Position. This related mostly to objections on education policy as part of national competence.

[125] HAEU, CM2/1977-634.7, The Council, Note, Subject: Proposal for a Council Directive on the education of the children of migrant workers, Outcome of the discussions of the Permanent Representatives Committee, Brussels, 24 June 1976 R/1555/76 (SOC 167); HAEU, CM2/1977-634.7 European Communities, The Council, Note, Subject: Proposal for a Council Directive on

In the negotiation of this instrument, we see how national disagreements over the personal and material scope of Community law led to the exclusion of children of TCN workers from the text of the Directive. Despite this exclusion, it is worth reflecting on the intimate link between the social and economic objectives of measures attributing rights to migrant workers' families. As it appears in later documents of the Commission, the education of migrant children was a measure aimed at addressing the underachievement and marginalization of immigrant groups. On the economic side, education was connected to the growing realization on behalf of the Community that migrant communities would be necessary for future demands of the labour market and as a result, education could play a central role in that.[126] The social advancement of migrant workers' families was set in the context of improving the living and working conditions of the people residing in the Community regardless of their nationality. At the same time, a utilitarian approach to their education was adopted to ensure that the labour market demands will be covered by the offspring of migrant workers, so there is no need to recourse to more migration.

4.2.4 The Double Economic and Social Objective of the Community Migration Policy

During this period, the growing percentage of TCN workers present in Member States created the impetus for the adoption of a first set of legislative instruments, as means to create an incipient Community migration policy. The projected economic and social objectives of the Community dictated a need for coordination of national migration policies and attribution of rights to migrant workers. These objectives have been presented above in the following way.

First, there was the economic objective of ensuring the proper functioning of the Community labour market. Member States were required to safeguard free movement for Community workers and respect their obligations towards the Community manpower before hiring TCN workers.[127] This is closely related to a liberal trade theory on international migration that presupposes that in the long term, economic growth will reduce the need for factor mobility.[128] Insofar as the Community had labour demands that could not be covered by the regional labour force, there was a preference to adopt measures that would make the TCN workers

the education of the children of migrant workers, Outcome of the meeting of the Working Party on Social Questions, Brussels, 9 November 1976 1221/76 (SOC 253).

[126] Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final para 59.

[127] Consultation on Migration Policies Vis-à-Vis Third Countries COM(79)115 final para 2.10.

[128] Hollifield (n 2) 24.

already resident on the Community territory more appropriate for the market, rather than opening the door to more TCN migration. The initiatives related to the education of migrant children and the coordination of national positions on migration, which were reviewed in Sections 4.2.1 and 4.2.3, can be seen to fall under this economic objective.

Second, there was the social objective linked with TCN workers' contribution to growth. Due to their status as workers, migrants had to be treated with respect and the Community had to take action for the improvement of their living and working conditions. The measures related to education of migrant children and the emphasis on equal treatment, as the central principle guiding integration were linked to the pursuit of this objective which is identical for all migrants regardless of their origin. At the stage of Community law under examination, the Commission envisioned a policy on labour migration that would cover both TCN workers and Community workers without discrimination. Both these categories of migration were necessary for the economic development of the Community and both should be attributed rights to ensure social progress in the Community. This grounding of the Commission's approach on the parallel pursuit of economic and social objectives is essentially an attempt to ensure a system of sustainable migration.

This aspiration did not meet much resistance from the Council, as long as there were national labour demands to be filled. While the Commission consistently backed this aspiration in the years that followed, the economic effects of the oil crisis and the increase in unemployment gave rise to a more restrictive approach in the Council as we shall see in detail in Chapter 5. In the meantime, the next section investigates the regulation of migration in the context agreements concluded by the EU with third countries either with the aim of instituting closer cooperation (like Association Agreements) or with the aim of accession.

4.3 Special Arrangements for Migrants whose State of Origin is (about to be) Implicated in the Development Project

Having examined the legislative evolution of the free movement framework under Section 4.1, and the ambition of extending rights to TCN workers regardless of their country of origin in Section 4.2, this section addresses the special arrangements made to regulate migration from specific third countries. First, it will be shown how social and economic objectives, paired with favourable economic circumstances, laid the foundation for the extensive protection of Turkish workers under the EEC-Turkey Association Agreement. Then, Section 4.3.2 shows how economic cooperation with specific countries that were crucial for supplying migrant labour

led to the attribution of rights to third-country nationals, despite their exclusion from primary and secondary law. Finally, Section 4.3.3 turns to enlargement processes and investigates how accession treaties concluded during this period were framed in light of ensuring the promotion of economic objectives, while limiting migration rights for nationals of acceding states. The analysis reveals the constant attempts by EU institutions to ensure that migration policy is aligned with the objectives of growth and progress, and thereby with the economic and social pillars of sustainability.

4.3.1 Turkish Workers under the EEC-Turkey Association Agreement

The EEC-Turkey Agreement was concluded in 1963 with a view to preparing Turkey for eventual accession to the EU. Such an evolution has not materialized to this day.[129] Despite the fact that the accession has not occurred, the rights granted by this agreement to Turkish workers are quite extensive, especially as judicially interpreted, as we will see in Chapter 5. Due to this, their privileged status compared to other third country-national workers has been acknowledged in scholarship.[130] The aim of the EEC-Turkey Agreement enshrined in Article 2 was the continuous and balanced strengthening of economic relations between the parties, taking into account the need to ensure both the economic and social development of Turkey. In addition, the importance of Turkish workers for the development of the EU and for the functioning of the Turkish economy was acknowledged by all parties.[131]

Labour migration was regulated in the Agreement in the following way. Article 12 provided that the parties should be guided by Articles 48, 49 and 50 EC Treaty for the purpose of progressively securing free movement of workers. Article 36 of the Additional Protocol to the Agreement provided that free movement of workers between Turkey and the Community must be secured by progressive stages in the period between the end of the 12th and the 22nd year after the entry into force of the agreement subject to rules adopted by the Association Council.[132] Article 37 provided that Turkish nationals employed in the Member States should enjoy equal

[129] Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) [1977] OJ L 361/29.

[130] Narin Idriz, 'Hierarchies of Privilege: Juxtaposing Family Reunification Rights, Integration Requirements, and Nationality in EU Law' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020).

[131] HAEU, EM87 Secrétariat General, Rapport préliminaire de la Commission au Conseil au sujet du passage de la phase préparatoire à la phase transitoire de l'Accord d' Association avec la Turquie SEC(68)1386.

[132] Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force [1972] OJ L 293.

treatment as regards conditions of work and remuneration. Finally, under Article 38, the Association Council had the possibility to return to issues related to the geographical and occupational mobility of Turkish workers in order to facilitate their employment in the Member States as the association progressed. Article 39 provided that the Association Council would eventually adopt social security measures for the workers and their families, whereas under Article 40, it could make recommendations for the exchange of young workers guided by Article 50 EC.

In the progressive development of the Association, the Association Council adopted specific decisions in order to implement Article 12 of the Agreement and Article 36 of the Additional protocol.[133] During the process of negotiating these decisions, the Turkish side put continued emphasis on the need to ensure priority for its nationals in the EU labour market.[134] The Community resisted this prioritization as inconceivable since, in parallel to this Agreement, it was negotiating Association Agreements with all the countries from which it received migrant workers. Next to the Association concluded with Greece, it was negotiating with the Maghreb countries and Yugoslavia, which were also labour exporting countries.[135] Thus, giving priority to Turkish workers would necessarily mean giving priority to all the other countries under negotiation, which would make the provision pointless. [136] At the same time, member-state delegations invoked issues of political nature (in relation to antagonisms with other Mediterranean countries with which they had historical bonds), economic (in relation to the effects such a priority would have in case of a potential recession in the Community economies) and technical (in relation to the practical procedure of recruitment).[137]

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[133] These were Decisions 2/76, 1/80 and 3/80. Their provisions will be analysed in detail in the sections following, together with the Court's case-law that interpreted them.

[134] HAEU, EM87, Secrétariat General, Rapport préliminaire de la Commission au Conseil au sujet du passage de la phase préparatoire à la phase transitoire de l'Accord d' Association avec la Turquie SEC(68)1386, point 11.

[135] Association agreement with Greece presented in Section 4.3.3 See Article 44-46 of Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, [1983] OJ L 41/2 which ended in 1991.

[136] HAEU, EM87, Le Conseil, Association CEE-Turquie, Projet de Rapport du Comité «Associations Pays Tiers» au Comité des Représentants Permanents (Document de travail établi par le Secrétariat et destine à être examine au cours de la réunion du 5 juillet 1968), Objet: Passage de la phase préparatoire à la phase transitoire de l'Accord d' Association avec la Turquie, S/595/68 (NT 24) 20; HAEU, EM87, Secrétariat General, Rapport préliminaire de la Commission au Conseil au sujet du passage de la phase préparatoire à la phase transitoire de l'Accord d' Association avec la Turquie SEC(68)1386, point 12; HAEU, EM89, Le Conseil, Association CEE-Turquie, Aide-Mémoire du Secrétariat, Objet: Passage de la phase préparatoire à la phase transitoire de l'Accord d' Association avec la Turquie, Régime à prévoir en ce qui concerne le main d'œuvre, S/30/69 (NT 2).

[137] HAEU, EM89, Le Conseil, Association CEE-Turquie, Aide-Mémoire du Secrétariat, Objet: Passage de la phase de la phase préparatoire à la phase transitoire de l'Accord d' Association avec la Turquie, Régime a prévoir en ce qui concerne le main d'œuvre, S/30/69 (NT 2) page 6.

Despite this, the Community sought to find a solution for a rational use of Turkish manpower that could assist in the harmonious economic development of both the Community and Turkey.[138] What could be offered to achieve this was the implementation of the principle of non-discrimination by an analogous application of Article 48(2) EC,[139] and the easing of restrictions to professional and geographic mobility within the Member States in a more preferential way compared to other migrant workers.[140] In this regard, the position of economic and social considerations and their effects on the rights granted to migrant workers in the context of International Agreements was correctly conceptualized by Edoardo Martino, the Community Commissioner for External Relations in the period of 1967-1970, during a speech to the EEC-Turkey Joined Parliamentary Committee

> Il convient de remarquer, a cet égard, que le problème de la libre circulation des travailleurs turcs à l'intérieur de la Communauté parait avoir été jusqu'à présent quelque peu surestimé. En effet, ce qui compte n'est pas seulement le statut juridique en tant que tel des travailleurs turcs, mais aussi la conjoncture économique favorable, d'une part, l'expérience et la qualification technique des travailleurs turcs, d'autre part. Dans la mesure où ces deux conditions sont réalisées le problème de la libre circulation des travailleurs turcs à l'intérieur des états membres de la Communauté pourrait apparaitre en quelque sorte un peu théorique.[141]

In this passage Mr. Martino suggested that the issue of granting rights to Turkish workers was very much dependent on what these workers brought to the Community markets in terms of technical expertise, and the prevailing economic conditions in

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See also HAEU, EM89, Le Conseil d'Association, Sommaire des Conclusions de la 19eme Réunion du Comité d'association CEE-Turquie qui s'est tenue à Bruxelles le mardi 11 mars 1969 CEE-TR 9/69, 19.

[138] HAEU, EM88, Commission Parlementaire Mixte CEE-Turquie, Recommandation no 2 sur le passage à la phase transitoire de l'association, point 9. For a detailed overview of the negotiating differences HAEU, EM89, Le Conseil d'Association, Rapport du Comité d'Association au Conseil d'Association CEE-TR 25/69. See also HAEU, EM89, Direction Général des Relations Extérieures, Bruxelles, 26.02.1969 10391, Note a l'attention de monsieur Martino, Objet: négociations avec la Turquie en vue du passage à la phase transitoire de L'Accord d'Ankara, session du conseil d' Association du 25 Février 1969.

[139] HAEU, EM89, Le Conseil, Association CEE-Turquie, Aide-Mémoire du Secrétariat, Objet: Passage de la phase préparatoire a à la phase transitoire de l'Accord d' Association avec la Turquie, Régime a prévoir en ce qui concerne le main d'œuvre, S/30/69 (NT 2) page 4.

[140] HAEU, EM89, Secrétariat General, Projet de Communication au Conseil concernant l'état des négociations avec la Turquie sur le passage à la phase transitoire de l'Accord d' Ankara (présente par M. Martino) SEC(69)1601 page 11. The Commission referred to an OECD decision, which suggested the abolition of such restrictions after five years of unlimited employment and suggested that the relevant time could be three years for example in the case of Turkish workers.

[141] HAEU, EM91, Exposé de M Edoardo Martino, Membre de la Commission des Communautés européennes, Annex IV, Commission Parlementaire Mixte CEE-Turquie, Process Verbal de la VIIIe Session, du 27 au 30 Janvier 1970, Munich PE 24.098, 17.

the Member States. As long as there was a favourable economic climate, experienced workers would be needed to cover labour demands, and the question of granting them free movement rights became theoretical. The legal protection to be accorded to migrant workers should then be seen as closely tied to the economic conditions existing at the time when the relevant legal instruments are negotiated.

Ultimately, the rights of Turkish workers were established in Decision 2/76 adopted as the first stage in securing free movement of Turkish workers, and Decision 1/80 intended to improve the treatment of workers and their families in the social field.[142] These Decisions provided that Turkish workers duly registered as belonging to the labour force of a member would be entitled, after a specified period of legal employment, to free access to any employment of their choice. What is more, Turkey succeeded in securing a priority status in the Community labour market,[143] a provision which, together with the aims of the Agreement and the function of Turkish workers can be seen as the basis for the differentiated treatment of Turkish workers compared to other TCN workers.[144]

These Decisions also included safeguard clauses. Article 6 of Decision 2/76 and Article 12 of Decision No 1/80 provided that in cases where a Member State experience or anticipated disturbances in the labour market which could affect the standard of living or level of employment in a region, branch of activity or occupation, it could refrain from granting rights to Turkish workers and their families. This safeguard clause should be seen in parallel to Article 15 of Decision 1/80, which provided that the Association Committee should exchange information on the economic and social situation in Turkey and the outlook of the labour market to ensure that the provisions of the Decision do not cause the danger of disturbance of the Member States' employment markets. Decision 3/80 was also adopted to coordinate social security for Turkish workers.[145]

It should be noted that EEC-Turkey Agreement and its implementing Decisions did not create a right of residence for Turkish migrant workers. Member States maintained competence on regulating the admission of Turkish workers and their families under national law. What was regulated was the progressive access of Turkish workers to the Community labour market by a system based on attribution of rights depending on the period the migrant workers had spent under employment. Arguably, rights were earned by Turkish workers to the extent that they contributed

[142] Article 1 of the Decision 2/76 and recital 1/80 Decision No 1/80 of 19 September 1980 on the development of the Association.

[143] See Article 8 Decision 1/80.

[144] See analysis in Chapter 5, Section 5.3.1.

[145] Decision no 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member states of the European Communities to Turkish workers and members of their families [unpublished].

to the Community project of growth by their long participation in national labour markets. The specific provisions that regulated this attribution of rights are examined in more detail in Chapter 5, together with the case-law which interpreted them. In the relevant analysis it becomes apparent that not only the aim of the agreement, but also the function of the individual migrant was taken into account by the Court in interpreting the provisions of the EEC-Turkey Agreement and its implementing Decisions.

4.3.2 A Minimum Right to Non-discrimination in Association Agreements

Provisions granting rights to TCN workers were also included in agreements concluded by the EU with countries from which it traditionally imported labour. Next to the Association Agreements concluded with Greece and Turkey, which foresaw the possibility of Accession, the first Cooperation Agreements that included labour migration clauses were signed with Morocco, Algeria and Tunisia in the 1970s.[146] These Agreements had the purpose of contributing to the economic and social development of these third countries.[147] They established cooperation in the field of labour, which was guided by similar provisions in all three Agreements. At the time of their negotiation, workers from Morocco, Algeria and Tunisia were employed in large numbers in various Member States.[148] The countries of origin of TCN migrants were suffering extreme demographic pressures and had no means to finance the creation of new employment.[149] Migrant work in the Community was crucial for their development, as it both eased pressure in the local employment markets and supported national economies through remittances. This support raised

[146] Prior to these, the Community had set in place time-limited association agreements with Morocco and Tunisia with no labour related provisions. See Agreement establishing an Association between the European Economic Community and the Kingdom of Morocco [1973] OJ L 239; Agreement establishing an Association between the European Economic Community and the Tunisian Republic [1973] OJ L 239/125.

[147] See Preamble Recital 2 and Article 1 Cooperation Agreement between the European Economic Community and the Kingdom of Morocco [1978] OJ L 264/2; Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria [1978] OJ L 263/2; Cooperation Agreement between the European Economic Community and the Republic of Tunisia - Protocol 1 on technical and financial cooperation [1978] OJ L 265/2.

[148] See Commission of the European Communities, Spokesman's Group and Directorate General for Information, Europe Information Development, EEC-Morocco Cooperation Agreement, February 1980, 25 which states that there were about 180,000 Moroccan workers in the Community of whom about 130,000 are in France. Similarly, Commission of the European Communities, Information Directorate-General, Information, Cooperation and Development, EEC/Tunisia Cooperation Agreement, 162/77 E, 20 mention 85.000 Tunisians in the EEC of whom 70.000 in France.

[149] HAEU, EM130, Commission Communication to the Council, Relations de la CEE avec les pays du Maghreb, 4-10.

the purchasing power of the countries of origin, which was then used to the benefit of Europe.[150]

For this reason, the third counties tried to ensure some type of preferential access to employment for their nationals. [151] The interdependence created between their economies and the Community, due to the labour export from the former to the latter, meant that it would be inconceivable for any cooperation not to cover labour-related questions. [152] However, the Community was not willing to grant preferential treatment to workers from Morocco, Algeria and Tunisia, mostly because Greece and Turkey were negotiating similar advantages at the time, and they too had a large number of workers employed in the Member States. The Commission held that any advantage for Maghreb countries would have to be extended to Greece and Turkey.[153]

However, the Commission also held that it that was 'natural' for any cooperation to include a guarantee of non-discrimination on working conditions and remuneration.[154] After all, these migrants had 'contributed, and continue to contribute to Europe's economic development'.[155] The final version of the Agreements eventually provided for equal treatment of Moroccan, Algerian and Tunisian nationals as regards working conditions and remuneration.[156] Further, the Agreements provided that TCNs of the associated countries and their family members would enjoy equal treatment in the field of social security.[157]

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[150] See Commission of the European Communities, Directorate General for Information, Europe-South Dialogue, The Mediterranean Policy, 1984, 5.

[151] HAEU, EM130, Communication de la Commission au Conseil, Relations de la CEE avec les pays du Maghreb G(66) 524 final, points 64-65.

[152] European Commission, The relation between the Community and the Mediterranean Countries, Information Note P-48, October 1972, 2. See also Commission of the European Communities, Information Directorate-General, Information, Cooperation-Development, The European Community and the Arab World, 169/78 which mentions that 800.000 Arab workers are engaged in Member states. See also Commission of the European Communities, Cooperation Agreements between the European Community, Algeria, Morocco and Tunisia, Information Note P-14, March 1976, Section IV Cooperation in the field of labour.

[153] HAEU, EM130, Commission Communication to the Council, Relations de la CEE avec les pays du Maghreb, 4-10.

[154] Commission of the European Communities, Cooperation Agreements Between the European Community, Algeria, Morocco and Tunisia, Information Note P-14, March 1976 Section IV Cooperation in the field of labour.

[155] Commission of the European Communities, Information Directorate-General, Information, Cooperation-Development, the European Community and the Arab World, 169/78, 16.

[156] Article 40 EC- Morocco Cooperation Agreement, Article 38 EEC- Algeria Cooperation Agreement, Article 39 EEC- Tunisia Cooperation Agreement.

[157] Article 41 EEC- Morocco Cooperation Agreement, 39 EEC- Algeria Cooperation Agreement, 40 EEC- Tunisia Cooperation Agreement. In the same field, the agreements provided for the

The changing economic and political circumstances that existed in the EU in the late 1970s called for a reconsideration of its approach to its Mediterranean partners. Specifically, the rise in unemployment in Member States, the introduction of restrictive migration policies to stem the inflow of foreign workers, in order to address both the lack of jobs, as well as the need to integrate existing migrant labour and the completion of the South enlargement, whose candidates traditionally supplied migrant labour to the Community, limited the potential of large-scale migration from the Mediterranean region, as the relevant labour supply could not be absorbed.[158]

During this period, the Community suggested an approach to its cooperation with South Mediterranean that would emphasize both the rights of TCN workers employed in the Community and their function in the development process in their country of origin. A Commission Communication on the matter mentions that 'The Community owes much of its prosperity to migrant workers – it cannot now refuse its responsibility for their future. It should increase its efforts to give them true equality in their conditions of life and work.'[159] The Commission also mentioned the need for measures to support integration of workers and their families in the host countries.[160] Once more in this context we see that the functional role of the migrant sets the basis for the attribution of rights at the Community level in a discourse that is identical to the Commission's approach for both community and third-country nationals, as was suggested in Sections 4.1 and 4.2.

At the same time, clauses like the ones found in the Association Agreements with the Mediterranean were not included in the agreements regulating the cooperation of the EU with African, Caribbean and Pacific Countries (ACP). At the time of conclusion of the Treaty of Rome, decolonization was under way and the founding states set up a framework that would allow them to maintain trade with their former colonies, while excluding nationals of these countries from free movement.[161]

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aggregation of insurance, employment and residence periods for workers, medical care for workers and their families, payment of family allowances and transfer of pensions to their country of origin.

[158] Commission Communication to the Council, On a Mediterranean policy for the enlarged Community, COM(82)353 final 2-3.See also Opinion of the European and Economic Social Committee on the Mediterranean policy of the European Community, 89/C 221/05, [1989] OJ C 221/16 which mentions under point 9.29 the 17 million Community unemployed next to a growing gap between the main labour market and the secondary [temporary and socially unpopular jobs] and the black economy.

[159] On a Mediterranean policy for the enlarged Community, COM(82)353 final para 19.

[160] ibid. The Opinion of the European and Economic Social Committee on the Mediterranean policy of the European Community, 89/C 221/05, [1989] OJ C 221/16 also calls for full application of social legislation and collective bargaining in light with ILO Convention 143 under point 9.29.

[161] See Fourth part, Treaty of Rome, Article 135. Under the pressure of France, see Note du ministère de la France d'Outre-mer sur l'Union française et le Marché commun (Paris, 3 mai 1956) and

Scholars have engaged with how this exclusion privileged the interests of European states over the rights of former colonial subjects.[162] These interests were indeed privileged, with no consideration given to obligations of the Member States towards their former colonies. Archival material shows that underdevelopment of these states and the unskilled nature of their labour force were the reasons put forward for this exclusion.[163] As the Community states had no need for unskilled labour, the inclusion of the former colonial subjects in the free movement regime would only bring economic risks.

As decolonization proceeded and the Overseas Countries and Territories (OCTs) gained independence, various Conventions were put in place to establish trade cooperation with no mention of migrant's rights.[164] It was not till late 1970s, in the Lomé II Convention, that the parties attached a Declaration on the matter. The Declaration provided that states would accord migrant workers legally employed in their territory equal treatment as regards working conditions and pay. The Declaration also provided that migrant workers and their families were entitled to enjoy equal treatment as regards social security benefits linked to employment.[165] A similar Declaration was attached to Lomé III, supplemented by another Declaration acknowledging that migrant workers and their families would enjoy in the host state the fundamental freedoms derived from general principles of international law as well as treatment free from discrimination on the basis of race, religious, cultural and social differences.[166] Under Article 31 VCLT, Declarations are to be taken into

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Note de Léon Pignon sur la France d'Outre-mer et le marché commun (Paris, 15 mai 1956) Archives Nationales d'Outre-Mer, Aix-en-Provence accessed in the digital collection of CVCE.

[162] Indicative Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022) 117–138.

[163] Mémorandum du comité Verret sur la participation des PTOM au Marché commun (Paris, 5 octobre 1956), Fondation Jean Monnet pour l'Europe, Lausanne, Archives Jean Monnet. Fonds ARM. 16/9/2 where it is stated that there would be no way of participation of these states in the common market without derogations from its fundamental principles due to their state of underdevelopment.

[164] Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté, Signée à Yaoundé le 20 juillet 1963 [1964] OJ L 93/1431; Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté, Signée à Yaoundé le 29 juillet 1969 [1970] OJ L 282/2; Absence of considerations is also attested in Communication de la Commission au Conseil, Problemes de Renouvellement de la Convention de Yaoundé COM(68)230 32, which mentions the intention to abolish discrimination on freedom of establishment and provisions of services but lacks any consideration on free movement of workers.

[165] Annex XV Joint Declaration on workers who are nationals of one of the contracting parties and are residing legally in the territory of a Member State or an ACP State, Second ACP-EEC Convention signed at Lomé on 31 October 1979 [1980] OJ L 347/2.

[166] Annex X, Joint declaration on workers who are nationals of one of the Contracting Parties and are legally resident in the territory of a Member State or an ACP State and Annex IX, Joint

account for the purposes of interpretation of international agreements. Given that no provision of Lomé included any obligation as regards migrant workers and the non-binding status of the declarations, they were unlikely to directly confer rights to migrant workers.[167] Equal treatment eventually made it into the Agreement in Lomé IV. Article 5, which made extensive references to human rights in the context of development and cooperation of the parties, provided under paragraph 2 that migrant workers must not be discriminated against on the basis of racial, religious, cultural or social differences not only as regards employment but also as regards housing, education, health care, and other social services.[168] In parallel to this, the Joint Declaration specifying the equal treatment rights of migrant workers and their families was maintained as formulated in Lomé III.[169]

Overall, these agreements were not framed with the aim of creating rights for migrant workers to enter Member States. Rather they demanded the effective protection of workers who were already resident and employed in Member States under national law. Given the significant presence of migrants from the associated states in the Community labour market, the guarantee of equal treatment was inserted to ensure their social advancement by an entitlement to a certain level of protection as regards working conditions, remuneration, and social security, as compensation for their contribution to the common market. Behind such rights is the demand that migration does not only support the growth of Community industries, but also the fair treatment of the migrants, thereby ensuring social progress at the individual level and social cohesion at the Member State level. The way the demands for rights were incorporated in these Agreements showcases a balancing between economic and social objectives similar to what would be conveyed today in the concept of economic and social sustainability.

Declaration on ACP migrant workers and ACP students in the Community, Third ACP-EEC Convention signed at Lomé on 8 December 1984 [1986] OJ L 86/3.

[167] See however Katharina Eisele, The External Dimension of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective (Brill Nijhoff 2014) 261 who argues that there can be direct effect of these with reference to the direct effect of provisions of Annexes to International Agreements.

[168] The non-discrimination demand applies also to students and foreign nationals legally found in the territory of Member states or ACP states.

[169] Annex V, Joint declaration on ACP migrant workers and ACP students in the Community and ANNEX VI, Joint declaration on workers who are nationals of one of the Contracting Parties and are legally resident in a territory of a Member State or an ACP State, Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 [1991] OJ L 229/3.

4.3.3 Avoiding the Presumed Negative Effects of Migration in Accession Treaties

Previous sections have examined the frameworks creating rights of different extent for migrant workers from third countries (from progressive access to employment and security of residence for Turkish nationals to social rights for migrants under Association Agreements). This section considers the in-between category of migrants whose states of origin were about to become a part of the Community growth project.

Accession to the Community did not take place in an unregulated manner. Various clauses were inserted in different Accession Treaties, and the enlargement process became differentiated over the years, to minimize the economic risks that could be caused by extending free movement of workers to all nationals of the acceding states. This differentiation took into account the circumstances of the acceding states in terms of economic development, as well as the extent to which they were already labour-exporting countries to the other Member States.

The first enlargement took place through the accession of the United Kingdom, Ireland, Denmark in the 1970s. The relevant Accession Treaty provided the nationals of the acceding Member States with direct access to the free movement of workers framework. During the decade of negotiation that led to this enlargement, issues related to migration did not come up. From the perspective of the founding six, the UK, Denmark and Ireland did not pose any risk in that respect, as they were not emigration countries. As a result, there was no prospect of migration flows that could cause any disruption to the Community labour market. From the perspective of the acceding states, the issue of migration appeared in a marginal way in the negotiations, and was of relevance solely in the internal politics of the UK.[170] In this regard, no transitional period was set as to the application of free movement of workers provisions. This meant that UK, Irish and Danish nationals immediately enjoyed free movement rights as Community workers.

Despite the fact there was no migration-related risk, the Accession Treaty included a general safeguard clause under Article 135(1), which allowed both old and new Member States to apply for authorization to take protective measures in case of difficulties 'which are serious and liable to persist in any sector of the economy or

[170] See a speech by Hugh Gaitskell against UK Membership of the Common Market (3 October 1962), Britain and the Common Market, Texts of speeches made at the 1962 Labour Party Conference by the Rt. Hon Hugh Gaitskell M.P. and the Rt. Hon. George Brown M.P., together with the policy statement accepted by Conference (Labour Party 1962) where he emphasized the issue of unemployment in Britain at the time and the importance of reserving national powers to deal with the matter. See also WR Böhning, The Migration of Workers in the United Kingdom and the European Community (Oxford University Press for the Institute of Race Relations 1972) written with the aim of diffusing the misconceptions about a potential threat to the UK economy by foreign workers.

which could bring about serious deterioration in the economic situation of a given area'. Such an application was subject to the review of the Commission under Article 135(2). This general safeguard clause was similar to that of Article 226 of the Treaty of Rome. In this respect, it added nothing novel to the Community framework. The first free movement regulations examined in Section 4.1 also had clauses allowing derogations by Member States in case of national unemployment.[171] Finally, the Member States also attached a declaration to the Accession Treaty, where they acknowledged that free movement of workers might potentially create difficulties for the social situation of Member States.[172] As a result, they reserved the right to bring the matter before the Community institutions, should such difficulties arise, in order to tackle it from within Community law.

In contrast to this first enlargement, which included safeguards despite the absence of risks, the accession treaties signed with Greece in 1979, and Spain and Portugal in 1985 were differentiated to take into account risks related to potential migration flows. In these cases, the risks stemmed from the fact that the candidate states were traditional emigration states, and were less economically developed compared to the other members of the Community club. In the first enlargement, there existed a level of homogeneity between the founding and the acceding Member States.[173] Their level of development and industrialization was similar, allowing a smooth transition in a common market focused on promoting economic growth and social progress. Greece, Spain and Portugal, on the other hand, were considered developing countries.[174] Despite individual differences, they had recently transitioned to democracy and were all lagging behind the Community in terms of economic development.[175] Their economies were primarily based on agriculture, their rate of economic growth was not as high as that of the Community Member States, they were facing problems with unemployment, and they were already countries of origin of labour migration to the Community.[176] In this context, a Commission analysis on labour migration from Greece, Spain and Portugal noted that

[171] Regulation 15/1961, Regulation 38/64 in Preamble and Articles 2, 4-6; Regulation 1612/1968 Article 20.

[172] Joint Declaration on the free movement of workers, Treaty of Accession of Denmark, Ireland and the United Kingdom [1972] OJ L 73.

[173] Commission Communication, General Considerations on the Problems of Enlargement, COM(78)120 final points 4-6.

[174] Bulletin of the European Communities, May 1978, Supplement 5/1978, Commission Opinion on Portugal's application for accession, paras 4,11.

[175] Commission Communication, General Considerations on the Problems of Enlargement, COM(78)120 final points 1 and 6.

[176] ibid points 4-6. Greece had also concluded an Association Agreement with the Community already 1961 that provided for the creation of a customs union after a 22 year transitional period and a free movement regime after a 12 year transitional period and for future consideration of accession of Greece to the Community. Due to political changes in Greece (military occupation)

> During the period of high economic growth up to 1973, these [labor migration] links created a source of interdependence between the three applicant countries and the Community, with the Community being able to make up its labor shortage from labor surpluses in the applicant countries. Since the emergence of high and continuing levels of unemployment in the Community, this interdependence has gradually changed into a relationship of unilateral dependence of the three applicant countries on the Community, particularly France and Germany.[177]

The difference in economic and social conditions between the acceding countries and the Member States created the risk of high concentration of migrant workers in the more developed regions of the Community. This concern was particularly connected with anticipated migration from Spain.[178] There, the demographic prediction showed an anticipated growth in young population seeking their first job. As the Commission stated in its Opinion on the Spanish Accession, this created 'some justification for the fear that there would be a sudden flood of immigrants if access to employment were to be made completely free upon accession'.[179] This, in connection with the higher unemployment in the Community, created the necessity for extended transitional periods in order to allow the gradual and 'orderly' introduction of free movement.[180] Safeguard clauses were also considered next to the progressive liberalization of free movement to address 'erratic movements of labour'.[181]

Against this backdrop, the accession of the southern Member States was differentiated by the introduction of transitional arrangements specific to free movement of workers.[182] In the case of Greece, for a fixed period of six years, Greek workers would not be able to participate in the free movement framework.[183] During that period, Member States were allowed to regulate labour migration under national law, and thereby require prior authorization for migration of Greek workers to their territories. The members of the workers' family were equally excluded from access

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the Association Agreement was blocked. After the restoration of democracy, Greece applied for accession in 1975.

[177] Communication from the Commission to the Council, Economic and Sectoral Aspects, Commission Analysis supplementing its views on enlargement COM(78)200 final, Part I, point 46.

[178] Opinion on Spain's Application for Membership, COM(78)630 final, point 44.

[179] ibid point 117.

[180] ibid points 60, 117.

[181] ibid point 44.

[182] Article 44 Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties [1979] OJ L 291.

[183] Article 45 Act concerning the conditions of the Greek Accession.

to the labour market, albeit for a shorter period of 5 years.[184] As for Greek labour migrants who were already employed in Member States at the time of accession, members of their family would be allowed to independently take up work, if they had already resided with the worker for three years in the territory of the Member State where they sought employment.[185] From 1984 onwards this requirement would be limited to 18 months prior residence. This Accession Treaty also included the general safeguard clause that appeared in the first accession, allowing for protective measures to be adopted by the old Member States or Greece in case of serious problems which could bring deterioration in the economic situation in any given area for a period of six years.[186]

Similar transitional measures were adopted in the Portuguese and Spanish accession of 1985. The accession envisaged a fixed period of seven years, during which labour migration from the acceding countries would be regulated under national law or bilateral agreements.[187] With respect to Luxembourg, the relevant transitional period was extended to 10 years.[188] A new element, added for the first time in this Accession Treaty, is that the Community could subsequently review the transitional period and adjust the measures in place for Spanish and Portuguese workers within five years following the accession.[189] As for migrant workers employed prior to accession, members of their families residing with them would be allowed to immediately take up employment. Nevertheless, the Accession Treaty provided that such a right could be limited where special bilateral agreements put in place before the Accession Treaty provided for a different treatment.[190] As for Spanish and Portuguese workers who moved after the accession, their family members would be allowed to independently take up work if they had already resided with the worker for three years in the territory of the Member State where they sought employment. From 1989 onwards, this requirement would be limited to 18 months prior residence.[191] This accession also included the same general safeguard clause, which

[184] Article 45 (2) Act concerning the conditions of the Greek Accession.

[185] ibid.

[186] Article 130 Act concerning the conditions of the Greek Accession.

[187] Articles 56 and 216 Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties [1985] OJ L 302.

[188] ibid.

[189] Articles 56(2) and 216(2) Act concerning the conditions of the Spanish and Portuguese Accession.

[190] Articles 57(1)(a) and 217(1)(a) Act concerning the conditions of the Spanish and Portuguese Accession Treaty.

[191] Articles 57(1)(b) and 217(1)(b) Act concerning the conditions of the Spanish and Portuguese Accession.

allowed for protective measures to be adopted for a period of seven years.[192] The period was extended to 10 years for Luxembourg due to the difficulties related specifically to its employment market.[193]

The Accession Treaties did not make any differentiation as to how migrant workers who had been employed in Member States prior to accession should be treated during the transitional period. This gap was filled by the Court. In *Peskeloglou* and *Lopes da Veiga,* the Court dealt with restrictive policies against migrant workers and their family members who were nationals of Greece and Portugal.[194] The migrant workers were already employed in Germany in the case of *Peskeloglou,* and in the Netherlands in the case of *Lopes da Veiga,* prior to the accession of their states of origin to the Community. In both the cases, the Court confirmed that the aim of the derogation from free movement during the transitional period prescribed in the accession treaties was to prevent the disruption of the labour markets caused by the potential massive influx of migrants from the acceding Member States.[195] In this context, the Court held that derogations from free movement should be interpreted strictly, and should not be applied to the detriment of the migrant workers already residing in the Community Member States.[196] In contrast to this, in *Tsiotras v Landeshauptstadt Stuttgart*. the Court held that an unemployed national from an acceding Member State, for whom it has become objectively impossible to find employment, could not enjoy any rights under Community law during the transitional period. An ex-worker national of an acceding Member State who could no longer pursue work represented a category of migration that could pose adverse effects to economic growth. [197] Thus, only migrants actively engaged in the objective of growth and who could not pose a risk to the disruption of the labour market, could enjoy Community rights during the transitional periods.

In light of the above, and under a combined reading of the Accession Treaties and Regulation 1612/68 applicable to free movement of workers at the time of the Greek, Spanish and Portuguese accession, we can infer the following. All labour migrants from the acceding states who were employed in Community Member

[192] Article 379 Act concerning the conditions of the Spanish and Portuguese Accession.

[193] Article 379(4) Act concerning the conditions of the Spanish and Portuguese Accession.

[194] Judgment of 23 March 1983, *Peskeloglou v Bundesanstalt Für Arbeit*, 77/82, ECLI:EU:C:1983:92; Judgment of 27 September 1989, *Lopes da Veiga v Staatssecretaris van Justitie*, 9/88, ECLI:EU:C:1989:346.

[195] *Peskeloglou v Bundesanstalt Für Arbeit*, 77/82 para 12; *Lopes da Veiga v Staatssecretaris van Justitie*, 9/88 para 10. Also Judgment of 27 March 1990, *Rush Portuguesa v Office national d'immigration*, C-113/89, ECLI:EU:C:1990:142 para 19.

[196] *Peskeloglou v Bundesanstalt Für Arbeit*, 77/82 para 13; *Lopes da Veiga v Staatssecretaris van Justitie*, 9/88, para 10.

[197] Judgment of 26 May 1993*, Tsiotras v Landeshauptstadt Stuttgart*, C-171/91, ECLI:EU:C:1993:215.

States before or after accession would immediately benefit from the principle of equal treatment. Specifically, Article 48 EEC was subject to the transitional provisions laid down in the accession treaties and analysed above. At the same time, Regulation 1612/68, which implemented and specified how this freedom was to be enjoyed, was subject to transitional arrangements with respect to specific articles mentioned in the Accession Treaties. Article 7 of the Regulation, which constitutes a specific expression of the non-discrimination principle, was not mentioned as a provision whose application could be derogated during the transitional period. This meant that labour migrants of the acceding states who were employed in Community Member States during the transitional period fully enjoyed equal treatment.

In essence, the transitional arrangements set in place aimed at restricting free movement rights only for soon-to-be Community nationals who were suspected of seeking work in Community Member States. The fear of economic repercussions from a potential mass exodus to the north, which was a core rationale of the transitional arrangements, was unsubstantiated for one group of individuals from the acceding Member States. These were migrants who had established themselves in the Community prior to the accession and who were actively contributing to the development of the Community by participating in national labour markets as workers. Such migrants had acquired rights which should not be restricted during the transitional period.

Overall, in the regulation of accession, but also in the rest of the legal instruments which were negotiated and adopted in this period, the following characteristics can be identified. As the period was primarily characterized by demand for migrant labour, the Community agenda was quite liberal in the sense of demanding the extensive attribution of rights to migrant workers as a compensation for their participation in the project of growth. This was without consideration of nationality. Equal treatment in working conditions and social security was a bare minimum to be enjoyed by all migrant workers implicated in the Community project. In parallel, instruments which could lead to the creation of entry rights for migrants incorporated safeguard clauses to ensure that Member States can close the valve and limit potential adverse effects in case of change of economic conditions. Such safeguard clauses could not be adopted unilaterally and were instead submitted for review to the Community institutions. These were the ways in which social and economic objectives shaped the law-making during this period with due regard for parallel pursuit of growth and progress in a way which today would be called the pursuit of social and economic sustainability The next section turns to the Court of Justice of the EU and the way in which it revolutionized the protection enjoyed by migrant workers.

4.4 Social Rights of Community Migrants: A Judicial (R)evolution

In the secondary law adopted to implement free movement of workers provisions, the set of rights enjoyed by Community workers was dictated by Regulation 1612/68.[198] Article 7 of the Regulation implemented the non-discrimination principle of Article 48 EEC. It provided that migrant workers should enjoy equal treatment in relation to their working conditions and equal access to the social and tax advantages that are available to national workers. The Regulation also provided for the right of migrant workers to be joined by their family in the host Member State (Article 10), the right of family members to pursue employment (Article 11) and the right of migrant children to access education in the host Member State (Article 12).

In addition to this, Regulations 3 and 4 of 1958 and later Regulation 1408/71 were adopted under Article 51 EEC to coordinate social security between the Member States. Social security rights were harmonized to facilitate free movement of workers, and this objective conditioned the interpretation of the relevant regulations.[199] The Court developed a rich case-law on social security dealing primarily with the calculation of pension rights or accident costs.[200] By focusing on the abolition of barriers to ensure the greatest possible free movement for migrant workers and their families, it ensured the protection of Community workers.[201]

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[198] Until 2011, when it was repealed by Regulation 492/2011.

[199] Judgment of 19 March 1964, (*Hoekstra) Unger v Bedrijfsvereniging voor Detailhandel en Ambachten*, 75/63, ECLI:EU:C:1964:19 p 184.

[200] Judgment of 9 June 1964, *Nonnenmacher v Sociale Verzekeringsbank*, 92/63, ECLI:EU:C:1964:40; Judgment of 15 July 1964, *Van der Veen v Sociale Verzekeringsbank*, 100/63 , ECLI:EU:C:1964:65; Judgment of 2 December 1964, *Dingemans v Sociale Verzekeringsbank*, 24/64, ECLI:EU:C:1964:86; Judgment of 11 March 1965, *Sociale Voorzorg v Bertholet,* 31/64, ECLI:EU:C:1965:18; Judgment of 11 March 1965, *Betriebskrankenkasse der Heseper Torfwerke v Van Dijk*, 33/64, ECLI:EU:C:1965:19; 33/65 Judgment of 1 December 1965*, Dekker v Bundesversicherungsanstalt für Angestellte*, 33/65, ECLI:EU:C:1965:118.

[201] Judgment of 9 December 1965, *Hessische Knappschaft v Singer et Fils*, 44/65, ECLI:EU:C:1965:122; Judgment of 30 June 1966, *Vaassen-Goebbels v Beambtenfonds voor het Mijnbedrijf,* 61/65,ECLI:EU:C:1966:39; Judgment of 13 July 1966*, Hagenbeek v Raad van Arbeid*, 4/66, ECLI:EU:C:1966:43; Judgment of 5 July 1967, *De Moor v Caisse de pension des employés privés*, 2/67, ECLI:EU:C:1967:28; Judgment of 5 July 1967, *Guerra v INAMI*, 6/67, ECLI:EU:C:1967:29; Judgment of 5 July 1967, *Colditz v Caisse d'assurance vieillesse des travailleurs salariés*, 9/67, ECLI:EU:C:1967:30; Judgment of 5 December 1967, *Landesversicherungsanstalt Rheinland-Pfalz v Welchner*, 14/67, ECLI:EU:C:1967:48; Judgment of 30 November 1967, *Cossutta v Office national des pensions pour ouvriers*, 18/67, ECLI:EU:C:1967:46; Judgment of 5 December 1967, *Soziale Verzekeringsbank v Van Der Vecht*, 19/67, ECLI:EU:C:1967:49; Judgment of 30 November 1967, *Caisse regionale de sécurité sociale du Nord v Goffart*, 22/67, ECLI:EU:C:1967:47; Judgment of 19 December 1968, *De Cicco v Landesversicherungsanstalt Schwaben*, 19/68, ECLI:EU:C:1968:56; Judgment of 7 May

However, in cases where the Court assessed that the rights of Community workers could not be protected under the more specific scope of application of Regulation 1408/71 on social security rights, it did not exclude the relevant rights from the scope of Community law. Rather, it used the principle of non-discrimination and created extensive rights, by recourse to the concept of social advantages under Article 7 Regulation 1612/68.

By reviewing of the case-law of the Court on the social rights granted to migrant workers (4.4.1) and their families (4.4.2), we can see how economic considerations conditioned the consolidation of social rights for migrant workers. Section 4.4.3 will demonstrate how this reasoning played out in relation to access to education by migrant workers and their families. The *ratio* underlying the judgments is that granting social protection to migrants and thereby improving their living and working conditions can guarantee labour mobility that will in turn lead to the development of the Member States' economies. The achievement of growth was considered to bring about social progress as a by-product, by the raising of living standards for the worker in the form of social rights.

4.4.1. Social Advantages Extending the Scope of Equal Treatment

During the 1970s and 1980s the Court addressed many different aspects of Regulation 1612/68 and developed a rich case-law that extended the rights granted to migrant workers beyond what might be imagined under a literal reading of the Regulation. The logic behind this approach can be found in the 5th Recital of Regulation 1612/68, which prescribes, *inter alia*, that free movement should be exercised in freedom and dignity, and that worker and their families should be integrated in the host country. The economic benefits of migration and its position as means to achieve further development of the Union were tied to an improvement in the living and working conditions of the migrant and eventual social progress of the Community.

The provision of Article 7(2) Regulation 1612/68 provided that migrant workers should enjoy equal treatment in relation to their working conditions, and equal access to the social and tax advantages that are available to national workers. This provision was central to the development of the relevant case-law. In all cases where the Court dealt with discriminatory practices against migrant workers, it resolved them by recourse to the non-discrimination principle of Article 48 EEC, and Article

1969, *Caisse regionale de sécurité sociale du Nord v Torrekens*, 28/68, ECLI:EU:C:1969:17; Judgment of 5 July 1967, *Ciechelsky v Caisse regionale de sécurité sociale du Centre*, 1/67, ECLI:EU:C:1967:27; Judgment of 5 July 1967, *Colditz v Caisse d'assurance vieillesse des travailleurs salariés*, 9/67, ECLI:EU:C:1967:30; Judgment of 12 December 1967, *Office national des pensions pour ouvriers v Couture*, 11/67, ECLI:EU:C:1967:52.

7 of Regulation 1612/68, which was held to be a more specific application of Article 7 EEC.

The Court interpreted the concept of social advantages broadly and found that they did not have to be directly linked to a contract of employment. Specifically, it defined social advantages as all the advantages

> which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community.[202]

Already in 1969, the Court examined its first free movement case, which concerned protection against disadvantages resulting from fulfillment of military service.[203] *Ugliola*, an Italian worker in Germany, who had completed his military service in Italy, claimed the protection of a German law which provided that military service should be taken into account for the calculation of benefits related to the conditions of work and employment. Germany put forward an argument related to the economic burden it would have to bear if it were to apply the national benefits to workers who performed their military service in other Member States. Essentially it suggested that in such a case, it 'would be indirectly relieving the defence budget of those States'.[204] AG Gand's Opinion in the case reflected the economic integration basis of the Community and highlighted that free movement of workers was promoted and protected due to the multilateral advantages drawn by all members of the Community.[205] The Opinion implied that workers were not seen as full subjects of the Community.[206] They were rather protected in a format similar to bilateral migration treaties: the nationals of a state of origin should enjoy protection in a host state because the host state's nationals enjoy equal protection in the state of origin. The Court found that national law should extend to migrant workers in light of the principle of equal treatment under Article 48 EEC and 7 Regulation 1612/68.

Following this case, the Court's docket consisted of cases on different national benefits and their classification under Community law. In most cases, where the

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[202] Indicative Judgment of 31 May 1979, *Ministère public v Even*, 207/78, ECLI:EU:C:1979:144.

[203] Judgment of 15 October 1969, *Württembergische Milchverwertung Südmilch AG v Ugliola*, 15/69, ECLI:EU:C:1969:46

[204] *Ugliola*, 15/69, ECLI:EU:C:1969:46 p 367.

[205] Opinion of Advocate General Gand delivered on 10 July 1969 in *Württembergische Milchverwertung Südmilch AG v Ugliola*, 15/69, ECLI:EU:C:1969:38.

[206] In contrast to what was stated in the Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, 26/62, ECLI:EU:C:1963:1 that referred to the individual to a full subject of the EU legal order.

benefits could not be classified under social security coordination, the Court used Article 7(2) of Regulation 1612/68 and declared them to be social and tax advantages. Thus, it established an extensive reading that fortified the social protection offered to workers.[207]

At the same time, this reasoning was applied as regards discriminatory practices in Member States which were completely unrelated to employment. In *Marsman* the Court found that Community workers were entitled to the special protection against dismissal. Such a protection was granted under German law only to workers who were resident in Germany. The Court held that the protection should extend to all migrants who work in Germany, even if they reside in another Member State.[208] In *Mutsch*, the Court held that the right to be heard by a Court in one's own language was a social advantage under Article 7(2) of Regulation 1612/68.[209]

Then, in *Netherlands v Reed*, the Court held that the right of a Community worker to be accompanied by his unmarried partner also constituted a social advantage.[210] Article 10(1) Regulation 1612/68 provided the right of migrant workers to be joined by their spouse. The wording of the provision could not be stretched to incorporate family reunification rights for the unmarried partner.[211] Despite this, the Court held that the right to be accompanied by an unmarried partner fell within the scope of Community law. This right was recognized as a social advantage for the purposes of Regulation 1612/68 in light of the economic function of the Regulation.[212] The Court found that the residence permit of the unmarried partner supports the integration of the migrant worker in the host state and thereby contributes to the free movement of workers framework..[213]

In conclusion, the Court's case-law at the early stages of the EU project dealt with discriminatory practices against migrant workers in the Member States. Such cases were resolved by recourse to the non-discrimination principle of Article 48 EEC and Article 7 of Regulation 1612/68, which was held to be a more specific application of Article 7 EEC. As the Community developed, the Court attempted to guarantee

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[207] See for example Judgment of 14 January 1982, *Reina v Landeskreditbank Baden-Württemberg*, 65/81, ECLI:EU:C:1982:6 on interest-free loan granted with the purpose of assisting low-income families and encouraging childbirth. See Judgment of 27 March 1985, *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout*, 249/83, ECLI:EU:C:1985:139 para 22 on the Belgian minimex (subsistence benefit granted to anyone without sufficient means to support themselves).

[208] Judgment of 13 December 1972, *Marsman v Rosskamp*, 44/72, ECLI:EU:C:1972:120.

[209] Judgment of 11 July 1985, *Ministère public v Mutsch*, 137/84, ECLI:EU:C:1985:335.

[210] Judgment of 17 April 1986, *Netherlands v Reed*, 59/85, ECLI:EU:C:1986:157.

[211] ibid para 16.

[212] ibid para 28.

[213] ibid para 38.

the more human aspects of free movement. However, the competence of the Community on the market could not go further than the prescriptions of Article 51 EEC on the harmonization of social security systems. Where the Court saw that the rights of Community workers could not be protected under the more specific scope of application of Regulation 1408/71 on social security rights (due to the personal nature of certain rights or the relation to specific benefits in kind), it used the principle of non-discrimination and created a set of rights under the concept of social advantages under Regulation 1612/68.

4.4.2 Extensive Interpretation of Social Advantages for the Families of Migrant Workers

In parallel with this broad interpretation of social advantages for migrant workers, the Court developed a line of case-law on benefits for workers' family. This extension was affected by employing a similar line of reasoning. In most cases the Court recognized derivative rights for migrant workers' families as social advantages under Article 7(2) Regulation 1612/68. In the relevant case-law, the Court always clarified that social advantages granted to the worker's family were in all cases derivative rights, and they were enjoyed by virtue of the person's association to the migrant worker. This is because the members of a worker's family were granted the right to move in order to join the worker and ensure that they migrate in dignity.[214] Thus, the status of the migrant worker was the source of rights for the worker's family. The migrant worker was the only one engaged in the process of economic development of the Community, and as a result, the only subject that could draw rights directly from Community law. In this context, the Court recognized the right of workers' families to fare reduction cards for large families that were available to nationals of the host Member State,[215] handicap allowance for dependent children[216] and the right of dependent family members to old people's benefit.[217]

The protection afforded to workers' families was further extended in *Deak*, where the Court held that unemployment benefits could be granted to third-country-national family members of Community workers as social advantages under Article 7(2) of Regulation 1612/68.[218] The Court held that Deak could not draw rights to a

[214] 5th Recital and Article 10 of Regulation 1612/68.

[215] Judgment of 30 September 1975, *Cristini v S.N.C.F.*, 32/75, ECLI:EU:C:1975:120 para 16.

[216] Judgment of 16 December 1976, *Inzirillo v Caisse allocations familiales Lyon*, 63/76, ECLI:EU:C:1976:192.

[217] Judgment of 12 July 1984, *Castelli v ONTPS*, 261/83, ECLI:EU:C:1984:280; similar in Judgment of 6 June 1985, *Frascogna v Caisse des dépôts et consignations*, 157/84, ECLI:EU:C:1985:243.

[218] Judgment of 20 June 1985, *ONEM v Deak*, 94/84, ECLI:EU:C:1985:264.

benefit under Regulation 1408/71 on social security, as this Regulation applied to benefits related to personal rights of Community workers, and he was a third-country national associated to a worker.[219] In this context, the Court went on to examine whether protection could stem from Article 7(2) Regulation 1612/68, and it found that under this provision, advantages of this kind should be attributed to the worker's family. An unemployment benefit for the worker's child should be recognized as a social advantage of the worker herself due to the objective of effective exercise of free movement rights:

> A worker anxious to ensure for his [sic] children the enjoyment of the social benefits provided for by the legislation of the Member States for the support of young persons seeking employment would be induced not to remain in the Member State where he had established himself and found employment if that State could refuse to pay the benefits in question to his children because of their foreign nationality.[220]

Subsequently, the Court held that the principle of non-discrimination, which migrant workers enjoy in relation to their employment, also extended to their third-country-national spouses. In *Gül*, a Cypriot doctor married to a British worker in Germany was denied the renewal of his temporally limited authorization to practice medicine due to the fact that there was an increasing level of unemployment among doctors of German nationality.[221] The Court held that the right of access to the employment market enjoyed by the spouse of the migrant worker under Articles 10 and 11 Regulation 1612/68 was linked to the rights enjoyed by the worker under Article 48 EEC.[222] As long as the spouse relies on such 'secondary rights', their access to employment should take place under the same conditions of non-discrimination as those enjoyed by the migrant worker beneficiary of free movement.[223]

Later, the Court built on *Hoeckx* and the entitlement of workers to minimex, a Belgian minimum subsistence benefit, finding that dependent family members were also entitled to this benefit. Lebon, a French national, lived in Belgium with her father, who received a retirement pension there.[224] She received minimex, which was discontinued on the ground of lack of evidence that she was looking for a job.

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[219] ibid para 15-16.The case concerned a Hungarian national residing in Belgium with his Italian mother, who was a worker there. Deak was refused the special unemployment benefit due to his Hungarian nationality.

[220] ibid para 23.

[221] Judgment of 7 May 1986, *Gül v Regierungspräsident Düsseldorf*, 131/85, ECLI:EU:C:1986:200 para 6.

[222] ibid para 20.

[223] ibid.

[224] Judgment of 18 June 1987, *CPAS de Courcelles v Lebon*, 316/85, ECLI:EU:C:1987:302.

The Court considered that Lebon came under the scope of Community law, since her father was a retired Community worker. It thus confirmed the extension of equal treatment regarding social advantages under Article 7 Regulation 1612/68 to members of the worker's family.[225] It also emphasized that this extension of equal treatment referred to rights derivative from the worker and extended to family members only to relieve the migrant worker from undue burden. As a result, the descendants of migrant workers can rely on equal treatment only to the extent that they are dependent on the worker.[226]

Such rights as are enjoyed without regard to the nationality of the family members required an association with the worker. This means that benefits that are attributed in the form of personal rights could not be claimed under Article 7(2) of Regulation 1612/68.[227] It is the association to a worker, or the dependency on them in certain cases, that forms the basis of the rights of family members. At this stage of Community law, families and family members were not protected independently out of considerations of humanity – instead, they were situated within the functional logic of the Community. They were granted rights because they facilitated migration in dignity.[228] What is more, when the association with the worker ends, there is no longer a basis to claim the rights under Community law. This was confirmed in *Diatta*, where the Court implicitly held that an official divorce would take away residence rights of a third-country national spouse of a migrant worker.[229]

4.4.3 The Social Protection of Migrant Workers and Their Families in Education

The case-law analysed above showed how the Court interpreted the concept of social advantages broadly as a means to facilitate free movement and to promote the economic objectives served by labour mobility. The economic progress supported by labour migration would bring about social progress for the migrant as a byproduct. This section turns to how this reasoning played out in relation to access to education. It shows that equal access to education was guaranteed for Community workers and their families because it supported personal development that could make them more competitive in the internal market. Non-discrimination and the

[225] ibid para 12.

[226] ibid para 13.

[227] Judgment of 8 July 1992, *Belgian State v Taghavi,* C-243/91, ECLI:EU:C:1992:306 para 12.

[228] With a different focus of analysis see also Clare Mc Glynn, 'Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo' 26 European Law Review 582, 587.

[229] Judgment of 13 February 1985, *Diatta v Land Berlin*, 267/83, ECLI:EU:C:1985:67 whereas separation and residence in different houses does not take away such rights.

effective exercise of free movement rights have been examined in a series of preliminary rulings related to enrolment fees for access to education or grants related to maintenance while in education.[230] The next sections will look at how the effective protection of social rights developed in the case-law related to access to education of children of Community workers, as well as of Community workers themselves. The analysis will highlight the close link between economic and social objectives also in relation to this type of social rights.

4.4.3.1 The Double Objective of Access to Education for Children of Community Workers

The case-law of the Court during the 1970s made groundbreaking steps in relation to the protection of children of migrant workers and their access to education. Article 12 of Regulation 1612/68 provided for the equal access of migrant children to education in the host Member State. This provision was interpreted by the Court in relation to benefits of different kind and the rights of access to education for children of migrant workers under Article 12 of Regulation 1612/1968.

The first line of cases examined disability benefits for children of migrant workers. In *Michel S*, the Court recognized that the child of a Community worker was entitled to access any benefits aimed at improving the fitness for work of disabled individuals under Article 12 Regulation 1612/68. [231] Subsequently in *F*, the Court found that benefits under Article 12 could also be granted to children of migrant workers, even when such children had no prospect of employability. [232] In that case, Belgium, where the migrant family resided, argued that the only reason why disability benefits should be granted to children of migrant workers was to improve the children's fitness for employment. This could not be the case for the F's child, who had no prospect of employment due to their disability. The Court did not accept this argument. Similar to *Deak*, the Court put forward the effective enjoyment and exercise of free movement rights and emphasized that if this benefit was not recognized,

[230] Judgment of 13 July 1983, *Forcheri v Belgian State*, 152/82, ECLI:EU:C:1983:205; Judgment of 13 February 1985, *Gravier v Ville de Liège*, 293/83, ECLI:EU:C:1985:69; Judgment of 27 September 1988, *Matteucci v Communauté française de Belgique*, 235/87, ECLI:EU:C:1988:460; Judgment of 26 February 1992, *Raulin v Minister van Onderwijs en Wetenschappen*, C-357/89, ECLI:EU:C:1992:87; Judgment of 21 June 1988*, Lair v Universität Hannover*, 39/86, ECLI:EU:C:1988:322; Judgment of 2 February 1988, *Barra v Belgian State*, 309/85, ECLI:EU:C:1988:42; Judgment of 2 February 1988, *Blaizot v Université de Liège and others*, 24/86, ECLI:EU:C:1988:43.

[231] Judgment of 11 April 1973, *Michel S. v Fonds national de reclassement social des handicapés*, 76/72, ECLI:EU:C:1973:46.

[232] Judgment of 17 June 1975, *Mr and Mrs F. v Belgian State*, 7/75, ECLI:EU:C:1975:80.

> [A] worker anxious to ensure to his child the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not to remain in the Member State where he has established himself and has found his employment. [233]

In these first cases, the derivative rights of children were interpreted in an instrumental manner. Children of migrant workers should enjoy social rights in the host Member State because otherwise the worker would not be able to move and become an active part of the Community labour market. The second line of case-law of the Court developed by reference to the right of migrant children to equal access to education in the host Member State.

In *Casagrande*, the Court addressed the question whether migrant children of Community workers should have access to education grants available to children of German nationals. The case was resolved in favour of the migrant children with reference to the fifth recital of Regulation 1612/68,[234] that enshrined the intended purpose of integration of the migrant family in the host country. This reasoning was confirmed in *Alaimo*.[235] As a result, migrant children were entitled to equality not only in terms of admission to education, but more broadly with respect to all measures, adopted by Member States, that can facilitate their course of education.

The issue was developed by the Court in *di Leo*, which concerned a German educational grant for attendance of courses outside Germany.[236] The daughter of an Italian worker was refused this grant, because under national law, even though the grant could be provided to children of Community nationals, the education could not be provided in the state of which they were nationals. Despite the clear case-law on Article 12 of Regulation 1612/68 and its application to educational grants, the German and Dutch governments argued that if the children of a migrant worker were to study in their state of origin, the objective of the Regulation, which is to promote integration, would not be pursued.[237]

The Court rejected these arguments. It emphasized that integration of migrant workers in the host country should take place in respect of liberty and dignity.[238] To that end, it was essential that children of migrant workers, who resided with them in the host country, should be able to choose their education in the same way that

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[233] *F.,* 7/75, ECLI:EU:C:1975:80 para 20. Same in *Inzirillo*, 63/76, ECLI:EU:C:1976:192 para 17.

[234] Judgment of 3 July 1974, *Casagrande v Landeshauptstadt München*, 9/74, ECLI:EU:C:1974:74 para 6.

[235] Judgment of 29 January 1975, *Alaimo v Préfet du Rhône*, 68/74, ECLI:EU:C:1975:11.

[236] Judgment of 13 November 1990, *Di Leo v Land Berlin*, C-308/89, ECLI:EU:C:1990:400.

[237] ibid para 11. See *Casagrande*, 9/74.

[238] *Di Leo*, C-308/89 para 13.

children of nationals did.[239] As a result, Article 12 of Regulation 1612/68 also extended to grants for training or education abroad. However, Article 12 imposed obligations only on the Member State in which migrant workers resided. In *Humbel and Edel*, the Court held that protection from discrimination in relation to access to education could not be extended to create obligations for a third Member State in relation to any migrant worker within the Community.[240]

Overall, in the above case-law the Court acknowledged various objectives underlying the broad interpretation of secondary law. First, the rights of children were meant to facilitate the function of their worker parent in the internal market. Especially when it comes to children with no prospect of employment, the central idea was that the worker should be facilitated in the host Member State, otherwise they would be less willing to migrate. This reason is a primarily economic one tied to providing incentives for labour migration. Second, equal access to education for migrant children is ensured in order to achieve integration. Integration in this case is sought as a purely social objective. It is a recognition that the common historical and cultural background of Community workers is not enough in itself. Rather, action needs to be taken to promote the social advancement of migrant families by facilitating their incorporation into national societies. The next section turns to migrant workers themselves and their rights to education to investigate how economic and social objectives appear in their protection under Community law with regard to education.

4.4.3.2 Migrants' Rights While in Education: Protection Dependent on an Effective Market Link

The Court's extensive interpretation of social advantages presented earlier in Section 4.4.1 also applied to maintenance grants for students, insofar as they could qualify as workers. This was confirmed in *Lair*, which concerned training grants requested by a French national in Germany.[241] Germany refused to award the grants on the ground that the worker had not been engaged in occupational activity in Germany for five years prior to their studies. The Court took this opportunity to clarify the difference between access grants and maintenance grants. It reminded that grants related to registration and tuition fees, insofar as they concerned access to education, came within the scope of the Treaty as conditions of access to vocational training, and Article 7 EEC was thus applicable.[242] In contrast, grants

[239] ibid.

[240] Judgment of 27 September 1988, *Belgian State v Humbel and Edel*, 263/86, ECLI:EU:C:1988:451 para 10. In that case French workers in Luxemburg claimed the repayment of 'minerval' [enrollment fee] for their sons' education arguing that Luxemburgish nationals are not required to pay such fee when they access education in Belgium.

[241] Judgment of 21 June 1988, *Lair v Universität Hannover*, 39/86, ECLI:EU:C:1988:322.

[242] ibid para 14; *Gravier*, 293/83 and *Blaizot v Université de Liège and others*, 24/86.

attributed by Member States to students for maintenance during their education fell outside the scope of Community law as they fell under educational policy, which was a competence retained by the Member States.[243]

The Court could have concluded the case at this stage – but it did not. It tried to examine whether that type of assistance could fall under the notion of social advantage for migrant workers under Article 7 of Regulation 1612/68. In this regard, Article 7(3) provided for access to training in vocational schools and retraining centers. But the school in question did not fall in either of these categories. This did not preclude the Court from qualifying the training grant at issue as a general social advantage under Article 7(2) of Regulation 1612/68.[244] During the proceedings, Member States argued that once a person became a student, they lost their status as workers and, accordingly, the entitlement to social advantages in the host Member State.[245] The Court resisted such a limitation of the right to equal access to social advantages. Specifically, the Court held that as regards grants for university education, the status of worker could form the basis of entitlements as long as there was a relationship between the previous employment and the course of study.[246]

This function of studies as a means of developing a worker's capacities can only be invalidated if 'a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field of activity'.[247] Hence, the granting of entitlements to migrant students presupposes that it takes place in the context of professional development that could reinforce their professional mobility. If the course of study had no link with one's occupational activities, then the status of worker and the benefits that come attached to it could not be retained.[248]

In *Brown* the Court additionally held that when a Community national entered in an employment relationship for a short period (eight-month traineeship in this case) with a view to undertaking studies in the same field, and where his employer employed him only because he was already accepted for admission, that person qualified as a worker under the Treaty, but he did not qualify for maintenance benefits related to study under Article 7(2) of Regulation 1612/68.[249] This created a

[243] *Lair*, 39/86, para 15.

[244] ibid para 22.

[245] ibid para 29.

[246] ibid para 37.

[247] ibid 37.

[248] *Raulin* , C-357/89 para 22.

[249] Judgment of 21 June 1988, *Brown / Secretary of State for Scotland*, 197/86, ECLI:EU:C:1988:323 paras 23, 28.

'legal loophole' according to O'Keeffe and Johnson.[250] Prospective students could take up casual work in the country where they intend to study and qualify as workers.[251] In such cases, they would be eligible for all the benefits available to workers in that state under Regulation 1612/68. This issue was clarified in *Raulin*.[252] There the Court held that enjoying benefits related to education through the concept of social advantages under Article 7(2) of Regulation 1612/68 required an independent employment relationship prior to pursuing studies. The nature and duration of the prior employment had to be taken into account and the migrant needed to show that there was an effective and genuine exercise of economic activity.[253]

Finally, in *Matteucci*, the Court held that equal treatment of migrant workers should also apply in relation to scholarships awarded pursuant to a bilateral agreement between two specific Member States.[254] Specifically, the Court observed that even if such types of agreement fell under the cultural sphere, they could not jeopardize the rights of Community workers to equal treatment.[255] What is more, similarly to the case-law on access to education,[256] the Court held that Article 7(2) of Regulation 1612/68 created a responsibility in the social sphere on each Member State to ensure equality of treatment for every Community migrant worker whether they pursued training in the territory of their host Member State or abroad.[257]

This case-law shows that the Court proceeded in far-reaching interpretation and application of Community law in the educational sphere. This led to a significant enlargement of equal treatment rights when it comes to maintenance while in education. Nevertheless, this was never disconnected from the functional logic of education in the Community legal order. The Community worker was not attributed rights on the grounds of human dignity and freedom of choice on how to pursue life, or at least the Court's reasoning does not point to such bases for justification. Rather, they were attributed rights to survive while better tailoring themselves to serve the market. This close interdependence of social rights for migrants and economic

[250] David O'Keeffe and Esther Johnson, 'From Discrimination to Obstacles to Free Movement; Recent Developments Concerning the Free Movement of Workers 1989-1994' (1994) 31 Common Market Law Review 1313, 1318.

[251] ibid.

[252] *Raulin*, C-357/89.

[253] ibid para 14.

[254] Judgment of 27 September 1988, *Matteucci v Communauté française de Belgique*, 235/87, ECLI:EU:C:1988:460.

[255] ibid para 14.

[256] *Di Leo*, C-308/89.

[257] *Matteucci*, 235/87 para 16.

growth under Community law points to considerations that would nowadays fall under the economic and social pillars of sustainability.

4.5 The Incorporation of Safeguards and the Attribution of Rights

This chapter has engaged in a historical study of different areas of Community law that concerned the rights of migrant workers from the Treaty of Paris to the Single European Act and it highlighted the way economic and social considerations shaped the attribution of rights to migrants. The analysis has shown how economic and social objectives have affected the attribution of rights to migrants already from the establishment of Community law. It also showed that labour demand and positive economic circumstances were behind an aligned approach to both Community and TCN migrants. During the early years of the Community project and before the oil crisis, it would not be an understatement to say that the Commission had the objective of shaping a sustainable migration. Such a plan was envisaged as based on social rights for all migrants contributing to the post-war project of growth.

Section 4.1, by examining the incorporation of free movement of workers in primary law, as well as secondary law put in place to complete the common market, showed how free movement was progressively opened up to ensure orderly migration of workers and to avoid detrimental effects on national economies from lack of labour migrants. The demand of primary law to allow free movement of workers was gradually achieved via secondary law that evolved with the incorporation of clauses related to national labour market priority and the possibility to restrict free movement for economic reasons. This shows that economic considerations primarily drove the applicable legal framework that operationalized Article 48 EEC.

Analysis of the ambition of extending the scope of protection to migrant workers from third countries in Section 4.2 revealed the emphasis of the Commission linking migration policy to the Community labour policy. In that context, all the instruments proposed started from the premise that TCN and Community migrants serve the same function for the Community, and, as a result, the competence of the Community could be established by provisions related to free movement. In addition, the examination of the different International Agreements and Accession Treaties in Section 4.3 showed that the EU institutions negotiated these instruments with a view to guaranteeing the rights of migrants engaged in the Community project of growth and to regulate the smooth transition of such migrants in the more privileged free movement framework in the case of accession.

Finally, Section 4.4 analysed the case-law of the Court during this period, which revolutionized the social rights of Community migrants by an extensive application

of the free movement provisions. The analysis revealed the centrality of economic objectives in the reasoning of the Court as a basis for broader interpretations facilitating free movement. By promoting such objectives, the Court also guaranteed social progress for the Community migrants and their families in the form of rights they were entitled to.

Overall, the analysis showed that until the 1970s, there was nothing distinguishing Community workers and TCN workers, as both groups provided the same contribution to the EU project, and the different action plans put forward were meant to cover both.[258] The position of the migrant in the Community legal order was based on their market participation. By being actively engaged in the Community project of growth, Community migrants 'earned' social rights in return. Similarly, the EU institutions were determined to extend these rights to all other migrants engaged in this project. At the same time, the archival material revealed a link between the economic benefits of migration for the Community market and the social advancement of migrants in their capacity as workers. Social progress came in the form of rights as the result of the economic function of migrants. As long as the economy continued to develop, all migrants within the territory should draw benefits from this progress. In circumstances of unhindered economic growth, the paths of regulating migration were aligned for both Community and TCN migrants.

In the early 1980s, and with the effects of the oil crisis experienced in the Member States, the category of 'workers' slowly became differentiated based on nationality. Member States hesitated to extend rights to all, for fear that they could not guarantee social progress for their own citizens. And while extending rights to Community migrants is supposed by a form of solidarity between the different Member States that are all implicated in the same development project, this type of solidarity cannot extend to migrants whose state of origin is not implicated in the project at all. In that context, we do see the attribution of rights to migrants in trade and cooperation agreements, but once the crisis hit, Member States hesitated to maintain such treatment. Indeed, clauses were embedded in all frameworks and controlled by Community institutions to ensure that, in all cases, economy did not collapse under the weight of the rights granted.

In general, during this period, considerations related to economic imperatives determine the limitation, the temporal attribution, and the extension of rights for migrant workers. Depending on these economic considerations, social progress comes as a byproduct in the form of personal rights for the migrants and derivative rights for their family. The same considerations will continue to appear throughout the regulation of migration in the next two chapters. What changes is that during the period examined in the next chapter, political ambitions enter the picture in relation

[258] Indicatively see Action Programme in Favour of Migrant Workers and Their Families COM(74)2250 final and Council Resolution of 9 February 1976 on an Action Programme for Migrant Workers and Members of Their Families [1976] OJ C 34/2

to the rights of Community migrants, whereas thicker perceptions of social progress in the form of rights are also found in the legal system. The interdependence and parallel pursuit of economic and social objectives via the regulation of migration framed both free movement and Association Agreements as the first frameworks pursuing a Community sustainable migration. Similar considerations also lay behind the pursuit of coordinating national migration policies and in the transitional clauses inserted in the Accession Treaties concluded in this period. The next chapter will investigate how such considerations evolved after the adoption of the Single European Act and until the failed Constitutional Treaty.

Chapter 5. Differentiation from the Single European Act to the Failed Constitutional Treaty

The previous chapter has demonstrated the importance of migration for the Community project of post-war growth as the main reason behind the attribution of rights to migrants. Most importantly, the analysis unveiled an aligned approach on the part of the Community institutions regarding the attribution of rights to both nationals of the Member States and TCN migrants. This approach was shaped by an understanding that all migrants contributed with their labour to the development of the Member States, and because of this they were to enjoy equal treatment rights from Community law. The balancing of economic and social considerations behind the regulation of migration was explicit, uniform and clear-cut in relation to all migrants. Sustainability did not exist as concept for the greater part of the period examined. However economic and social considerations driving the regulation of migration are identical to what the economic and social pillars of sustainability would demand, namely pursuing economic and social development by the regulation of migration.

During the period examined in this chapter, the approach to EU and TCN migrants was differentiated. The political ambition behind the transformation of the EU framework after the Single European Act framed an institutional discourse that emphasized the special status of EU migrants as EU citizens, and the lesser status of TCN migrants, whose status and rights were left in the realm of intergovernmental cooperation. However, a closer investigation of archival material and case-law undertaken in this chapter proves that the need to balance the economic and social objectives of the Treaties continued to appear and condition the rights of all migrants. Essentially this chapter shows that economic and social objectives of EU law continued to exist as the end to be served by the regulation of migration, even when the prevalent institutional discourse highlighted different considerations. Adding another building block to the historical investigation, this chapter demonstrates that while the EU sustainable objective is a recent one, its underlying considerations have constantly found their way in EU secondary law and case-law.

The late 1980s and early 1990s found the Community up against diverse challenges. The growth of the 1950s and 1960s was long forgotten, while global changes

pointed to the potential of bigger population movements towards the Community Member States. Specifically, increased unemployment and political instability pointed to potential movements from the Mediterranean.[1] In addition to this, the fall of the Soviet Union and the process of accession of the Central and Eastern European Countries (CEECs) pointed to the potential of increase in labour migration.[2] This was at a time when the Community industries were not in need of extra labour, and the Member States continued to employ the restrictive policies that began in the 1970s in order to permanently halt migration.[3] Towards the mid-1990s, growth began to slowly resume, and this created extra demand for labour in specific sectors.[4] In parallel, a new challenge appeared – that of an ageing population which would no longer be able to support the EU development needs.[5] All these were taking place in a period of continued national unemployment combined with settled migrant communities that were increasingly facing racism and xenophobia.[6] The need to resort to labour migration to cover labour needs would become complicated

[1] Commission of the European Communities, Directorate General for Information, Europe Information Development, The countries of the Greater Arab and Maghreb and the European Community. DE 68, January 1991; Communication from the Commission to the Council and the European Parliament, The future of relations between the Community and the Maghreb, SEC(92)401 final. See also Communication from the Commission to the Council and the European Parliament, Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership, COM(94)427.

[2] HAEU, GJLA-246, Commission of the European Communities, Directorate General External Relations, Task force Enlargissement, Enlargement and the Community's Relations with its Mediterranean Neighbours, Brussels 2 March 1992, RDM/m 4. See also Commission Communication to the Council and the European Parliament on Immigration, SEC(91)1855 final paras 8-9.

[3] On Immigration, SEC(91)1855 final para 3. See also Commission of the European Communities, Directorate General, Employment, Industrial Relations and Social Affairs, Unit: Freedom of movement, migration policy, Immigration Policies in the Member States: Between the need for Control and the Desire for Integration, Working Document, Summary Report of the information network in migration from non-EC Countries (RIMET) year of reference 1991, V/1020/92.

[4] See also retrospective description of the 1990s trends in migrant employment in Communication from the Commission to the Council and the European Parliament, On a Community immigration policy COM(2000)757 final, Annex 1, The Demographic and Economic context.

[5] Communication from the Commission to the Council and the European Parliament, On immigration and asylum policies, COM(94)23 final para 9.

[6] ibid para 10. The Parliament was pushing for different measures to address this issue. See initially European Parliament, Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the findings of the inquiry, Evrigenis Report and indicatively, Parliament resolution on racism and xenophobia, adopted on 10 October [1991] OJ C 280. The Council also issued declarations on the matter. See Maastricht European Council, Presidency Conclusions, 16.12.1991, Annex 3 Declaration on racism and xenophobia; Corfu European Council 24-25 June 1994, Presidency conclusions, ANNEX III: Implementation of the Franco/German initiative against racism and xenophobia and Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council of 5 October 1995 on the fight against racism and xenophobia in the fields of employment and social affairs [1995] OJ C 296/10.

for the EU, as it took place in a highly politicized climate around migration,[7] and a constantly changing legal framework.

In parallel, the Member States engaged in an ambitious project of incorporating political elements into their cooperation, and consequently the Treaty framework was repeatedly transformed during the years under review. The Single European Act demanded the completion of the internal market, defined as an area without internal frontiers, in which, among others, free movement of persons should be guaranteed under Article 13. The completion of the internal market moved border controls between Member States to the external frontiers of the EU territory. This first change was followed by the Maastricht Treaty, which came with the grand promise of political integration between Member States. The citizenship of the Union was established, which created a generalized right of nationals of Member States to move and reside freely within the territory of the EU. At the same time, migration policy came into the EU framework under the intergovernmental pillar of Justice and Home Affairs. During these developments, there seemed to be an ambition to create political bonds between nationals of the Member States and the EU, whereas the status of third-country nationals was to be regulated through intergovernmental cooperation. The changes were completed with the Amsterdam Treaty, which moved migration to the Community pillar and created a specific competence basis for the adoption of legislation on migration under Title IV of the Treaty. The Amsterdam Treaty established the Area of Freedom, Security and Justice, under which measures would be adopted in different areas to guarantee the free movement of persons within EU borders. While the incorporation of migration in the Community framework was welcomed, the creation of an Area of Freedom, Security and Justice was thought to perfect a legal structure whereby Europeans are the primary recipients of rights from the EU legal order and all other persons would come into the picture either by their association with a European citizen, or with very limited rights guarantees.[8]

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[7] On immigration and asylum policies, COM(94)23 foreword; HAEU, CEUE _SEGE-SEC(1991)0803, Commission of the European Communities, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, Annex I, Annex 6, which elaborates in detail the racist trends characterizing public opinion and the importance of the issue in political debate and local elections.

[8] Steve Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 Common Market Law Review; Giuseppe Callovi, 'Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle' (1992) 26 The International Migration Review 353; David O'Keeffe, 'Recasting the Third Pillar' (1995) 32 Common Market Law Review; James F Hollifield, 'Immigration-Related Problems and Issues Facing the EC on the Road to 1992' (1991) 14 In Defense of the Alien 73; Steenbergen, 'All the King's Horses…: Probabilities and Possibilities for the Implementation of the New Title IV EC Treaty' (1999) 1 European Journal of Migration and Law 29.

As for scholarly research during this period, it became much more theoretically dense as regards European migrants and their rights. This was due not only to the Treaty changes but also to the case-law of the Court, which began to employ grand phrasing and emphasized the importance of the newly created citizenship status, as we will see in Section 5.1.2. Different scholars emphasized the *telos* of an ever-closer Union between the peoples of Europe, and engaged with different theoretical frameworks that would permit a conceptualization of this *sui generis* citizenship.[9] Others emphasized the continuum and natural evolution between the rights afforded to EU workers and the rights protected by EU citizenship. [10] At the same time, scholarship also examined the deficiencies of the new status and emphasized a perceived lack of social direction of the internal market.[11] In addition, some authors reflected on more specific exclusions (on the basis of gender, nationality, class) which, in their view, EU law privileged.[12] Research on TCN migrants and their rights under EU law remained much more doctrinal and to a large extent descriptive.[13] Authors engaged in many case-law analyses on the right to family reunification of EU migrants and on Association Agreements.[14] What is more,

[9] Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 The Modern Law Review 233 for an overview.

[10] Indicative Elspeth Guild, The Legal Elements of European Identity: EU Citizenship and Migration Law (Kluwer Law International 2004) Chapter 5.

[11] Antoine Jacobs, 'Social Europe in Delay' (1990) 6 International Journal of Comparative Labour Law and Industrial Relations 26; Miguel Poiares Maduro, 'Europe's Social Self: "The Sickness Unto Death"' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) who argues that the EU can only be fully legitimized if it addresses its social self; Heinz Werner, 'Migration and Free Movement of Workers in Western Europe' 22; Noreen Burrows, 'The Promotion of Women's Rights by the European Economic Community' (1980) 17 Common Market Law Review 191; Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making The ECJ's Migrant Worker Model' (2009) 46 Common Market Law Review 1107 on the inconsistencies in the definition of migrant worker in the case-law.

[12] Tamara Hervey, 'Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law' in Jo Shaw and Gillian More (eds), *New legal dynamics of European Union* (Clarendon Press 1995); Clare McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 Columbia Journal of European Law; Isabella Moebius and Erika Szyszczak, 'Of Raising Pigs and Children' (1998) 18 Yearbook of European Law 125.

[13] Daniel Duyssens, 'Migrant Workers From Third Countries in the European Community' (1977) 14 Common Market Law Review; Kenneth R Simmonds, 'The Fourth Lomé Convention' (1991) 28 Common Market Law Review; Jan Niessen, 'European Community Legislation and Intergovernmental Cooperation on Migration' (1992) 26 International Migration Review 676; Peter-Christian Müller-Graff, 'The Legal Bases of the Third Pillar and Its Position in the Framework of the Union Treaty' (1994) 31 Common Market Law Review 493.

[14] Kenneth R Simmonds, 'The Concertation of Community Migration Policy; Joined Cases 281/85; 283; 284 and 285/85 and 287/85; *Germany and Others* v *Commission*; Judgment of 9 July 1987' (1988) 25 Common Market Law Review 177; Willy Alexander, 'Free Movement of Non-EC Nationals A Review of the Case-Law of the Court of Justice' (1992) 3 European Journal of International Law 53; Henry G Schermers, 'Case C-192/89, S.Z. Sevince v. Staatssecretaris van

different scholars engaged with the deficits and potentials of the changing Treaty framework for TCN migrants, and criticized the intergovernmental elements of cooperation on migration.[15]

Finally, some engaged with the question of whether and how the EU could extend free movement rights to TCNs and to create a coherent migration policy.[16] In this context, different authors mapped the rights TCN migrants enjoyed under the different legal frameworks (family reunification for Community workers, Turkish workers and other Association Agreements) and pointed out inconsistencies with the free movement framework. [17] Two articles stand out in this regard as identifying the legal conflicts arising from the treatment of TCNs under Community law with norms affording higher protection and suggest different normative solutions.[18] The first article, by Thomas Hoogenboom, engaged with the issue of inequality of treatment between legally resident TCN migrants and Community migrants, due to

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Justitie, Preliminary Ruling of 20 September 1990 Requested by the Raad van State of the Netherlands on the Netherlands on the Interpretation of Certain Provisions of Decisions 2/76 and 1/80 of the Association Council Established by the Association Agreement between the EEC and Turkey' (1991) 28 Common Market Law Review; Hagen Lichtenberg, 'The Rights of Turkish Workers in Community Law: Case C-237/91 Kazim Kus v Landeshauptstadt Wiesbaden (1993) 2 CMLR 887 and Case C-355/93, Hayriye Eroglu v Land Baden-Württemberg, Judgment of 5 October 1994, Not yet Reported' (1995) 24 Industrial Law Journal 90; A Weber, 'Case C-18/90, Bahia Kziber v. Office National de l'Emploi (ONEM), Preliminary Ruling of 31 January 1991, Requested by the Cour Du Travail de Liège (5th Chamber) on the Interpretation of Certain Provisions of the Cooperation Agreement between the EEC and the Kingdom of Morocco, Not yet Reported.' (1991) 28 Common Market Law Review.

[15] Kay Hailbronner, 'Perspectives of a Harmonization of the Law of Asylum after the Maastricht Summit' (1992) 29 Common Market Law Review 917; WR Böhning and J Werquin, *Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market* (International Labour Office 1990); Steve Peers, 'Building Fortress Europe: The Development of EU Migration Law' (1998) 35 Common Market Law Review; Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004); Steve Peers, 'Family Reunion and Community Law' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004).

[16] See David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 European Law Review 3.

[17] Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (n 8); Marise Cremona, 'Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union' (1995) 22 Legal Issues of Economic Integration 87; Kay Hailbronner and Jorg Polakiewicz, 'Non-EC Nationals in the European Community: The Need for a Coordinated Approach' (1992) 3 Duke Journal of Comparative & International Law 49.

[18] Joseph HH Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 European Journal of International Law 65; Thomas Hoogenboom, 'Integration into Society and Free Movement of Non-EC Nationals' (1992) 3 European Journal of International Law 36.

the exclusion of the former from the free movement regime. Hoogenboom suggested that such treatment went against the very logic of the Community and the objective of creating a common employment market, and that it might potentially lead to unfair competition.[19] Emphasizing the positive contribution of migrant workers to the Community labour and consumer markets, he suggested the extension of the free movement framework to cover TCN permanent residents on an equal footing with Member State nationals.[20] The second article, by Joseph Weiler, focused on two cases issued by the Court during this period and criticized them for the inability of the judiciary to extend rights to TCN migrants not in light of their 'instrumentality' for the internal market, but rather in light of their 'humaneness'.[21] Weiler suggested that judicial review had the potential to pave the way for more liberal treatment of TCN migrants under Community law by invocation of higher human rights norms and under a judicial duty to 'safeguard the values of common humanity'.[22]

Against this backdrop, the chapter develops as follows. Section 5.1 presents the institutional ambition to disconnect economic objectives from the exercise of free movement rights, in an attempt to create a political community of European nationals. It shows how this ambition was reflected in the case-law of the Court, underlining that economic considerations were never detached from the framework in the adoption of secondary law.

Section 5.2 focuses on the complicated issue of regulation of migration from third countries. This section presents different failed proposals of the Commission during these years, showing the interaction and opposing views of the Commission and the Council, which blocked the adoption of legislation on that matter. The usual lens for this period in the scholarship is a critique of intergovernmentalism and of the creation of fortress Europe.[23] The examination undertaken in the section does not contest that. However, the analysis shows that there is a lot more to be said in relation to the perception of migrants' rights by different institutions. A closer investigation into the Commission's work during this period shows that this institution continuously envisioned and proposed a legal framework that could efficiently serve the economic and social objectives of the EU project through the regulation of migration, thereby shaping a framework of sustainable migration. At the same time, Member States in the Council expressed a strong political discourse emphasizing their common efforts to progress in the EU, while in practice they

[19] Hoogenboom (n 18) 41.

[20] ibid 52.

[21] Weiler (n 18) 90.

[22] ibid 69.

[23] Patrick Ireland, 'Facing the True Fortress Europe: Immigrant and Politics in the EC' (1991) 29 Journal of Common Market Studies 457; Peers, 'Building Fortress Europe' (n 15).

blocked the relevant proposals because they could not agree on a common EU conception of growth and progress. Instead, what they pursued was national growth and progress. During this time the first instruments on admission and rights for TCN migrants were adopted with standards significantly downgraded from the initial proposals.

Section 5.3 evaluates the case-law of the Court on Association Agreements. This section should be read having in mind the analysis of the case-law of the Court in Section 5.1. Both these sections equally highlight the Court's significance as an actor of European integration. The Court followed the reasoning of the previous period and shaped an extensive system of rights for migrants covered under Association Agreements in light of the role they played in the EU project of growth. This approach of the Court was not well received.

Section 5.4 shows how Member States tried to restrict rights of migrant workers in Association Agreements concluded during this period precisely with the purpose of avoiding the transposition of the case-law of the Court. It also examines the clauses in enlargement and association with European developed countries, where the extension of rights to migrants was easily accepted.

Overall, the period under review in this chapter adds to the evolution of EU law by the element of differentiation. Unlike the previous period, where there were seeds for a common single migration policy that would cover all migrants, now, a mix of economic recession and political ambition shaped differentiation. This differentiation came with the aspiration of making something more of the EU migrants, overcoming the function of their labour work, but shaping a set of rights they should enjoy as members of a new political community of a kind. That aspiration was matched by disagreement on what to do with other migrants and on how to regulate their rights. This disagreement blocked the proactive stance of the Commission, that had a specific vision of how migrants could play a part, even in this political project, and how their rights could be aligned with the economic and social objectives of the EU, thereby service economic and social sustainability. Both ambitions were undermined due to diverse historical events experienced in the new millennium, as will be shown in Chapter 6.

5.1 Shifting Political Ambitions and Persistent Economic Considerations

The regulation of residence and movement of EU migrants was subject to many changes during the period under examination. During the early 1990s, Commission highlighted that the citizenship provisions shaped a political link between Member States nationals and the EU with the purpose of fostering a sense of identity with

the EU.[24] In this regard, the Commission emphasized that the rights EU migrants already enjoyed under Community law (like free movement) were now 'fundamentally altered'.[25] It suggested that Articles 8 and 8a EC Treaty in combination could directly generate entry and residence rights for EU nationals.[26] However, it also stated that these Articles were supplementary and could not replace the more specific legal bases for residence found in the Treaties. [27] The relevant Treaty bases, however, restricted residence to people engaged in economic activity under the free movement provisions.[28] As a result, during the first years after the introduction of the EU citizen status, residence rights for EU migrants continued to be regulated by sectoral Directives which predated the adoption of the citizenship status in primary law. This section analyses the relevant secondary law framework and different suggestions to amend it, while Section 5.1.2 looks at the case-law of the Court during this period. The analysis shows the tension behind the ambition to create a shared political identity and the economic unsustainability of extending social rights without limitations to all EU migrants.

5.1.1 Economic Considerations Limiting Residence Rights

The first time the Commission tried to disconnect residence rights under secondary law from economic activity was in 1979. The proposal was put forward under Article 3(c) of the EEC Treaty, which provided for the abolition of obstacles to free movement of persons, in the context of the first discussion on more political aspirations for the Union.[29] The attribution of residence rights under the relevant

[24] Commission Communication, Report from the Commission on the citizenship of the Union. COM(93)702 final.

[25] See also Second report from the Commission on citizenship of the Union [1994-1996] COM(97)230 final, indicatively as 49, 54, 56 and 6 of the EC Treaty at the time.

[26] ibid 14.

[27] ibid 14.

[28] In the meantime, Directives were put in place for self-employed and retired workers under Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24; Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14; Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10.

[29] Proposal for a Council Directive on a Right of residence for nationals of Member States in the territory of another Member State COM(79)215final [1979] OJ C 207/14/. Also Commission of the European Communities (1976) Bulletin of the European Communities, Supplement 1/76, Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council; Communique of European Summit in Paris on 9/10 December 1974.

initiative would allow Member States to require proof of sufficient resources as a condition for residence.[30] This proposal was on the table for almost a decade, during which time the Council avoided discussing the issue.[31] From archival material, it appears that Member States could not reach an agreement on the parts of the proposal that could pose risks to their national economies. Among the points of contestation were the requirement of resources for students, the difference between insurance systems of Member States, and the legal basis and scope of application of the Directive.[32] The attribution of a generalized residence right to all EU migrants could pose risks to national economies, especially because of the various social rights such migrants would enjoy in the different social security and social assistance systems of the Member States. Thus such a generalization carried the risk of making the EU free movement system economically unsustainable.[33]

In parallel, the case-law of the Court on Regulation 1612/68 substantially extended the categories of EU migrants falling under the scope of free movement as workers, as well as the rights they were to enjoy under secondary law.[34] In light of this case-law, in 1988 the Commission proposed an amendment to Regulation 1612/68 and Directive 68/360 aimed at extending their provisions on equal treatment and family reunification to consolidate the rights of EU migrants.[35] According to the Commission, this was necessary in view of promoting the social objectives of the

[30] See also Recital of the Proposal, which mentioned that 'the exercise of this right may, however, be made subject to economic conditions.' Under Article 4.2 the Directive would apply to all those who were not covered by secondary law as workers or self-employed.

[31] There were several amendments following comments by the Parliament and the ECOSOC. See Amended proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State COM(80)358 final [1980] OJ C 188/7; Amending of the proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State COM(80)649 final [1980] OJ C 292/3; Amended Proposal for a Council Directive on a Right of residence for nationals of Member States in the territory of another Member State COM(85)292 final [1985] OJ C 171/8.

[32] See HAEU, CM2/1988-00024/001, 1237ème session du Conseil (marché intérieur), Bruxelles, 03.05.1988, DROIT DE SEJOUR, 5932/88 (Presse 53) Communication a la presse.

[33] See also Catherine Barnard and Emilija Leinarte, 'The Creation of European Citizenship: Constitutional Miracle or Myopia?' (2022) 24 Cambridge Yearbook of European Legal Studies 24 arguing that in the first discussions on EU citizenship there was no practical considerations of how the respective migration flows would be managed and that the political discussion was disconnected to the practical extension of rights.

[34] See Chapter 4, Section 4.4.

[35] Proposal for a Council Regulation (EEC) amending Regulation (EEC) No 1612/68 on Freedom of Movement for workers within the Community COM(88)815 final, Revised Version [1989] OJ C 100/6; Proposal for a Council Directive amending Directive 68/360/EE on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, COM(88)815 Final, Revised Version [1989] OJ C 100/8

Community.[36] The Council could not reach an agreement on the matter.[37] I have not been able to trace what the disagreement was about, and in the relevant Eur-lex section, there is no information on whether the proposal was ever actually discussed at a Council meeting. The Commission presented another proposal in 1998, framed in terms of promoting the economic objectives of the Union.[38] In this proposal, the consolidation of rights for EU migrants and their families was framed in line with the need to promote the competitiveness of the EU project.[39] Still, the Council failed to discuss the relevant proposal.

In parallel, and with the impetus created by the Single European Act, the Commission presented three sectoral proposals in order to extend residence rights to students, retired persons and others not engaged in economic activity. For the Commission, the extension of residence rights should be viewed in light of Article 8A EC Treaty, which established a general right of residence to the Member States nationals.[40] During the negotiation of these instruments, Member States were concerned that an unrestricted extension of residence rights would lead to migration flows solely driven by financial considerations due to the lack of harmonisation of social security and social assistance systems.[41] To avoid the perceived negative economic impact of such type of migration, a principle was put forward, which determines the residence rights of EU migrants to this day, that no one wishing to reside in a country other than their own should constitute an unreasonable burden on the public finances of the host country.[42] In line with this, the relevant Directives provided for the attribution of residence rights to EU migrants who could demonstrate sufficient resources and insurance, so as not to become a burden for the

[36] See Recital 5 of the 1989 Proposal to Amend Regulation 1612/68.

[37] See Communication from the Commission, Free movement of workers: achieving the full benefits and potential COM(2002)0694 final.

[38] Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community COM(98)0394 final [1998] OJ C 344/9, Recitals 3 and 10; Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families COM(98)0394 final [1998] OJ C 344/12.

[39] Recital 4 of proposal to amend the Directive 38/360.

[40] Report from the Commission to the Council and the European Parliament on the implementation of Directives 90/364, 90/365 and 93/96 - (Right of residence) COM(99)0127 final.

[41] See Proposal for a Council Directive on the right of residence, COM(89)275 FINAL [1989] OJ C 191/5 which mentions that the ad hoc Committee on a People's Europe indicated in its report to the European Council in Brussels on 29 and 30 March 1985 that it is vital to avoid migration flows resulting solely from financial considerations based on the fact that the social security and social assistance systems have not been harmonized.

[42] ibid. See also HAEU, CM2/1989-00062/001 1352ème session du Conseil (marché intérieur), Luxembourg, 10.10.1989, Projet de Procès-Verbal, 9170/89 restreint.

social security systems of the Member States.[43] These texts continued to regulate residence rights of EU migrants until the adoption of Directive 2004/38, which repealed them. What is more, Regulation 1612/68 was not amended, but rather codified to incorporate amendments caused to it by other instruments over the years.[44] The relevant evolutions are examined in Chapter 6. At this stage it should be noted that there was no single Community view on how to proceed with EU migrant's rights even under the changed institutional setting, especially because of the need to safeguard the economic and social sustainability of the EU.

The political aspirations were reflected in Treaty changes and various soft law instruments, but the Council was not able to agree on how migration rights could be generalized without risks to national economies. The overview of the proposals by the Commission and their deflection by the Council are indicative of the constant motivation to safeguard the economic objective of growth. The Council preferred to negotiate different instruments for different categories of movement, while maintaining safeguard clauses in all of them. Contribution to the economy could no longer be set as the reason behind attribution of rights to EU migrants. The aspiration to shape a true political community would not justify that. However, this political aspiration was matched with the constant historical aspiration of the EU project to promote growth and progress. This growth and progress could be

[43] See Article 1, Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/2; Article 1, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L 180/30. Directive 90/366 was adopted in light of the Court's case-law in Judgment of 13 February 1985, *Gravier v Ville de Liège*, 293/83, ECLI:EU:C:1985:69 and Judgment of 2 February 1988, *Blaizot v Université de Liège and others*, 24/86, ECLI:EU:C:1988:43 and the Commission suggested Article 7(2) as the appropriate legal basis. The Council disagreed with that legal basis (which also implied the involvement of the Parliament), and it adopted the Directive on the basis of Article 235 EEC. This led the Parliament to turn against the Directive in Judgment of the Court of 7 July 1992, *European Parliament v Council of the European Communities*, C-250/90, ECLI:EU:C:1992:294. In that case the Court confirmed Articles 7 and 128 EEC Treaty as the basis of residence rights for students based on the abovementioned case-law and annulled the relevant Directive. The Commission adopted Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59 which reproduced the provisions of the annulled Directive 90/96 and adapted the text to comply with the ruling of the Court and the appropriate legal basis of Article 7(2).

[44] By Council Regulation (EEC) No 312/76 of 9 February 1976 amending the provisions relating to the trade union rights of workers contained in Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [1976] OJ L 39/2; Council Regulation (EEC) No 2434/92 of 27 July 1992 amending Part II of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [1992] OJ L 245/1 and eventually Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

guaranteed by excluding from the attribution of rights those EU migrants who could negatively affect growth. Relatedly we see the goal of economic sustainability as conveyed in the primary law objective of harmonious and balanced development of economic activities behind the limitation of the rights of EU migrants. In the next section we will see how the case-law of the Court approached the relevant limitations by using primary law to strike them down.

5.1.2 The Judicial Aspiration to Overcome the Economic Foundations

During the period under review, the Court consistently invoked the broad framing of primary law to consolidate the rights of EU migrants beyond the limits prescribed in secondary law analysed above. This was celebrated in scholarship as an indication of the potential of EU citizenship as an independent status, disconnected from statist limitations.[45] In the relevant case-law, the Court did not invalidate the limitations prescribed in secondary law. Rather, while acknowledging the economic considerations that preclude the unlimited enjoyment of rights by EU migrants, it tried to expand protection by focusing on how such limits should be reviewed in light of the social and political objectives of primary law that established the legal status of EU citizenship.

First, in *Martinez Sala*, the Court suggested that EU migrants lawfully residing in a Member State should enjoy equal treatment on access to family benefits. The Court could not establish if Martinez Sala fell under the category of worker or self-employed and, hence, whether she enjoyed an EU law residence right.[46] Despite this, the Court held that when an EU migrant lawfully resided in another Member State, their situation fell within the scope of EU law by virtue of the provisions on EU citizenship.[47] This is regardless of whether the legal basis of their residence rights is from EU or national law. As a result, EU migrants lawfully resident in another Member State could rely on equal treatment under Article 6 of the EC Treaty in order to claim family benefits and were not limited to enjoying such rights only as social advantages under secondary law on free movement of workers.[48]

The Court went even further in *Baumbast*, where it held that EU migrants could rely directly on Article 18(1) EC Treaty as a basis for residence rights in a Member State.

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[45] See Jo Shaw, 'View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010).

[46] Judgment of 12 May 1998, *Martínez Sala / Freistaat Bayern*, C-85/96, ECLI:EU:C:1998:217 paras 34 and 45.

[47] ibid para 61.

[48] ibid para 63.

In that case, Baumbast did not satisfy the conditions of secondary law to claim a right of residence due to lack of comprehensive insurance,[49] even though he did have sufficient resources. The Court suggested that residence rights under secondary law can be limited due to legitimate interests of Member States.[50] Such a legitimate interest would be avoiding the negative economic effects of migration by not granting residence rights to EU migrants who became an unreasonable burden in light of Recital 4 of Directive 90/364.[51] The Court further held that the limitations imposed due to such legitimate interests should comply with the principle of proportionality and should be subject to judicial review for compliance with the rights attributed to individuals under Article 18 EC.[52]

There is a paradox in the reasoning of the Court which would become clearer in the future, and which is addressed in more detail in Chapter 6. The Court evaluated the limitation to the residence rights of Baumbast as a limitation based on the legitimate interests of Member States. However, this limitation was based on the requirements of EU secondary law and should rather be perceived as a consideration of the EU legislature, in light of the attempt to minimize the effects of free movement to the project of growth. Since sufficiency of resources does not appear as an exception to the free movement rule, but rather as the condition behind the attribution of free movement rights under secondary law, it is problematic to suggest that judicial review refers to the compliance of state action and the legitimate interests of Member States with primary law. Rather, the Court could have considered whether such limitations, as expressed in the Directive conditioning the right to reside, are in compliance with primary law, and whether secondary law should be reviewed against primary law in light of the objectives it seeks to pursue.

In any case, at this stage of evolution of the case-law, scholars suggested that this approach was employed by the Court to consolidate the rights of EU migrants in line with the Maastricht Treaty and to limit the restrictions of the residence Directives adopted before the establishment of the citizenship status.[53] The Court carried on with similar interpretations in *Grzelcyk* concerning the rights of residence

[49] Judgment of 17 September 2002, *Baumbast and R*, C-413/99, ECLI:EU:C:2002:493 paras 88 and 80.

[50] That was Directive 90/364.

[51] *Baumbast and R*, C-413/99 para 91.

[52] ibid paras 85-86, 91.

[53] Christian Timmermans, 'Martínez Sala and Baumbast Revisited' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010); For a critique see Agustín José Menéndez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010).

of a student who claimed a subsistence benefit as a former worker.[54] In this case the Court developed a formula, which has been repeated in the case-law and quoted in literature with great hopes.[55] Therein the Court held that

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[56]

The quote above has been seen as setting the backdrop against which the rights of EU migrants should be developed, in line with a new fundamental status, disentangled from economic considerations.[57] This de-coupling of economic considerations and migrant movement in the EU does not appear throughout the rest of the judgment, where the Court repeated that Member States could withdraw the residence permit of an EU migrant if they found that, in having recourse to social assistance, said migrant no longer had sufficient resources, which is the precondition of their residence right.[58] The greater protection for EU migrants in this case actually lay in the fact that the Court suggested that expulsion measures could not be an automatic consequence of having recourse to social assistance.[59] By shaping a system in a way which limits the rights of residence to holders of sufficient resources, while also providing access to social assistance under equal treatment conditions, the economic and social objectives of primary law are channelled into secondary law. As the Court held,

> Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[60]

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[54] Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458.

[55] Perhaps as many as the 'civis europeaus sum' in the Opinion of Advocate General Jacobs delivered on 9 December 1992 in *Konstantinidis,* C-168/91 ECLI:EU:C:1992:504.

[56] Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458 para 31.

[57] Kostakopoulou (n 9); Shaw (n 45).

[58] *Grzelczyk*, C-184/99 para 42.

[59] ibid para 43.

[60] ibid C-184/99 para 44.

Jesse and Carter have rightly suggested that, in this finding, the Court introduced a distinction between reasonable and unreasonable burden, with the latter capable of breaking the bond of financial solidarity between a host state and a migrant.[61] *Trojani* and *Bidar* followed a similar inconsistent line.[62]

In *Trojani*, which concerned the claim of a French national to subsistence benefit in Belgium, the Court confirmed that EU migrants could claim a general residence rights under the Treaty citizenship provisions. But at the same time, the Court found that such right to residence could not be established for Trojani, for want of sufficient resources under secondary law.[63] Contrary to *Baumbast*, where the EU migrant had sufficient resources and family members with him in the UK, and only lacked comprehensive health insurance, Trojani had none of the above. Thus, failure to recognize a residence right was not found to be disproportionate in light of the objective of the Directive to avoid EU migrants becoming a burden.[64] The Court then repeated the approach of *Martinez Sala*, where it had held that residence under national law is sufficient to claim equal access to social benefits under Article 12 EC.[65]

Essentially, the Court made a differentiation between EU residence rights, which could be limited for economic reasons, and social rights stemming from EU citizenship, once a migrant finds themselves in a host state. Member States can deny residence to economically inactive EU migrants who do not possess sufficient resources, in order to protect their national welfare systems from collapse. However, if they recognize a right of residence under national law, by virtue of this lawfulness of residence, EU nationals need to be protected under equal treatment provisions, furthering the objectives of social cohesion in the Member States. In this balancing of economic considerations as a limit to residence and social considerations behind treatment in the host state, the Court acknowledged the discretion of Member States to remove EU migrants who had recourse to the social assistance system, however

[61] Moritz Jesse and Daniel William Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress, Social Justice, Brexit and Other Challenges*, vol 16 (Brill Nijhoff 2020) with reference to Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 European Law Journal 623 and Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017).

[62] Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488; Judgment of 15 March 2005, *Bidar* C-209/03, ECLI:EU:C:2005:169.

[63] *Trojani*, C-456/02, para 36.

[64] ibid.

[65] ibid paras 39-44.

such removal should not be the automatic consequence of having recourse to the social assistance system.[66]

Bidar continued down the path of this case-law. Bidar was a student, lawfully resident in the UK, where he completed his secondary education and claimed assistance for the tuition fees of his university education. The Court found that the student enjoyed a right of residence on the basis of Article 18 EC and Directive 90/364, even though he did not have sufficient resources and did not fulfil the conditions of secondary law.[67] In order to qualify how the balancing act should take place between granting social assistance under equal treatment and preserving the public finances of Member States, the Court came up with the criterion of integration. Specifically, it stated that Member States can legitimately grant assistance covering maintenance costs to students who have demonstrated a certain degree of integration in the host state.[68] In so doing, the Court attempted to ground its expansionist protection of EU citizens' right in the fact that they were already part of the host societies. It further tried to dissociate access to such benefits from market participation by differentiating from the criterion it applied to the case-law on job-seekers.[69]

Specifically, in cases regarding job-seekers who did not have residence rights under EU law and claimed benefits, the Court had suggested the existence of a genuine link between the applicant and the geographical market in question as a condition to be taken into account in order to examine whether the denial of access to such benefits would be discriminatory for EU migrants under primary law.[70] In the relevant case-law, it is true, as Jesse and Carter have suggested, that

> On paper, these formulas recognized the legitimate interest of Member States to protect the financial sustainability of their welfare system. However, in practice they strengthened the position of individual applicants vis-à-vis the State, again arguably circumventing conditions contained in applicable secondary legislation.[71]

Looking at the legislative and case-law developments of the relevant period, the ambition to reshape the rights of migrants under EU law is clear. The Council was hesitant to operationalise a general residence right without safeguards for national

[66] ibid para 45.

[67] *Bidar,* C-209/03 para 36.

[68] ibid para 57.

[69] ibid para 58 with reference to Judgment of 11 July 2002, *D'Hoop*, C-224/98, ECLI:EU:C:2002:432 para 38, and Judgment of 23 March 2004, *Collins*, C-138/02, ECLI:EU:C:2004:172 para 67.

[70] *Collins*, C-138/02, and Judgment of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, ECLI:EU:C:2009:344 para 38.

[71] Jesse and Carter (n 61) 141.

economies, despite the Commission proposals on the table. At the same time, the Court went much further in consolidating the protection of EU migrants under primary law. Besides *Baumbast*, the Court did not go as far as accepting an EU residence right stemming directly from the Treaties without regard to the conditions of secondary law. Nevertheless, it did use primary law as a ground for review of Member State action, limiting the grounds that could allow removal of EU migrants from a Member State. At the same time, it extended the application of equal treatment provisions to all EU migrants who had lawful residence in Member States, regardless of whether that residence stemmed from EU or national law. Next to the Court, the Commission had the ambition that

> Union citizens should, *mutatis mutandis*, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country. Any additional administrative or legal obligations should be kept to the bare minimum required by the fact that the person in question is a "non-national".[72]

While such an evolution of migrants' rights eventually materialized as regards entry and residence, this was only the case for a short period of time.[73] Security of residence and family reunification are not generally applicable to all EU migrants. Rather, economic considerations dictate their limitation only to those who have sufficient resources not to become a burden on the public finances of the host states.[74] In this way, the economic objectives of the Treaty are pursued by ensuring that free movement rights are not unlimited. Relatedly, economic sustainability dictates the limitation of EU migrants' rights. The challenges in setting up a system of residence and social rights for EU migrants and the different views of institutional actors accurately reflect the development of a legal framework with due regard to a balance between different objectives of the EU project. In this framework we see the intention to support the economy by promoting mobility of EU migrants who can positively affect growth (via their work). In parallel to this, the ambition of closer political integration and social cohesion necessitates rights for those who do not negatively impact economic growth (those not being unreasonable burden). Having shown in this section that the development of EU migrants' rights is closely connected to a continuous balancing of the economic and social objectives of EU

[72] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2001)0257 final [2001] OJ C 270E/150 Section 1.3. See also Communication from the Commission to the Council and the European Parliament on the follow-up to the recommendations of the high-level panel on the free movement of persons. COM(98)403 final.

[73] Due to Schengen, abolition of border controls and free travel and the instruments allowing for a three month stay without any condition.

[74] See also Article 1 Directive 2004/38.

law, and thus to economic and social sustainability, the next section will investigate how similar objectives played out in relation to TCN migrants.

5.2 National Contestation Over the Aspiration of Long-term Solutions to Migration

To achieve the intended objective of an internal market without frontiers, actions were required by both the Community and the Member States in their respective areas of competence.[75] What this objective would mean for the rights of TCN migrants was not conceived in a uniform way by the Commission and the Council. On the contrary, the abolition of frontiers shaped the agenda of the Council and the Commission in very diverse ways. Specifically, during this period Member States were coordinating action outside the framework of EU institutions. Intergovernmental meetings of different kinds took place from the late 1980s to the end of the 1990s with the aim of setting an agenda for closer cooperation in what they considered to be sensitive areas.[76] The discussions that occurred in these groups were shrouded with a veil of secrecy and their outcome contained technical goals related to specific areas.[77] To the extent that these technical goals were incorporated in Council Resolutions regarding migration, they form part of the analysis that follows.

The Commission's agenda on migration, in contrast, was more transparent. For this institution, the abolition of border controls should entail the elimination of legal obstacles to access to employment in other Member States and the harmonization

[75]Communication of the Commission on the Abolition of Controls of Persons at Intra-Community Borders, COM(88)640 final para 9.

[76] Indicatively see the ad hoc group on Immigration set up at the initiative of the UK presidency, Coordinator's group on the free movement of persons set up following the Rhodes European Council, Trevi ministers' group and Immigration ministers group under the Belgian Presidency.

[77] Ford Glyn (1990) Report drawn up on behalf of the Committee of Inquiry into Racism and Xenophobia on the findings of the Committee of Inquiry. Session Documents, A3-195/90, 23 July 1990 criticized these groups for deflecting community competence and democratic control from the Parliament. Communication from the Commission, Towards an Area of Freedom, Security and Justice COM(98)459 final commenting in retrospect on the absence of transparency and the inadequacy of the achievements of the period before the Amsterdam Treaty. On the goals on migration see Statewatch European Monitoring and Documentation Centre on justice and home affairs in the European Union compilation no 3, Maastricht immigration programme (1991) and follow up (1993), Supplement to: 'Key texts on justice and home affairs in the European Union, Volume 1 (1976-1993)' , 1.Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, SN 4038/91 (WGI 930) 3 December 1991.

of policies on admission.[78] Aware of the constantly changing socio-economic circumstances, the Commission emphasized the need to create a system that could accommodate and regulate the fluctuation of population movements and, relatedly, labour demand and supply in Member States.[79] At the same time the Commission demanded maximum protection for legally resident migrants so as to promote their social advancement and social cohesion within Member States.[80] Behind this demand lay the acknowledgement that migration had brought economic and cultural benefits to the European societies, and such benefits needed to be preserved.[81] The approach of the Commission constantly attempted to align migration with economic and social sustainability.

In light of the above, the analysis will develop as follows. In the sections below we see how social and economic considerations played out in attempts to harmonize admission (5.2.1), and to grant rights to TCN workers (5.2.2). Unlike the period examined in Chapter 4, where the EU institutions emphasized the need to align the regulation of migration for TCNs to that of EU migrants, the contestation and politicization of migration in Member States precluded a uniform approach to the regulation of TCN migrants' rights. Limited legislative measures were passed, despite the conclusive proposals put forward by the Commission.

5.2.1 The Complicated Issue of a Harmonized Admission Policy

During the 1990s, Member States continued to apply restrictive migration policies but used temporary work contracts to respond to the need of specific economic sectors. In parallel, the Commission pursued the matter of harmonizing admission and creating an EU right of entry, based on economic considerations.[82] While national concerns on access to territory limited the Commission in actively pursuing the matter,[83] the slow economic revival and lack of manpower in specific sectors,

[78] On Immigration, SEC(91)1855 final para 62. The Commission proposal was more grounded in that it suggested the application of free movement first for certain categories of TCNs (permanent residents, refugees, frontier workers, staff of firms providing cross border services).

[79] On immigration and asylum policies, COM(94)23 Section I.2.

[80] On Immigration, SEC(91)1855 final para 3 and 69.

[81] On immigration and asylum policies, COM(94)23 Section I.2.

[82] On immigration and asylum policies, COM(94)23 para 78 with reference to the Commission's 1994 White Paper on Growth, Competitiveness and Employment.

[83] As acknowledged in HAEU, CEUE _SEGE-SEC(1991)0803, Commission of the European Communities, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, Annex I page 6

combined with an ageing EU population, shaped the need for harmonization.[84] This clear need did not lead to a uniform approach to the matter, however. The Council and the Commission had entirely different stances, as reflected in instruments proposed and adopted during this period, which are examined below.

5.2.1.1 Reactive Approach of the Council Shaped by Economic Fears and Unwillingness to Yield Competence

Already with the adoption of the Single European Act, Member States issued a Declaration, in which they acknowledged their intention to cooperate on matters of entry, movement and residence of TCNs on the one hand and terrorism, crime and trafficking on the other hand.[85] They also added a General Declaration to Article 13 SEA stating that they retained competence on measures related to controlling migration.[86] In line with this emphasis on national competence, the Council paid little attention to issues of harmonizing admission or granting rights to TCN migrants.

Contrary to the Commission's emphasis on the need to ensure the development of the EU project via a regulated system of admission shaped around long-term considerations, discussed in detail in the following section, the Council adopted a series of resolutions stemming from intergovernmental cooperation, which stressed national competence over admission. The 1994 Resolutions touched upon admission of different categories of migrants. One Resolution was issued on migrant workers, while two more followed on self-employed migrants and students.[87] The Resolution on TCN workers was extremely restrictive.[88] At a time when Member States were struggling with high national unemployment and had no immediate need for migrant workers, the Resolution addressed exclusively the issue of admission for temporary employment.[89] Member States reserved the right to allow family reunification for people admitted for temporary employment.[90] Finally, failing to take into account

[84] ibid p 4.

[85] Political Declaration by the Governments of the Member states on the Free Movement of Persons [1987] OJ L 169/24.

[86] General Declaration on Articles 13 to 19 of the Single European Act [1987] OJ L 169/24.

[87] Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member states for the purpose of pursuing activities as self-employed persons [1996] OJ C 274/7. 1994, Council Resolution of 20 June 1994 on Limitations on Admission of Third -Country Nationals to the Member states for employment [1996] OJ C 274/3; Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member states for study purposes [1996] OJ C 274/10.

[88] Council Resolution of 20 June 1994 on Limitations on Admission of Third -Country Nationals to the Member states for employment [1996] OJ C 274/3 para i.

[89] ibid paras ii and iii.

[90] ibid para v.

future considerations, the Resolution emphasized that the restrictive measures on admission already implemented in Member States should be maintained, and if necessary, reinforced.[91] In this context, the principles set out to govern admission were meant to represent the stricter standards and were not intended to be relaxed by Member States.[92]

The overall approach of the Council was that Member States should in principle refuse entry to all TCN workers. Entry should only be considered in case of vacancies that could not be filled by Community workers or TCN workers already permanently residing in a Member State.[93] Such admission was to take place for workers who had specialist qualifications or if there was a temporary manpower shortage in national or Community labour markets, which can affect the operation of employers.[94] Authorizations to reside should be restricted to employment in a specific job and with a specific employer.[95] Further, the Resolution provided that admission for temporary employment might be offered to seasonal workers, in strictly controlled numbers, who undertook specific jobs and fulfilled a 'traditional need' in a Member State, trainees, frontier workers and intra-corporate transferees. Finally, the Resolution included restrictions as to the maximum period of admission for employment, perhaps to avoid the potential settlement of migrant workers.[96] As a result, extension of temporary stays was to be denied to seasonal workers over the six-month employment period, whereas for regular TCN workers extension of permits could be considered only if the criteria for initial admission continued to be met, that is special skills, vacancies unfilled by Community labour, and jeopardizing the function of an undertaking.

Were economic considerations the reason for such a restrictive policy? While there is not much information in the text of the Resolution to draw definite conclusions, if we compare this Resolution with the Council Resolutions that followed on self-employed TCNs and students, the economic fears behind labour migration become clear. Specifically, the Council resolution on self-employed TCNs was not restrictive, and the Council acknowledged therein that the reason for differentiation was that admission of people pursuing independent economic activity added value

[91] ibid para vi.

[92] ibid.

[93] ibid I. general criteria.

[94] ibid.

[95] ibid para iii restrictions as to the scope of employment.

[96] ibid para iv restrictions as to the period of admission to employment; for seasonal workers a maximum six months in a 12-month period; for trainees a maximum of one year, which might be extended for the time needed to obtain a professional qualification, and a general ban on admission for more than four years in the first instance.

to the economy of the host state, and thus was, as such, of benefit.[97] To the extent that the economic activity was of no benefit to Member States, then TCNs should not be admitted.[98] Similarly, regarding students, the Council emphasized the importance of ensuring that their migration was time-limited and did not turn into permanent immigration via employment.[99]

Essentially, in times of national contestation of immigration, with local unemployment and the possibility of employing workers already residing in EU territory, the slowly resurging economies of Member States had no need for migration from outside the EU to continue to perform. This restrictive approach, although based on economic considerations, did not take into account the constantly changing economic circumstances and their relation to labour migration. What was missing was a long-term understanding of migration for achieving economic sustainability. Towards the end of the 1990s and in the years following, the Council continued to engage very sporadically with economic migration and the need to harmonize conditions of admission and residence. According to the Tampere Council, such harmonization should take place based on a shared assessment of economic and demographic developments within the EU, as well as the situation in the countries of origin.[100] It is not clear why the Council did not refer to the fact the Commission had tried to issue an instrument which would embed such assessment within the EU framework, as we will see in the next section.

5.2.1.2 The Persistent Ambition of the Commission to Align Migration with the Project of Growth

With an emphasis on the need to shape a system that has inbuilt guarantees to ensure the development of the Member States in changing economic and demographic circumstances, the Commission submitted a proposal on a Convention to harmonize the rules of admission of TCNs in 1997.[101] The proposed Convention was submitted under Article K3(2) of the Maastricht Treaty, and the Commission was prepared to redraft it into a Directive after the entry into force of the Amsterdam Treaty, should there be agreement. Despite its title, the proposal went a lot further than the harmonization of conditions of admission, suggesting a framework for the conclusive regulation migration at EU level. The proposed Convention addressed

[97] Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons [1996] OJ C 274/7 para 4.

[98] ibid para 5.

[99] Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes [1996] OJ C 274/10 para 4.

[100] Tampere European Council, Presidency Conclusions, 15 and 16 October 1999 para 20.

[101] Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States COM(97)387 final.

admission of migrants for employment, independent economic activity, training, study, non-gainful activity, family reunification, and the attribution of progressive rights for long-term residents. This section evaluates how economic and social objectives appeared behind the regulation of admission, while the parts of the proposal that dealt with the attribution of rights to migrant workers form part of the analysis under Section 5.2.2. The analysis highlights how the Commission envisioned a migration system deeply rooted in economic and social sustainability.

Acknowledging that the economic growth of the 1950s and 1960s would not return, and that the current labour market situation would not allow for a liberal migration policy, the Commission remained realistic as to the fact that the zero immigration target envisioned by Member States could not be realized.[102] In the explanatory memorandum, the Commission set the Convention within the context of shaping a system that could ensure the continued benefits of migration for the EU development project. This would materialize as follows: admission would be granted to TCN workers if there existed a vacancy that could not be filled by a Community worker or by a legally resident TCN worker. The idea behind this system was to allow the market to function, while avoiding an increase in labour force via migration at a time when unemployment was already a problem in the Member States.[103]

TCN workers would need to have an offer of employment for at least one year in order to enter, and they could be admitted with a maximum four-year authorization at the first entry.[104] The renewal of their permit would be dependent on the continuation of the conditions behind their initial entry. This meant that, if there was labour demand, migrants would be able to continue to reside, whereas, in the case of recession and unemployment, the conditions of their initial entry would not be fulfilled, and they would not be able to prolong their stay, as their labour would no longer be needed. As for seasonal workers, they would be granted admission for six months, and TCNs who had already been admitted as seasonal workers would have priority in future applications for a seasonal work permit.[105] The idea behind the prioritization was to counter the risk of seasonal workers staying illegal, as they would benefit from preferential treatment in future applications.[106]

The emphasis on the function of labour migration, and more specifically on a harmonized admission system for achieving the economic objectives of the EU is

[102] Proposal COM(97)387 final Section 2.

[103] Proposal COM(97)387 final, Explanatory memorandum.

[104] Article 8 of the Proposal COM(97)387 final.

[105] Article 9 of the Proposal COM(97)387 final.

[106] This was channelled into the Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375.

also apparent if we compare the admission criteria for workers to those of students and trainees. Under Article 17 of the proposed Convention, students would be given authorization for employment only to the extent that such employment did not impair the pursuit of their studies, and to ensure that admission for studies was not disguised to access employment. Article 18 of the proposed Convention provided that students would not be allowed to turn their student admission into a work permit, unless they followed the regular procedure provided for a work permit in the proposal. This means that in practice students would have to leave the EU territory to apply, and labour demand would need to exist for them to be able to get a permit as workers. Similarly, Article 19 of the proposed Convention prescribed that admission of trainees should take place in a way that would not impact the social welfare system, nor constitute disguised admission for employment.

Finally, Article 22 of the proposed Convention attested the cost-benefit analysis behind the regulation of admission of TCNs in the EU. Specifically, the Commission suggested that there were certain categories of TCNs who were not covered by the proposal but who should not be denied stay, namely pensioners, people living on capital income, writers receiving royalties and au pair students. Since such people do not seek to join the labour market, but are consumers and investors, their admission should be considered favourably. The reason behind such favourable consideration was that the migration framework the Commission envisioned would allow admission of migrants who created no economic burden to the host states. This proposal was eventually withdrawn in 2001.[107]

At this point, the Commission issued another proposal under Article 63(3)(a) of the Amsterdam Treaty suggesting that the role of TCNs in the EU labour market had been disregarded in comparison with other areas, related to the single market.[108] The 2001 Proposal for a Directive sought to regulate the admission of TCNs for the purpose of paid employment and self-employed activities.[109] The aim was to provide rights to TCN migrants, while allowing Member States to limit admission for economic migration in case of limited labour demand. Specifically, the framework would permit a quick reaction to changing economic and demographic circumstances, and admission would be allowed only if there was an economic need on behalf of the Member States, or if such TCN migrants had a beneficial effect to the national economies.[110]

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[107] Communication from the Commission - Withdrawal of Commission Proposals which are no longer topical COM(2001)0763 final marked as implicitly withdrawn.

[108] On a Community immigration policy COM(2000)757 final 13.

[109] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001)0386 final [2001] OJ C 332E/248.

[110] ibid Explanatory Memorandum, Section 3, points 5,6, 8. Article 6(1) applied the principle of Community preference and provided for admission in case of vacancies that could not be fulfilled

The proposed Directive provided for equal treatment on a set of basic rights (working conditions, access to vocational training, recognition of diplomas, social security including healthcare, access to goods and services which are available to the public, including housing and trade union rights), enshrined in Article 11. [111] More specific provisions regulated the admission of seasonal workers, trans-frontier workers, intra-corporate transferees, trainees, and au pairs.[112] Further, Article 32 of the proposed Directive introduced a general non-discrimination provision regarding its application, with a wording based on Article 13 EC Treaty and Article 21 of the Charter.[113]

Under Article 26 of the proposed Directive, Member States were allowed to maintain horizontal measures (like a quota or ceiling system to residence permits issued or a temporary suspension of issuing residence permits) in addition to the economic needs test to regulate access to the labour market. Such measures would have to be communicated to the Commission, which would evaluate whether they were justified.[114] Finally, Member States could introduce exceptions for employment in public service under Article 28 of the proposed Directive.[115] This proposal was eventually withdrawn in 2006, after failing to gather support from the

by EU nationals, their family members, TCNs legally resident under Community or national law, TCNs who had worked in the Member State for more than three years in the preceding five years and who would want to return to the labour market. Article 6(2) provided for a procedure to prove the lack of manpower. Article 6(3) allowed Member States to establish flexible tools like 'green card' programmes to allow them to cover shortages in specific sectors. Such discretion would have to be exercised in a transparent manner. Chapter V of the Directive would apply to measures introduced under Article 6(3). Aside from establishing a labour market shortage in the relevant sector, Member States would have to include a statement of reasons based upon objective and verifiable criteria, they would have to conduct regular review of the measures, and in publication before the entering into force. On the matter of migrants with beneficial effect to the economies, by allowing Member States would be allowed to fix income thresholds for admission. Where the income submitted exceeded such thresholds, the economic needs test would be considered fulfilled under Article 6(4). A similar discretion would be left to Member States to set up a scheme that would allow extra premium to be paid by an employer in order to grant a residence permit to their perspective TCN employee under Article 6(5).

[111] Housing could be limited to only apply to workers with minimum stay. See Article 11 para 2. Article 11 of the explanatory memorandum refers to article 12 of the LTR draft directive which was issued around the same time.

[112] Proposal COM (2001)0386 final Articles 12-16.

[113] ibid, Explanatory memorandum, Article 26.

[114] ibid Article 30.

[115] See also ibid, Explanatory memorandum Article 28 which was proposed to have the same wording as 39(4) and 46(1) TFEU on employment in public service.

Council, which did not want to address the matter of horizontal admission for all categories of TCN migrants.[116]

In addition to this failed proposal, the Commission had proposed an instrument on admission of students and an instrument on family reunification, which were supposed to be complementary and to meet the Tampere demand for conclusive regulation of migration. Admission for third-country nationals for reasons other than the above (employment, independent economic activity, family reunification and studies) was deemed as adequately regulated under domestic law due to the low number of people falling in this category.[117]

The regulation of student admission was presented as disconnected from the labour market and linked to social enrichment and the exchanges between cultures promoted by student mobility.[118] The instrument was much more socially oriented, insofar as it aimed at promoting the EU as a global centre of excellence for education which would support the dissemination of human rights values, and sought to contribute to the objective of promoting quality education under Article 149 EC.[119] In the end, the Directive adopted the admission of students and left it to the discretion of Member States whether to extend its application to school pupils, unremunerated trainees and volunteers. The Directive included general and specific conditions of admission for the different categories.[120] Regardless of the category

[116] Communication from the Commission to the Council and the European Parliament - Outcome of the screening of legislative proposals pending before the Legislator COM(2005)0462 final/ Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects [2006] OJ C 64/3. See Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM(2007)0637 final and Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State COM(2007)638 which state that '[w]hilst the other European Institutions gave positive opinions, discussion in Council was limited to a first reading of the text, which was officially withdrawn in 2006'.

[117] Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purposes of studies, vocational training or voluntary service COM(2002)0548 final [2003] OJ C 45E/18, Section 1.1.

[118] ibid Section 1.2. and recital 7.

[119] ibid Section 1.3 and recital 6.

[120] General conditions under Article 5 and 6 and category specific conditions of admission (7-8 for student, 9 for pupils) Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

though, comprehensive insurance and sufficient resources during the migrants' stay were required.[121]

Following the national practice of allowing students to remain in Member States in order to address skilled manpower shortages, the Commission also proposed the possibility of change of status from student to worker without having to leave the host state and reapply.[122] The proposal provided for the right to work to both students and trainees.[123] In the Directive adopted, this right was only limited to students under Article 17, which also allowed Member States discretion to determine for how many hours students could be employed.[124] Additionally, Member States were allowed to restrict access to employment for the first year of residence under Article 17(3). Finally, Article 12(2)(a) of the Directive provided that a refusal to renew or withdrawal of a permit could be justified based on a failure on the part of the student to respect the limitations regarding access to economic activities.

Essentially, all the proposals by the Commission to horizontally regulate admission for all the different categories of TCN migrants failed. It is not easy to determine with certainty why these proposals were rejected by the Council, i.e., whether the issue was the need of Member States to maintain competence on regulating migrations, the assumed risks for their economies, or the fact that the proposals, especially the 1997 one, would lead to a system of residence and movement equally extensive to that applicable to EU migrants. In any case, in the period under review the only measure that was eventually adopted as EU legislation was the regulation on admission of students, which came with no economic cost, and which still incorporated specific limits to avoid the possibility of students entering the EU to find employment.

5.2.2 Laying the Groundwork for Fragmentation and Differentiation

In the previous chapter, I examined how the contribution of TCN workers to the Community development project became the basis of the demand for assimilation of their rights to those enjoyed by Community workers. Unlike the previous period, the claim for migrant rights in the transformed legal order drew on a stronger perception of social objectives and the importance of rights for social cohesion.

[121] Sickness in Article 6(1)(c), resources for students in 7(1)(b), for pupils Article 9(1)(d) and (e), for trainees Article 10(b), for volunteers 11(b) and (c) Directive 2004/114.

[122] Proposal COM(2002)0548 final Section 1.4. This change of status was to be regulated under the Proposed Directive on self-employed third country nationals COM(2001) 386.

[123] Proposal COM(2002)0548 Article 17.

[124] Article 17(2) set a limit of no less than 10 h /week.

During this period different institutions advocated the attribution of rights to TCN migrants.

Equal treatment continued to be the central principle guiding the Community approach to legally resident TCNs during the 1990s.[125] Both social and economic considerations lay behind the demand for equal treatment. Economic considerations were included with reference to contradictory practices at national level having the potential of distorting the EU labour market, and of social dumping within the EU.[126] At the same time, the granting of equal rights was perceived as having the potential to lead to an increase in the workforce, and to affect beneficially the social security systems of Member States, which were experiencing difficulties due to negative population growth.[127] However, the emphasis on the value of the migrant worker for the project of growth diminished, and equal treatment became part of broader social objectives of the EU through a link between the treatment of migrants and a social agenda for a functioning EU society.[128] Equal treatment for legally resident TCNs became necessary as a demand related to achieving social cohesion in Member States, and relatedly to shaping socially sustainable societies.[129]

Against this backdrop, equal treatment was demanded in a series of initiatives to advance the rights of migrant workers. In 1995, the Commission suggested extending the personal scope of Article 22 of Regulation 1408/71 to third-country nationals in order to ensure their right to immediately necessary healthcare when staying for a short time in another Member State.[130] This proposal did not go through

[125] On Immigration, SEC (91) 1855 final para 42.

[126] ibid para 43; Economic and Social Committee, Own-initiative opinion on the Status of migrant workers from third countries (91/C 159/05) [1991] OJ C 159/12 para 3.2.2.

[127] Economic and Social Committee, Own-initiative opinion on the Status of migrant workers from third countries (91/C 159/05) [1991] OJ C 159/12 para 3.2.3.

[128] See On Immigration, SEC(91)1855 final para 59. See also European Economic and Social Committee, Opinion on the status of migrant workers from third countries (91/C 339/15) OJ C 339/82 para 2.4.1. suggesting that equal rights between EC and TCN workers should come as an independent political choice of the Community.

[129] On Immigration, SEC(91)1855 final introduction and On immigration and asylum policies, COM(94)23 final para 130. HAEU, CEUE _SEGE-SEC(1991)0803, Commission of the European Communities, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, page10 which mentions that the lack of free movement rights for legally resident TCN workers creates a situation which is 'quite simple unjust'.

[130] See Amended proposal for a Council Regulation (EC) amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, Regulation (EEC) No 1247/92 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 1945/93 amending Regulation (EEC) No 1247/92 COM(95)284.

in the adoption of the Council Regulation 3095/95.[131] However social protection for TCN migrants was eventually achieved with the adoption of Regulation 859/2003.[132] Moreover, TCN workers were included in the scope of the Community Charter on Fundamental Rights of workers, a non-binding instrument, adopted by a declaration in 1989 by all the Member States, with the exception of the UK.[133] Similarly, the Agreement on Social Policy annexed to the Maastricht Treaty, which sought to set up closer cooperation among all Member States with the exception of the UK, provided that the Council could take action in the area of conditions of employment of legally resident TCNs. Having these in mind, the following sections look at the development of family reunification rights and the progressive attribution of rights to long-term residents.

5.2.2.1 Towards an Autonomous Protection of Migrant Workers' Families

The attribution of family reunification rights to legally resident TCN migrants was very controversial. Despite the restrictive admission policies prevalent in the 1980s, Member States had maintained exceptions for humanitarian reasons, among which was also family reunification. This led to substantial migration movements, and, as a result, in the 1990s Member States started to impose tighter conditions for family reunification.[134] According to an ILO working paper, economic considerations influenced both the law and practice of Member States, as foreign family members

[131] Council Regulation (EC) No 3095/95 of 22 December 1995 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self- employed persons and to members of their families moving within the Community, Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71, Regulation (EEC) No 1247/92 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 1945/93 amending Regulation (EEC) No 1247/92 [1995] OJ L 335/1. For more details on the relevant initiatives and the problems created by the lack of inclusion of third-country nationals see Caroline Laske, 'The Impact of the Single European Market on Social Protection for Migrant Workers' (1993) 30 Common Market Law Review; Herwig Verschueren, 'Ec Social Security Coordination Excluding Third Country Nationals: Still in Line with Fundamental Rights After the Gaygusuz Judgment?' (1997) 34 Common Market Law Review.

[132] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [2003] OJ L 124/1.

[133] Community Charter of Fundamental Social Rights of Workers adopted at the European Council in Strasbourg meeting on 8, 9 December 1989.

[134] See indicatively On Immigration, SEC (91) 1855 final para 17. See also Commission of the European Communities, Directorate General, Employment, Industrial Relations and Social Affairs, Unit: Freedom of movement, migration policy, Immigration Policies in the Member states: Between the need for Control and the Desire for Integration, Working Document, Summary Report of the information network in migration from non-EC Countries (RIMET) year of reference 1991, V/1020/92 p 23.

were viewed as a potential economic liability, searching for work at times of high unemployment.[135]

During this period, the ad hoc Group on Immigration tabled a Resolution on harmonization of national policies on family reunification, which was adopted in Copenhagen in June 1993.[136] The Resolution did not provide much harmonization. Rather, it suggested that family reunification should apply to TCNs legally resident in a Member State 'on a basis which affords them an expectation of long-term residence'.[137] The definition of what constituted an expectation of long-term residence was left to national law. Member States were allowed to make entry and stay conditional on the availability of adequate accommodation, sufficient resources and the existence of health insurance, to avoid placing a burden on public funds.[138] What is more, the authorization to family members could be made conditional on a continued fulfilment of the criteria for admission for a period, which the Member States would define.[139] Within a reasonable time following admission, family members could be authorized to stay on an independent basis in accordance with the provisions of national law.[140] This restrictive approach is in stark contrast with the Opinion of the Economic and Social Committee, which suggested that family reunification should take place under the same conditions as applicable to Community workers.[141]

The 1997 Commission proposal on a Convention regulating the admission of TCN migration discussed earlier, also included provisions on family reunification. In the proposal, the issue was disconnected from economic considerations, and instead it was linked with obligations to consolidate the rights of migrant workers.[142] Under Article 24 of the proposed Convention, family reunification rights would be granted to TCNs who were resident for one year and had a prospect of valid residence for two more years. Article 28 of the proposed Convention provided that the applicant should have sufficient material conditions to support their family and to ensure that reunification would not place a burden on state expenditure. Article 30 of the proposed Convention enshrined a limitation for family members' access to

[135] Böhning and Werquin (n 15) 41.

[136] Ad hoc Group Immigration, Resolution on the harmonization of national policies on family reunification, 1 June 1993, SN2828/1/93 WGI 1497 REV1.

[137] ibid point 1.

[138] ibid point 16.

[139] ibid point 11.

[140] ibid point 12.

[141] European Economic and Social Committee, Opinion on the Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies (94/C 393/13) [1994] OJ C 393/69 para 3.2.2.

[142] Proposal COM(97) 387 final Section 2.

employment for a period of six months, as the admission was granted for human rights reasons and not for economic ones. Finally, Article 31 of the proposed Convention provided that family members would be entitled to an autonomous right to reside subject to the fulfilment of the specified conditions.

After the failure to adopt the proposed Convention, the Commission issued a specific proposal on family reunification for both TCNs and EU nationals who did not fall under the free movement rules.[143] By wat of this proposal, the Commission sought to consolidate the protection of family life in the EU, as means to promote the living conditions of everyone in the territory, rather than specific migration related rights. Specifically, the harmonization of family reunification was suggested because of the function of family for the integration of migrants. According to the Commission, 'The presence of family members makes for greater stability and deepens the roots of these people since they are enabled to lead a normal family life'.[144] By analogy to family reunification rights for EU nationals, the Commission suggested that fair treatment of TCNs was 'indispensable' if they were to lead a normal life in the host states and it would help them to integrate in local societies.[145] However, this horizontal regulation of family life for both TCN and EU nationals who had not moved from their state of origin was not accepted by the Council.[146]

Eventually, the Family Reunification Directive was adopted in 2003.[147] It applies to all legally resident TCNs and excludes all migrants whose status is considered uncertain or temporary.[148] Under the current framework, the right to family reunification for TCNs is regulated and harmonized as a means to promote economic and social cohesion under Article 3 TEU, as acknowledged in Recital 4 of the Directive. Even though Article 3 TEU is not explicitly referred to, the recital mentions the central role of family reunification in the creation of sociocultural stability and integration for TCNs, and explains that such outcome serves to promote economic and social cohesion as fundamental objectives stated in the Treaty. The

[143] Proposal for a Council Directive on the right to family reunification, COM(99)0638 final, Article 1, Article 3(c).

[144] ibid Section 2.2.

[145] ibid Section 7.2.

[146] Amended proposal for a Council directive on the right to family reunification COM(2002)0225 final Section 2.4.

[147] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

[148] Article 3 Family Reunification Directive: asylum seekers, temporary protection or subsidiary protection status holders, family members of Union citizens whose conditions for reunification are regulated in Directive 2004/38 and finally TCNs who are entitled to more favourable treatment under agreements concluded between the EU and third countries and the EU and Member States and third countries, or who are entitled to more favourable conditions under the Charter. See also Amended proposal COM(2002)0225 final.

Directive creates a right to family reunification for the nuclear family of TCN migrants. The 1999 proposal for this Directive provided for a larger scope of family members entitled to reunification.[149] This was met with resistance by the Council, which suggested as a compromise that the Family Reunification Directive should create an obligation on the part of the Member States for family reunification for members of the nuclear family, and allow discretion for the rest.[150] Thus, Article 4 of the Family Reunification Directive provides family reunification rights for the spouse of the TCN and the minor children (including adopted children) of the TCN or the spouse as long as the TCN has custody and the children are dependent on them. The age of majority for reunification of children is set by national law and the children must not be married. Apart from the spouse and minor children, Member States have discretion to authorize the reunification of other family members under Article 4(2) and (3) of the Directive. Similarly, the provisions as to the age of children were revised as Member States requested room for manoeuvre to examine whether children met the conditions of integration beyond a certain age before authorizing family reunification.[151]

The Family Reunification Directive also provides family members with rights that are dependent on economic considerations. All family members enjoy entry and residence rights in the host Member State of the sponsor.[152] The Directive also provides rights of access to vocational guidance. This should not come as a surprise, since access to vocational guidance means that family members will be ready and trained for work when labour demand might arise. They should indeed eventually enjoy access to employment. However, the Directive provides that Member States may limit such right for up to 12 months, during which they may examine the situation of their labour market, and they may also restrict access to the employment market for the dependent relatives and adult children entitled to reunification under Article 4(2) of the Directive. This type of limitation of family members' right to access the labour market should also not come as a surprise. The purpose served by such restrictions is the following: family reunification is introduced as a social measure to ensure better living conditions for the migrant worker. If family members are allowed to access the labour market with no restriction, this has the

[149] Proposal COM(99)0638 final, Article 5 with obligation for spouse and unmarried partner in line with Judgment of 17 April 1986, *Netherlands v Reed*, 59/85, ECLI:EU:C:1986:157, ascendants and children of full age.

[150] See Council of the European Union, Press Release, 2370th Council meeting - Justice, Home Affairs and Civil Protection, Brussels, 27 and 28 September 2001, 12204/01 (Presse 334).

[151] Amended proposal COM(2002)0225 final Section 2.4 and Article 4. See Article 4(6) and 4(5) on forced marriages, Family Reunification Directive.

[152] In the Blue Card Directive 2009/50 and Directive 2021/1883, the Intra-Corporate Transfers Directive 2014/66 and Researchers Directive 2005/71 the duration of their residence permits is altered to match the duration of the sponsor permit.

potential of negatively impacting the economy at times when there is no labour demand.

Finally, the Family Reunification Directive provides for the possibility that family members establish an autonomous right of residence.[153] Specifically, the Directive provides for such an autonomous right to be granted after maximum five years of residence in the host state. Member States are allowed to limit the autonomous rights of the spouse or unmarried children in the case of breakdown of the family relationship. They have the discretion of granting such a right to adult children and dependent relatives under Article 4(2) and the possibility to providing it in cases of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line, as well as in cases of particularly difficult circumstances. Family members of workers also enjoy a set of procedural rights, which have been consolidated in the case-law of the Court.[154]

The Directive includes limitations to the right to entry and grounds for non-renewal of the permit in case the conditions set by the Directive are no longer satisfied, in case of fraud, public policy threat, fake marriage or marriage of convenience, in case family members no longer have a real relationship with the sponsor, in case the sponsor has no right to reside and, finally, and in case the sponsor does not have sufficient resources.[155] The requirement of sufficient resources applies as a condition of entry but is explicitly repeated as a reason to withdraw the permit upon application for renewal.[156] The difference is that, on renewal, Member States can also take into account the potential contribution of the family member.

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[153] The 1999 proposal granted such rights after four years, but in the 2002 proposal it was apparently needed to change this in order to improve consistency with the long-term resident status.

[154] In judgment of 16 July 2020, *Belgian State (Regroupement familial - Enfant mineur),* C-133/19, C-136/19 and C-137/19, ECLI:EU:C:2020:577 the Court engaged with the question of whether the application for family reunification by minor children should be examined as such in case the children reached the age of majority during the course of administrative proceedings or during the judicial proceedings challenging a potential rejection. In that case the Court emphasized the need to interpret the Directive in light of Articles 7, 24 and 47 of the Charter in paras 45 and 53. This means that the age of the child should be defined by reference to the time the application was submitted.

[155] See Judgment of 14 March 2019, *Y.Z. and others*, C-557/17, ECLI:EU:C:2019:203 on the case of fraud as a ground of withdrawal when such fraud has been conducted by the sponsor an the family member has no knowledge. The Court held the objective of the Directive, its wording and the fact that the right of family members is derived from the sponsor and intended to assist their integration, implies that the fraud on part of the sponsor affects the process of family reunification as a whole. Nevertheless, such withdrawal should not be automatic and should be based on a balanced and reasonable assessment of all the interests in place and in conformity with the right to respect private life.

[156] This clause was not included in the original proposal of 1999, but upon deadlock it was included in the revised proposal of 2002.

Thus, in the field of family reunification, while economic considerations appeared behind restrictive national policies, the Commission's approach was socially oriented. Essentially, the demand for securing rights to family reunification was aligned with a need to protect the human rights of people residing in EU territory and fit with the promotion of the social objectives of the EU project.[157] This is unlike family reunification for EU migrants, where the stated objective of regulation was to support the migrant worker in the performance of their task, as discussed in Chapter 4. At the same time, economic considerations condition the attribution of rights to migrant families to ensure that the family members will not pose risks to Member States' economy. This is achieved through the introduction of requirements related to sufficient resources of the sponsor as a precondition for enjoyment of the family reunification right. The economic conditioning of the relevant rights has been interpreted in a restrictive way by the Court, as we will see in the following chapter. Overall, in the regulation of family reunification, we see a shift that places migration closer to the social objectives of the EU, which were redefined during this period and were consolidated in the post-Amsterdam framework. At the same time it is clear that the parallel pursuit of economic and social sustainability also conditions the attribution and limitation of migrants' rights in this field.

5.2.2.2 From a Byproduct of Economic Progress to a Means of Integration: the Case for Progressive Attribution of Rights

During this period, the rights of legally resident TCNs appear in concrete legislative proposals. As should be expected at this stage of the analysis, the ambition to attribute rights to TCN migrants was subject to conflicting ideas between different actors. Specifically, the Commission suggested the extension of free movement and access to employment across all Member States for resident migrants.[158] The need to extend freedom of movement to TCN migrants was also supported by the Parliament and the Economic and Social Committee, with reference to the contribution of TCN workers to the development of the EU project, and to the aim of creating an EU labour market.[159] Regarding the Commission's position, it appears

[157] On immigration and asylum policies, COM(94)23 final para 125.

[158] On Immigration, SEC(91)1855 final para 62. The Commission proposal was more grounded in that it suggested the application of free movement, first for certain categories of TCNs (permanent residents, refugees, frontier workers, staff of firms providing cross border services).

[159] Resolution on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers (Doc. A 2-261/88) [1989] OJ C 69; Economic and Social Committee own-initiative opinion on the status of migrant workers from third countries [1991] OJ C 159 point 3.4; European Economic and Social Committee, Opinion on the status of migrant workers from third countries (91/C 339/15) OJ C 339/82 para 2.6.3 on mobility for TCN workers and 2.6.4 on free movement as Community workers for legally resident TCN after a period of two years. See also European Economic and Social Committee, Opinion on the Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies (94/C 393/13) [1994] OJ C 393/69 para 3.1.3.

that the internal market logic lay behind such a demand. Absent any differentiation between EC and TCN workers' contribution to growth, there was a demand to grant access to employment in another Member State to the latter.[160] In this context, the Commission envisioned the priority of legally resident TCNs after EC nationals in accessing employment in other Member States.[161] That would be the first step, while a 1994 Commission Communication suggested a second step of allowing TCN workers to enter another Member State to respond to offers of employment.[162] Leaving some leeway to the intergovernmental cooperation taking place at the ad hoc group on Migration, the Commission suggested that it would pursue the conditions of movement in the EU for legal migrants if the relevant initiatives did not move forward.[163]

Free movement of TCNs did not materialize at that time, but instead the Commission submitted a proposal that would grant rights to legally resident TCNs to travel within the Community.[164] The attribution of a right to travel was based on Article 100 EC, which provided for the coordination of national laws in matters affecting the functioning of the common market. While such a right would advance the position of TCNs, the central aim was to ensure the full economic benefits of a single market and to contribute to the abolition of internal frontiers as obstacles to movement. As the Commission suggested in the relevant proposal, such a right to travel between the Member States for short stays was both useful from an economic point of view and legally necessary.[165] In any case, what we see behind the demand for access to employment for TCN workers is a need to ensure that there are no barriers to the EU development project. For the Commission, it does not make sense to have labour demand that can be filled internally, i.e., by other EU workers and TCN workers resident in other Member States, and to still preclude TCNs from such employment, which would lead to more external recruitment.

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[160] On Immigration, SEC (91) 1855 final para 62; On immigration and asylum policies, COM(94)23 final para 127.

[161] On immigration and asylum policies, COM(94)23 final para 129.

[162] ibid para 129.

[163] HAEU, CEUE _SEGE-SEC(1991)0803, Commission of the European Communities, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, page 6.

[164] Proposal for a Council Directive on the right of third-country nationals to travel in the Community COM(95)346 final.

[165] ibid para 12. The proposal was amended in 1997, Amended proposal for a Council Directive on the right of third-country nationals to travel in the Community COM(97)0106 final, and then was implictly withdrawn in Withdrawal of Commission Proposals which are no longer topical COM(2001)0763 final.

At the same time, security of residence becomes a demand related to the social advancement of the migrant, and hence there is call for a common permanent residence scheme granted after a fixed period across the Member States, [166] as well as for the progressive attribution of extra rights to settled migrants. While the Council seemed to recognize the social significance of integration of legally resident TCNs, its approach to granting rights to long-term resident TCN workers remained restrictive.[167] In a 1996 Resolution, the Council held that long-term residents should be defined as TCN migrants who have stayed in the territory of a Member State for a period of 10 years.[168] While the Resolution provided that Member States should ensure security of residence for at least 10 more years to long-term resident workers, it suggested that when an application was made to this end, Member States should be able to assess whether the applicant had a certain and stable level of means of subsistence, in particular health insurance, and whether they fulfilled the conditions for exercising an occupation.[169] As to the question of rights, the Resolution provided that long-term residents and their family members should enjoy 'no less favourable' treatment than nationals of the Member States as regards working conditions, membership in trade unions, public policy in the housing sector, social security, emergency health care and compulsory schooling.[170] Moreover the resolution suggested that it should be possible for long term residents and their family members to be granted non-contributory benefits.[171]

Unlike the restrictive approach of that Resolution, the 1997 proposed Convention discussed earlier placed security of residence in light of integration, as necessary to safeguard an equilibrium in European societies.[172] Under Article 32 of the proposed Convention, long-term resident status would be granted to TCNs who had been resident in a Member State for five years and who held a residence permit that ensured that on expiry they would have lived in that Member State for a total period of ten years. The rights for long-term residents would be guided by non-discrimination compared to EU nationals and a greater protection against expulsion.[173] In Article 35, the proposed Convention provided them the right to apply for vacancies in other Member States, and to study throughout the EU. The

[166] On Immigration, SEC(91)1855 final para 59; On immigration and asylum policies COM(94)23 final para 124.

[167] Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States [1996] OJ C 80/2, 3rd recital

[168] ibid III.1.

[169] ibid III.2 and IV.2

[170] ibid V.2

[171] ibid.

[172] Proposal COM(97)387 final Section 2.

[173] ibid, Article 34.

reasoning behind the attribution of such rights was both economic and social. According to the Commission, the possibility to take up work in another Member State would not affect the labour market, as it would not increase the number of migrants employed in the EU.[174] Moreover, with the aim of moving towards a broader EU social space, the Commission mentioned that long-term residents were seeking integration not in the particular Member State where they resided but rather in the frontier-free area of the EU.[175] As the new millennium began, the Commission also used the Charter as a point of reference, perhaps in an attempt to consolidate a direct linking of rights between third-country nationals and the EU legal order. Specifically, it mentioned that the Charter could be a reference point for the development of a civic citizenship for TCNs that would comprise of common rights and obligations.[176]

Relatedly, a proposal was issued by the Commission with the aim of consolidating the rights of long-term residents.[177] The proposal suggested that full integration for long-term residents should necessarily imply their right to move between Member States. Specifically, the Commission claimed that 'A genuine area of freedom, security and justice, a fundamental objective of the European Union, is unthinkable without a degree of mobility for third-country nationals residing there legally, and particularly for those residing on a long-term basis.'[178] Free movement rights for long-term residents were fixed in light of Article 45 of the Charter, which provides for the possibility of extending free movement rights to third-country nationals. Apart from suggesting such free movement in terms of rights to be granted to TCNs, the Commission insisted on the economic need behind such attribution. Specifically, it stated that

> The evolution of the employment market in the Union is highlighting employment shortages in certain sectors of the economy. Third-country nationals who are long-term residents may be ready and willing to relocate either in order to put their vocational skills to work in another Member State or to escape unemployment in the Member State where they reside. The mobility of long-term residents can thus make for better utilisation of employment reserves available in different Member States. At a time when several Member States are engaging in international competition to attract specialists, notably in information technology, the possibility of acquiring long-term resident status and therefore of residing in any of the Member States will

[174] ibid, Explanatory Memorandum, Article 35 para 1.

[175] ibid, Explanatory Memorandum, Article 35 para 1.

[176] On a Community immigration policy COM(2000)757 final 19-20.

[177] Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final.

[178] ibid Section 5.6.

make the prospect of settling in the European Union on a long-term basis all the more attractive.[179]

The Commission managed to gather support and adopted the Long-term Residents Directive in 2003, as means to promote the social objectives of the EU by ensuring fair treatment to legally resident TCNs and to put in place an integration policy that would grand TCNs rights and obligations comparable to those of EU migrants.[180] Recital 4 of the Directive mentions that the integration of TCNs who have had a long residence in the EU is key in promoting the economic and social cohesion of the Union. Under Article 4(1) of the Directive, the status is attributed to all migrants who have lawfully resided in a Member State for a period of five years. Under Article 14 of the Directive, long-term residents can move to another Member State for periods longer than three months for any purpose (study, economic activity, other purposes). What is more, they have access to the labour market of the second Member States under equal treatment conditions under Article 21 of the Directive. However, Articles 13 and 21(2) of the Directive allow Member States to set restrictions and conditions to the exercise of such rights which can significantly limit their effectiveness by making it extremely hard to move to take up employment in another Member State. Thus, even though free movement found its way in the Directive, the practical effect of the relevant right is significantly limited.

The Long-term Residents Directive is a clear example of the ways in which economic considerations can frame legislation at EU level: the aspiration of extending rights to migrants in order to boost the economy is limited and made ineffective due to economic fears of what might happen to the economy if migrants actually enjoy rights. The long-term approach of the Commission and its emphasis on the positive function of long-term residents for the EU economy was the reason for attribution of free movement rights to this category of TCNs. In parallel, the economic fears connected to potential negative effects of such movement for national labour markets were expressed by the Council as a reason to set substantive limitations to such movement making it practically ineffective.[181]

This ineffectiveness led to a demand for the revision of the Long-Term Residents Directive. In December 2022, the Commission issued a proposal for revision with the aim of strengthening the rights of long-term residents and their families and

[179] ibid Section 5.8.

[180] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/ 44. See also Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, Proposal COM(2001)127 final, Explanatory memorandum 1.1.

[181] See also Sara Iglesias Sánchez, 'Free Movement as a Precondition for Integration of Third-Country Nationals in the EU' in Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), *Illiberal liberal states : immigration, citizenship, and integration in the EU* (Ashgate 2009).

drawing them closer to the rights of EU nationals.[182] The Commission demanded consolidation of free movement rights for long-term residents once again, based on the idea that such movement can improve labor market effectiveness. It demanded the curtailment of state discretion on free movement of long-term residents by suggesting that the prerogative of Member States to determine volumes of admission under the Treaty refers to first entry, and not to intra-EU mobility, by proposing the recast of povisions that allowed Member States to carry out a labour market check or to set pre-existing quotas for admission of long-term residents, and by introducing shorter deadlines for application to ensure efficiency.[183] The potential of effectiveness of mobility rights for TCNs is very much dependent on this proposal whose future is still unclear.[184] When it comes to the protection of social rights of long-term residents, which were also limited in the original formulation of the Directive, these have been extensively interpreted by the Court, which has limited state-discretion behind their limitation, as we will see in the following chapter. Once again economic and social considerations appear in the approach of different actors and affect the shaping of the EU migration policy. The lack of long-term considerations on the part of the Council limiting the attribution of both mobility and social rights to long-term residents lies behind the unsustainability of this instrument and its failure to achieve the economic and social objectives of primary law in the regulation of migration.

5.2.2.3 National Contestation Limiting the Rights of TCN Workers and Social Considerations Behind New Demands

Unlike the period reviewed in Chapter 4, the way economic and social objectives appear behind the regulation of labour migration becomes differentiated in the 1990s, leading to paradoxical results. Long-term economic planning dictated the Commission's effort to pursue harmonization of admission for TCN migrants. It put forward various proposals in an attempt to align migration with the economic and social objectives of the Community under a long-term strategy. Behind these

[182] Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) COM(2022)650 final. See also the similar demands of the Parliament in European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on new avenues for legal labour migration (2020/2010((INI)) (rapporteur: Sylvie Guillaume) and of public stakeholders in Commission, Directorate General for Migration and Home Affairs, Synthesis Report, Analysis of the responses to the public consultation on the future of legal migration, January 2021.

[183] Proposal for revision of Long-term residents Directive COM(2022)650 final 4, Explanatory memorandum Articles 16-18.

[184] See also Council Document, Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) - Presidency compromise text, ST 10528/1/23 REV 1, Brussels 21 June 2023 already limiting some elements of the Commission poroposal.

proposals we find a need to shape a migration policy that could match national labour demand with the TCN workforce resident in the EU, and that would allow admission of TCNs in order to cover potential labour needs with a long-term perspective. In parallel, the Commission's proposal sought to align migration to the social objectives of the EU, referencing the need to guarantee a minimum core of rights to migrant workers and a progressive attribution of extra rights to long-term residents, who would eventually be protected similarly to Community workers. At that point of closer political integration, the rights of migrants became tied to a positive vision of what EU societies should look like.

The Council's stance was determined by economic considerations, but unlike the Commission, its approach to EU law-making is reactive.[185] During the time period examined, Member States were facing high national unemployment, and in this context labour migration was viewed as an aggravating factor. This created a political sensitivity around migration that precluded any consideration regarding the contribution of migrants as a reason for harmonizing admission. Instead, the Council focused on measures that would reinforce a feeling of control for Member States over their territories and shared borders.[186] On this matter, O'Keeffe rightly noted that

> It is ironic that the different initiatives to bring about the internal market and to realise the People's Europe thus far are characterized by an increase in the power of government to carry out checks and controls, to store and exchange information, while the judicial protection of the individual is if anything weakened.[187]

Regarding measures that guarantee rights for migrants, such as family reunification and security of residence, equal treatment for TCNs was dictated under both a socially oriented and an economic logic. On the social side, the EU was promoting an identity that was socially and culturally pluralistic, based on respect of human rights and human dignity.[188] At the same time, equality for TCN workers was linked to observance of labour law, as a precondition for attracting migrants for highly skilled jobs, a demand the EU population could not meet.[189] As the Commission stated, granting such equality in terms of wages and working conditions was in the interest of society, which could benefit fully from the contribution of migrants to

[185] Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004) who suggests that the AFSJ developed as a reactive policy domain.

[186] Callovi (n 8) who mentions that the obstacles are not technical but purely political.

[187] O'Keeffe (n 16) 19.

[188] On a Community immigration policy COM(2000)757 final 19.

[189] ibid 19.

the economic and social life, while at the same time this would ensure that economic exploitation would not fuel unfair competition in the Union.[190]

A tension can be identified between the approaches of the two institutions to rights of long-term residents. Even though the Council stated that the status of TCNs should be approximated to that of EU nationals, the suggestion was watered down by the statement that long-term residents should be granted a set of rights that are as 'as near as possible' to those of EU nationals.[191] The Commission, on the other hand, suggested the provision of civic and political rights to long-term residents.[192] What is more, the initial suggestion of the Commission for rights of all migrants to move within the EU to cover labour demands, became restricted to long-term residents.[193]

The difference between the Council and the Commission as regards economic and social considerations behind migration appears on two levels. First the Council focused these considerations on a domestic level and the relation of migration to the circumstances and labour needs of each Member State, while the Commission was looking at the EU as a whole. Second the Council, perhaps due to its touch with national politics, took a short-term approach to economic and social objectives, while the Commission took a long-term one. It is in this long-term approach to the pursuit of economic development and social progress that the demand of economic and social sustainability finds implicit expression in the regulation of migration.

In any case, these different approaches on the function of migrants for EU economies blocked every attempt to harmonize admission, but they did allow the adoption of instruments guaranteeing a set of rights to migrant workers. The rights were not as ambitious as the Commission had planned, as we saw in both the case of the Family Reunification Directive and in the case of the Long-term Residents Directive. However, they did put in place minimum guarantees which, as we shall see in the next chapter, were significantly extended by the case-law of the Court. After this overview of the legislative evolution, the next section analyses the case-law of the Court on rights of migrant workers during this period, before showing the implications this had for the Agreements concluded by the EU with third countries in the 1990s.

[190] ibid 13.

[191] Tampere European Council, Presidency Conclusions, 15 and 16 October 1999 para 21.

[192] On a Community immigration policy COM(2000)757 final 19.

[193] ibid 9.

5.3 The Unstoppable (?) Social Orientation of the Court

In its early case-law on free movement of workers, the Court extended the protection of migrants falling under the scope of Regulation 1612/68 by teleological interpretations, related to the need to remove obstacles to free movement and to assist workers in migrating in dignity. With an emphasis on the economic considerations behind personal rights, the Court pioneered the protection of rights of migrant workers in ways that could not have been envisioned under a literal reading of the text of the relevant provisions. From the 1980s onwards, the Court followed a similar approach as regards the rights of migrants falling under Association Agreements. The effects of the extensive interpretation were mostly felt regarding the rights of Turkish workers. The EEC-Turkey agreement was implemented through specific instruments that had more detailed provisions and provided the basis of interpretation for the Court. Nevertheless, even in Association Agreements with more vague provisions and different purposes, the Court upheld extensive interpretations that promoted the rights of migrant workers. This section will review the case-law on EEC-Turkey Agreement in Section 5.3.1, before examining case-law on Association Agreements and social security rights in Section 5.3.2, and the striking emergence of the principle of non-discrimination behind a limited right to remain in EU territory in Section 5.3.3.

5.3.1 The Extensive Judicial Protection of Turkish Workers

The Court's case-law on the rights of Turkish migrants brought their position closer to that of EU migrants. The analysis that follows highlights that it is not only the purpose of the Agreement, but also the function of Turkish workers for EU economy that was recognized by the Court as a reason to advance their social position.[194] Essentially, the Court employed a reasoning very similar to that used in the case-law on EU workers. Before going into the relevant analysis, a reminder is due: the EEC-Turkey Agreement did not affect Member States' competence in regulating entry of migrants, nor did it impose obligations regarding family reunification. Rather, through different implementing decisions, the Agreement sought to advance the social position of Turkish workers and their families by ensuring the consolidation of their position after a certain time in the national labour market.

The most crucial part of these implementing Decisions, and one which differentiates Turkish workers to this day, when the EU has put in place a separate migration

[194] Daniel Thym, 'Constitutional Foundations of the Judgments on the EEC-Turkey Association Agreement' in Daniel Thym and Margarite Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015) See however mentions to a purely economic or essentially economic aim of the Agreement in *Ziebell*, C-371/08 and *Demirkan*, C-221/11.

policy, is the standstill clauses that were included those decisions. Specifically, Decision 1/80, which specified the rights that should be granted to migrant workers and their families, included a standstill clause under Article 13.[195] The clause provided that Member States should not introduce new restrictions on the conditions of access to employment of Turkish workers and their families legally resident and employed in the Member States. Early on, the Court held that Article 13 of Decision 1/80, much like the similar clause of Article 41 of the Additional Protocol to the Agreement, had direct effect and could grant rights to individuals [196] The Article was interpreted as meaning that Member States were not allowed to adopt new measures having the object or effect of making the conditions of access to employment for Turkish nationals more restrictive.[197] The Court further held that the standstill was intended to protect Turkish nationals who were not already lawfully employed and residing in the host state.[198] Those who were lawfully employed were protected via the provision of Article 6 of Decision 1/80.[199] What is more, the Court held that this also applied to Turkish workers and their families who were not in paid employment.[200] How to reconcile this with the fact that the wording of the provision refers to 'legally resident and employed' Turkish nationals? The Court held that this should be taken to mean that the provision benefited Turkish nationals only if they complied with the host state rules on entry, residence, and

[195] See also Article 41(1) of the Additional Protocol to the EEC-Turkey Agreement which provided similar as to the refrain from introduction of new restrictions on freedom to provide services and freedom of establishment. It was interpreted in Judgment of 21 October 2003, *Abatay and others*, C-317/01 and C-369/01, ECLI:EU:C:2003:572 in relation to Article 13; In Judgment of 19 February 2009, *Soysal and Savatli*, C-228/06, ECLI:EU:C:2009:101 on visa requirements for provision of services; in Judgment of 24 September 2013, *Demirkan*, C-221/11, ECLI:EU:C:2013:583 the requirement of a tourist visa was not seen as a new restriction due to an emphasis on the economic nature of the agreement, which meant that the Court's case-law on Judgment of 31 January 1984, *Luisi and Carbone / Ministero dello Tesoro*, 286/82 and 26/83, ECLI:EU:C:1984:35 and a passive freedom to receive services could not be transposed.

[196] See as regards Article 41(1), Judgment of 11 May 2000, *Savas*, C-37/98, ECLI:EU:C:2000:224 para 54 and 71, and as regards Article 13 see Judgment of 20 September 1990, *Sevince / Staatssecretaris van Justitie*, C-192/89, ECLI:EU:C:1990:322 para 26.

[197] *Abatay and others*, C-317/01 and C-369/01 para 80. See also para 74 where the Court explains that the analogous interpretation of Article 41(1) in *Savas*, C-37/98 para 69 should apply in Article 13. This was taken to mean more restrictive compared to what it was when the Agreement was adopted, however, in Judgment of 9 December 2010, *Toprak and Oguz*, C-300/09 and C-301/09, ECLI:EU:C:2010:756, the Court found that the standstill prohibited more restrictive measures also compared to more lenient practices adopted by Member States after the adoption of the Decision 1/80. So, in that sense, if Member States have in the meantime adopted less stringent legislation on aliens, they cannot go back, at least for Turkish workers.

[198] *Abatay and others*, C-317/01 and C-369/01 para 81.

[199] ibid para 78; Judgment of 17 September 2009, *Sahin*, C-242/06, ECR 2009, ECLI:EU:C:2009:554 para 51.

[200] *Abatay and others*, C-317/01 and C-369/01 para 81.

employment.[201] The similar standstill clause of Article 41 of the Additional Protocol to the Agreement also shaped the Court's case-law on practices of Member States which could limit family reunification rights.[202]

Overall, the standstill clause was interpreted as follows: the adoption of new rules by Member States would either have to benefit the Turkish workers or, if these were more restrictive, they would have to apply equally to both Turkish and Community nationals, and would have to be proportionate in light of the pursuit of a reason of overriding public interest.[203] The Court has found several legitimate reasons falling under this concept: the aim of preventing illegal entry and residence, the prevention of forced marriages, ensuring successful integration, effective management of migration flows, and preventing and combatting entry fraud.[204]

In the analysis that follows, I first show how the court has shaped an EU right of residence through considerations related to the effective protection of a right to work under Section 5.3.1.1. I then investigate the social considerations behind the attribution of rights to family members and the purpose family life serves for the social advancement of workers under Sections 5.3.1.2. Section 5.3.1.3 examines case-law regarding the autonomous rights of children of Turkish workers. Finally, Section 5.3.1.4 offers conclusions on the way economic and social considerations shaped the interpretations of the Court on the provisions of the EEC-Turkey Agreement.

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[201] *Abatay and other*s, C-317/01 and C-369/01 para 84; *Sahin*, C-242/06, para 53, as in the case of the Agreements examined in Section 4.1.

[202] See Judgment of 10 July 2014, *Dogan*, C-138/13, ECLI:EU:C:2014:2066 on automatic dismissal of family reunification application for lack of knowledge of German language; Judgment of 12 April 2016, *Genc*, C-561/14, ECLI:EU:C:2016:247 on requirement of integration of children by requiring that the application for reunification is made within a specific time from granting a permanent residence; Judgment of 2 September 2021, *Udlændingenævnet*, C-379/20, ECLI:EU:C:2021:660 on tightening the requirements for family reunification with children over 15 years of age.

[203] In all cases it should not lead to a situation where a Turkish national would be in a position more advantageous than a Community one. This was provided in Article 59 of the Additional Protocol and dictated an interpretation of Article 13 in conjunction therewith. For example, see *Sahin*, C-242/06, paras 67 and 71; *Soysal and Savatli*, C-228/06 para 61. Similarly in Judgment of 29 April 2010, *Commission / Netherlands*, C-92/07, ECLI:EU:C:2010:228.

[204] *Demir*, C-225/12 para 41; *Dogan*, C-138/13, in the context of the standstill on Article 41 on automatic dismissal of family reunification application for the spouse of a self-employed Turk, the reasoning was extended in Article 13 in *Genc*, C-561/14, ECLI:EU:C:2016:247 paras 43-44; *Genc*, C-561/14 para 55 and *Udlændingenævnet*, C-379/20; Judgment of 29 March 2017, *Tekdemir*, C-652/15, ECLI:EU:C:2017:239 para 39, Judgment of 7 August 2018, *Yön*, C-123/17, ECLI:EU:C:2018:632 para 77; Judgment of 3 October 2019, *A and others*, C-70/18, ECLI:EU:C:2019:823 para 49.

5.3.1.1 The Effective Exercise of a Right to Work as the Basis of an EU Right to Reside

As stated earlier, the EEC-Turkey Agreement did not create a residence right for Turkish migrants. Member States maintained competence on regulating entry under national law. Decision 1/80 was adopted in order to improve the treatment of Turkish workers and their families in the social field.[205] The Decision set up a system of progressive attribution of rights to Turkish workers on access to employment under Article 6. Specifically, Turkish workers were entitled to renewal of their permit to work for the same employer after one year of legal employment. After three years of legal employment, they could respond to any offers of their choice for the same occupation, subject to priority for Community workers. After four years of employment, they were entitled to free access to any paid employment. This Article regulated the conditions under which Turkish workers would progressively enjoy greater access to employment in the Member States.[206] Despite the reference to free movement in the phrasing of Article 6 Decision 1/80 and in the case-law of the Court, the rights of Turkish workers refer to employment in a specific Member State and do not include the right to move between Member States.

By engaging with the different criteria that needed to be met for a Turkish national to acquire the relevant EU law rights, the Court extended the scope of protection of the Decision and consolidated the rights of Turkish workers to security of residence. The reasoning of the Court was based not only on the aim of the agreement but also on the function of the individual workers. Overall, for a Turkish national to enjoy rights under Decision 1/80, they would have to be a worker, duly registered in the labour force of a Member State, and in legal employment for a specified period of time. The Court aligned the interpretation of 'worker' with that provided under the free movement case-law.[207] Specifically, the Court held that the Agreement aimed at progressively extending access of Turkish nationals to the EU labour market, and that this was similar to the aim pursued by free movement of workers. The result was that the scope of the Decision was aligned with the extensive scope of protection under the free movement framework.[208]

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[205] 3rd recital to Decision 1/80.

[206] The Article also clarified what counts as periods of legal employment for the attribution of rights.

[207] See also the analysis in Opinion of Advocate General Fennelly delivered on 28 May 1998 in Judgment of 26 November 1998, *Birden / Stadtgemeinde Bremen*, C-1/97, ECLI:EU:C:1998:262 para 23.

[208] See for example Judgment of 5 October 1994, *Eroglu/Land Baden-Württemberg*, C-355/93, ECLI:EU:C:1994:369 on trainees; also Judgment of 19 November 2002, *Kurz*, C-188/00, ECLI:EU:C:2002:694 para 44 for apprenticeship as work; Judgment of 4 February 2010, *Genc*, C-14/09, ECLI:EU:C:2010:57 para 23-28 on a person engaged in work for 5h/week. Drawing an analogy to Judgment of 14 December 1995, *Megner and Scheffel/Innungskrankenkasse Vorderpfalz*, C-444/93, ECLI:EU:C:1995:442C-444/93 concerning EU nationals on 10h working week by emphasizing the need to assess if the activity carried is real and genuine. See also

The relevant case-law of the Court is characterized by a tension between the EU competence on progressive security of residence for those workers who fall under the scope of Decision 1/80, and the national competence on regulating entry and stay of Turkish nationals. In resolving this tension, the Court referred not only the aim of the Agreement regarding the attribution of rights to migrant workers, but also to the independent contribution of the worker that qualifies them to the set of rights attributed under the EEC-Turkey Agreement. Turkish nationals can gain rights from the Agreement by being engaged in work, but this does not presuppose that the purpose of their entry was to take up work.[209] This tension was also behind the interpretation the Court gave to the conditions of due registration in the labour force of a Member State and legality of employment.

On the condition of due registration to the labour force, as a means of acquisition of residence rights, the crux of the questions addressed to the Court was whether a Turkish worker who has no legal basis for residence under national law can claim a right to reside under EU law, due to the fact that they are engaged in lawful employment for the period prescribed by Decision 1/80. This issue was addressed in a series of cases, where the Court noted that Member States retained competence to regulate the entry of Turkish migrants into their territory, whereas the Agreement regulated the situation of migrant workers already integrated in the labour force of the Member States.[210] In this context, due registration into the labour force implied compliance with the national law and an entitlement to pursue an occupation in the host state.

For Turkish workers to enjoy rights under the Agreement, they should have legally established themselves in the Member State territory and have worked there with a valid work permit. In this case, they are entitled to renewal of their permit as workers covered by the Agreement. This holds true regardless of the purpose of the original residence permit, the type of legal relation which gave rise to their original permit,

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Judgment of 26 November 1998, *Birden / Stadtgemeinde Bremen*, C-1/97, ECLI:EU:C:1998:568 where the Court differentiated from Judgment of 31 May 1989, *Bettray v Staatssecretaris van Justitie*, 344/87, ECLI:EU:C:1989:226 and found that work under publicly subsidized scheme, which provided ancillary work to persons falling under the scheme's scope, in order to build up social security contributions and to enable them to improve their chances of finding work also fell under the agreement.

[209] Judgment of 24 January 2008, *Payir and others*, C-294/06, ECLI:EU:C:2008:36 para 38. In general Payir is an interesting read on this tension. See also the Opinion of Advocate General Kokott delivered on 18 July 2017 in *Payir and others*, C-294/06, who considered that the admission of a Turkish national as student, who was then engaged in ancillary work should not serve as a basis of protection.

[210] *Sevince*, C-192/89; Judgment of 16 December 1992, *Kus / Landeshauptstadt Wiesbaden*, C-237/91, ECLI:EU:C:1992:527 para 25; Judgment of 5 June 1997, *Kol / Land Berlin*, C-285/95, ECLI:EU:C:1997:280; Judgment of 8 November 2012, *Gülbahce*, C-268/11, ECLI:EU:C:2012:695; Judgment of 29 September 2011, Unal, C-187/10, ECLI:EU:C:2011:623.

or whether such legal relation persists.[211] Turkish nationals gained EU law residence rights via their integration in a labour market.[212] However, the worker's connection with the labour market is not without limits. In *Kol* the Court held that a Turkish worker whose residence permit under national law was issued as a result of a fraudulent conduct cannot claim the protection of the EEC-Association Agreement and regularize himself as a worker in legal employment.[213]

In examining the legality of employment which gives rise to residence rights, the Court held that this requirement implies a stable and secure situation as a member of the labour force for the necessary period of time.[214] The right of residence is derivative from to the right to employment, as it is indispensable according to the Court for the effective exercise of the latter.[215] It is the latter that needs to be effectively exercised by Turkish workers and, as a result, rights are created to ensure the former. The Court qualified this finding by acknowledging that a period of legal employment during the suspensory effect of an appeal against the rejection of a residence permit could not be considered as a period of legal employment and hence deprived the Turkish workers of acquisition of the relevant rights.[216]

What is more, even though the Agreement did not establish any right to search for work, the Court found that Decision 1/80 should be interpreted as meaning that residence rights should also be attributed under specific circumstances to job-seekers. In *Tetik*, the Court found that a Turkish worker should enjoy right to reside for a reasonable period of time in order to find other work; in doing so, it brought the rights of Turkish workers closer to those of EU workers.[217] According to the

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[211] *Payir and others*, C-294/06. Here also Judgment of 30 September 1997*, Günaydin and others / Freistaat Bayern*, C-36/96, ECLI:EU:C:1997:445; Judgment of 30 September 1997, *Ertanir / Land Hessen*, C-98/96, ECLI:EU:C:1997:446; *Kus*, C-237/91 para 26 and 22, where he entered to marry a German national and worked for a number of years and eventually divorced. See also *Gülbahce*, C-268/11, ECLI:EU:C:2012:695, where the court held that the retroactive withdrawal of a residence permit following a declaration of separation does not deprive a Turkish worker of the rights acquired by them as a worker for the employment carried during that period when the relevant permit was valid. See also Judgment of 29 September 2011, *Unal*, C-187/10, ECLI:EU:C:2011:623 para 50; Judgment of 4 February 2010, *Genc*, C-14/09, ECLI:EU:C:2010:57 para 40.

[212] *Günaydin and others* C-36/96, paras 37-38 where the Turkish national was granted a residence permit with temporal limitations for the purpose of being trained in a specific position within a company and then returning to Turkey to take up a similar post in a subsidiary of that company. Similarly, in *Ertanir*, C-98/96, paras 31,35 where a Turkish national was granted residence permit to work as a specialist chef under a permit that could only be renewed for 3 years.

[213] *Kol*, C-285/95.

[214] *Sevince*, C-192/89, para 30.

[215] *Kus*, C-237/91 para 33

[216] *Sevince*, C-192/89, 31-32.

[217] Judgment of 23 January 1997, *Tetik / Land Berlin*, C-171/95, ECLI:EU:C:1997:31 para 30.

Court, this was necessary to give full substance to the rights granted to Turkish workers after four years of legal employment. If such a derived residence right was not granted, then the right of free access to any paid employment of the worker's choice would be deprived of substance.[218] The Court did not elaborate on how long such a reasonable period would be, but suggested that it should be sufficient not to deprive the rights of Article 6(1) Decision 1/80 of their substance.[219] Most importantly though, the right to reside does not imply the right to remain for Turkish nationals unable to work. In *Bozkurt*, the Court found that the Association Agreement could not secure rights for people who are unable to work any longer, as the rights guaranteed thereby are intimately connected to a person's capacity to find work.[220]

The following observations can be made based on the case-law analysed above. With no EU competence on regulating entry of TCN migrants, the admission and residence of Turkish nationals were based on national law and the sovereign right of states to manage population. However, once Turkish nationals were engaged in economic activity that fulfilled the criteria of the decisions implementing the Association Agreement, they proved themselves worthy of rights attributed under EU law. Due to this, security of residence should be guaranteed in order to allow them to continue their engagement in the activity, by which they personally contributed to the EU development project. The Court drew both on the purpose of the Agreement and on the agency and contribution of the individual migrant as a way to secure residence rights for Turkish migrants. A need to secure the effective exercise of the right to work became the basis for attribution of residence rights to Turkish workers who could not secure such residence under national law.

5.3.1.2 The Multifunctional Role of Rights of Family Members

The EEC-Turkey Agreement did not establish a right to family reunification. Rather, the implementing decisions secured rights for family members, who were authorized under national law to join the Turkish worker in the host state.[221] Article 7 of Decision 1/80 secured rights for family members of Turkish workers in the following way. Family members were entitled to respond to offers of employment after residing in the host state for more than three years. After five years of

[218] ibid para 31.

[219] ibid paras 32, 41.

[220] Opinion of Advocate General Elmer delivered on 28 March 1995 in *Bozkurt / Staatssecretaris van Justitie*, C-434/93, ECLI:EU:C:1995:86 para 31, where he draws distinction between temporary incapacity, like involuntary unemployment, long absence due to sickness and permanent incapacity and Judgment of 22 December 2010, *Bozkurt*, C-303/08, ECLI:EU:C:2010:800 para 40.

[221] Judgment of 19 July 2012, *Dülger*, C-451/11, ECLI:EU:C:2012:504 62; Judgment of 11 November 2004, *Cetinkaya*, C-467/02 ECLI:EU:C:2004:708.

residence, they could enjoy an autonomous employment right and a corresponding residence right, flowing from EU law. After the establishment of such an autonomous right, family life need not be maintained.[222] The Court's case-law has engaged at great length with the purpose served by the rights granted to family members and has held that this gradual attribution of rights pursued a dual objective.[223]

The first objective of Article 7 Decision 1/80 (for the first three years of common residence) was to support migrant workers by means of family reunification in their employment and residence in the host state.[224] During these first three years, family members played a supportive function to the worker. Relatedly, the rights of family members promoted cohesion in the host societies.[225] In light of this function of family as conducive to the enjoyment of the worker's life in the host state, the Court interpreted the notion of family under Article 7 Decision 1/80 in ways similar to Regulation 1612/68. The analogous interpretation stemmed from an understanding that the purpose of Article 7 Decision 1/80 and Regulation 1612/68 was similar, that is protecting family unity as conducive to the enjoyment of the worker's life in the host state. [226]

In some cases, the Court went even further than the interpretation it had given to Regulation 1612/68. In *Eyüp* it held that cohabitation could also qualify for protection under family life, thus going further than the *Reed* judgment which concerned Community workers.[227] Such an interpretation must be attributed to the particular circumstances of the family in question (a married couple that divorced and remarried, all the while living together and having giving birth to children during the period of cohabitation) rather than in an attempt of the Court to extend the rights of Turkish workers further than those of Community workers.

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[222] Judgment of 16 March 2000, *Ergat*, C-329/97, ECLI:EU:C:2000:133 para 40 with reference to *Sevince,* C-192/89 paras 29 and 31, and *Tetik*, C-171/95 paras 26, 30 and 31 by analogy, as regards the third indent of Article 6(1) Decision No 1/80; and *Eroglu*, C-355/93 para 20 and Judgment of 19 November 1998, *Akman,* C-210/97, ECLI:EU:C:1998:555 para 24 as regards Article 7(2) Decision 1/80.

[223] *Bozkurt*, C-303/08, ECLI:EU:C:2010:800 para 32.

[224] Ibid para 33; Judgment of 17 April 1997, *Kadiman / Freistaat Bayern*, C-351/95 ECLI:EU:C:1997:205 33-34; Judgment of 22 June 2000, *Eyüp*, C-65/98, ECLI:EU:C:2000:336 2; *Cetinkaya*, C-467/02 para 25; Judgment of 16 June 2011, *Pehlivan*, C-484/07, ECLI:EU:C:2011:395 54.

[225] *Dülger*, C-451/11, para 42.

[226] In this see *Eyüp*, C-65/98 para 36; Judgment of 30 September 2004, *Ayaz*, C-275/02, ECLI:EU:C:2004:570 para 46 on the stepson of a Turkish worker as family member. See also para 47.

[227] *Eyüp,* C-65/98.

In any case, the enjoyment of rights of family members was dependent on their residence for a period of at least three years together with a worker who was duly registered as belonging to the labour force of the state. On the residence condition, the Court held that rights of access to employment could only be granted so long as the family member continued to reside with the worker for that three-year period.[228] The Court was lenient in interpreting the common residence condition by suggesting that reasonable periods of absence, and for legitimate reasons, should not count as interruptions of the three-year period, as they were not intended to detract from common residence.[229] The Court further noted that a different residence during this three-year period could be justified by objective circumstances necessitating that the worker and the member of his family could not live under the same roof.[230] Additionally, the rights can be claimed by the family member even after the period of residence with the Turkish worker has ended, as well as in cases where the family member was born in the host state and lacked authorization to join the worker.[231]

The due registration of the worker whose family is protected is examined by the Court as opposed to exclusion from the labour force. This means that as long as somebody has objective possibilities of rejoining the labour force and has not exceeded a reasonable time limit for finding new employment after the end of the period of inactivity, they cannot be considered excluded from the condition.[232] In *Altun* the involuntary unemployment of a worker for six months out of the three years of residence with family members was not considered sufficient to exclude the family member that resided with the worker from claiming the rights of Article 7 Decision 1/80.[233] The Court further held that such rights were attributed to family members even in cases where the Turkish worker was not engaged in work for the period immediately following the first three years of residence of the family member, but was rather engaged in work before or after that.[234] Or, to put it differently, the aim of Decision 1/80 is to guarantee the social protection of Turkish workers integrated in the national labour force. For such protection, is it irrelevant when such integration took place.

The second objective of the protection of family life appears in relation to free access to any employment and the corresponding residence rights for family

[228] *Kadiman*, C-351/95 paras 37, 40.

[229] ibid paras 48-49. The same held the Court should apply in cases of involuntary absence, as was the case when Ms Kadiman was abandoned in Turkey by her husband.

[230] ibid para 42, i.e. distance between residence and employment of a member of family, vocational training attended by a family member.

[231] *Cetinkaya*, C-467/02 para 32.

[232] Judgment of 6 February 2018, *Altun and others*, C-359/16, ECLI:EU:C:2018:63 para 25.

[233] ibid para 26.

[234] Judgment of 21 December 2016, *Ucar,* C-508/15 and C-509/15, ECLI:EU:C:2016:986 75.

members after a period of five years. These rights were conferred in order to consolidate the social integration of the Turkish worker's family in the host state by allowing family members to earn their own living and become independent of the migrant worker.[235] The individualization of protection of the family member is put forward by the Court in light of the purpose of Decision 1/80 to improve the social situation of Turkish migrants by promoting the gradual integration of those covered by the Decision in the Member State.[236]

In this regard, the Court held that residence rights of family members who have been residing with the worker in a host state for a period of five years should be maintained in cases where such family members were not actively pursuing employment. This was held by the Court in *Er*, which concerned a child of a Turkish worker who had spent most of his life in Germany, dropped out of different government support schemes aimed to assist the finding of employment, did not make an effort to find a job and was reliant on various social security benefits.[237] The Court did not consider the worker's prospect of obtaining employment. Instead, it repeated that the grounds for exclusion from the rights granted under Decision 1/80 were specific: they referred exhaustively to public policy limitations and absence from territory.[238] Member States no longer enjoyed discretion in adding restrictive conditions on the exercise of the relevant rights.[239] The finding of the Court on this matter significantly strengthened the protection of family members of Turkish workers. The reasoning for proceeding in such a finding followed the acknowledgement of a link between the unconditional right to access employment and the right of residence.[240] The right of free access to employment is granted to family members of Turkish workers in order to ensure their permanent integration in the host state.[241] Such permanent integration would be jeopardized where family members did not enjoy an effective right to reside and thereby to eventually exercise employment.

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[235] *Kadiman*, C-351/95 para 35; *Bozkurt*, C-303/08 para 34 with reference inter alia to *Eyüp* C-65/98, para 26; Cetinkaya C-467/02, para 25; *Aydinli*, C-373/03 para 23; and Judgment of 18 July 2007, *Derin*, C-325/05, ECLI:EU:C:2007:442 paras 50, 71.

[236] *Bozkurt*, C-303/08 para 39 with reference to inter alia to *Ergat*, C 329/97, paras 43 and 44; *Derin*, C-325/05, para 53; and *Altun*, C-337/07 paras 28 and 29.

[237] Judgment of 25 September 2008, *Er*, C-453/07, ECLI:EU:C:2008:524 para 23. The German national court, even in the way it formulated the question referred, tried to emphasize the lack of prospect that the applicant would find employment in the years to come.

[238] ibid para 30.

[239] ibid para 27.

[240] ibid para 29.

[241] ibid para 29, 34.

The acquisition of rights by family members after five years of residence in the host state also cannot be called into question on account of irregularities related to Turkish workers' right of residence.[242] This is based on the protection of legal certainty, and it implies that the family member of the Turkish worker has a right of their own to access the host labour market and continue to reside in that state.[243] Similarly, even in cases where the family was dissolved by divorce and the family member was convicted of assault and rape against the Turkish worker, by relation to whom they acquired their rights, such rights could not be forfeited.[244]

In developing this case-law, the Court put a lot of emphasis on the objective of Decision 1/80 to improve the situation of migrant workers in the social field. Does this mean that economic considerations should not affect the attribution of rights to family members? This seems to be the approach followed by the Court. Although not explicitly acknowledged by the Court in its decisions, AG La Pergola, in his Opinion in *Eyüp*, suggested that a balancing of interests between protection of family life and protection of national employment markets had already taken place in the design of the provisions of Decision 1/80.[245] Thus, it was assumed that no further restrictions should be imposed in a system designed to progressively attribute rights to family members of migrant workers.[246]

As regards Turkish workers, the Court proceeded in such interpretations in light of the aim of the Agreement to progressively secure free movement of workers. However, when it comes to conditions of family reunification, the Court took into account the supportive function performed by the family for the migrant worker. Even in the more recent case-law where the Court emphasized the primarily economic aims of the Agreement, it did not change its approach as to how the discretion of Member States in this field should be exercised. This is in itself an indication of social considerations of the Court as regards living standards of

[242] *Altun*, C-337/07 para 59. Contrary to what is the case for Turkish workers themselves, where rights acquired by a migrant worker under fraudulent conduct, which is discovered by the authorities, may have the effect of depriving them of rights claimed by Decision 1/80.

[243] *Altun*, C-337/07 para 60; *Bozkurt*, C-303/08 para 36.

[244] ibid para 22. The national court suggested that cases where the beneficiary of a right proves unworthy in relation to the person from whom he had derived such right might be considered an abuse. The Court found this irrelevant in so far as the rights had been duly acquired in para 44. Such conduct might, however, fall under the potential limitations for reason of protection of public policy under Article 14 of the Decision.

[245] The case concerned whether partners should come under the notion of family life. The Member States claimed that national employment markets would be under threat in case of potential attribution of access to labour market to a larger number of individuals, should partners also come within the scope of the notion of family.

[246] Opinion of Advocate General La Pergola delivered on 18 November 1999 in *Eyüp*, C-65/98, ECLI:EU:C:1999:561 paras 17-24.

workers in the territory of the Member States, and the function family life plays in that.

5.3.1.3 Autonomous Right to Work and Derivative Right to Reside for Children of Turkish Workers Educated in a Host State

Children of Turkish workers who had completed vocational training in the host state were granted a right to respond to offers of employment independent of the length of their residence there, as long as one of their parents had been already legally employed in the Member State for at least three years. This autonomous right, granted under Article 7(2) Decision 1/80 to children trained in the host country, is linked to the presumption that they had the expertise necessary to immediately participate in the labour market of the state that had trained them.

In this regard, in *Eroglu*, the Court confirmed that the rights of children to respond to offers of employment was independent of the reason for which the right to enter and stay was originally granted.[247] Further, in *Akman* the Court held that this right could also be granted to children of migrant workers, even after the Turkish worker was no longer employed or resident in the host country.[248] In suggesting this interpretation, AG Léger drew analogies to the case-law of the Court as regards children of Community workers and suggested that the status 'child of a Turkish worker' was not lost if the parent was no longer resident or employed in the Member State at the time when the child claimed the corresponding rights.[249] According to the AG, the fact that special treatment is attributed to children of Turkish workers under Article 7(2) Decision 1/80 should mean that the purpose of ensuring family unity does not underpin the attribution of such rights.[250]

Instead, according to the AG, the main aim of granting rights to children of Turkish workers who have attended vocational training is to encourage them to join the labour force.[251] In suggesting this, the AG drew a parallel to the case-law of the Court on the functional role of education, which prepares EC nationals for taking up work, and held that vocational training in the host state should create an independent right to work for Turkish children if one of their parents belonged to

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[247] *Eroglu*, C-355/93, para 22. The fact that the right to enter might have been given for the purpose of study and not for the purpose of family reunification is irrelevant.

[248] *Akman*, C-210/97, ECLI:EU:C:1998:555.

[249] Opinion of Advocate General Léger delivered on 9 July 1998 in Judgment of 19 November 1998 in *Akman*, C-210/97, ECLI:EU:C:1998:344 paras 33 and 37 with reference to Judgment of 21 June 1988, *Brown / Secretary of State for Scotland*, 197/86, ECLI:EU:C:1988:323 and Judgment of 15 March 1989, *Echternach and others / Minister van Onderwijs en Wetenschappen*, 389/87 and 390/87, ECLI:EU:C:1989:130.

[250] ibid paras 48-52.

[251] ibid para 52

the labour force of the host state at some point in time.[252] To ensure the practical effect of this right, the AG suggested that the right of children to respond to offers of employment and the corollary right of residence should be exercised within a reasonable time period, in which the child was informed of offers of employment corresponding to their qualifications and took necessary steps to find such employment.[253]

The functional aim of the rights provided under 7(2) Decision 1/80 was confirmed by the Court, which held that the purpose of this provision was to facilitate entry into employment market for children of Turkish workers, in line with the aim of progressively securing free movement of workers.[254] This finding was confirmed in *Bekleyen,* which concerned a child born in Germany in a family of Turkish workers.[255] The family returned to Turkey, and then, upon reaching adulthood, the child returned to Germany and attended higher education courses while the parents stayed in Turkey. Bekleyen wanted to establish residence rights in order to have access to any employment of her choice under Article 7(2) Decision 1/80. The Court confirmed that the objective of this provision was to progressively secure free movement of workers by facilitating access to employment for members of the family of workers who had trained in the host state, and that this right was founded on past employment of parents in the host state.[256] The Court also clarified that the condition that the parent must have worked for at least three years by the time the child starts their vocational training serves as its sole purpose to establish 'the level of the child's integration' by the time courses are undertaken.[257]

In addition to these rights, Article 9 Decision 1/80 required that children of Turkish workers be granted access to education, apprenticeship and vocational training under the same conditions as children of EC nationals. In *Gürol*, the Court held that Article 9 Decision 1/80 is an application of the general principle of non-discrimination in the sphere of education and vocational training. Specifically, the Court held that this provision is a specific iteration not only of the principle of non-discrimination laid down in Article 9 of the Agreement, but also of the general non-discrimination principle of Article 7 of the EC Treaty.[258] The right to equal access to education is independent of residence with the parents during the period of

[252] ibid with reference to Judgment of 13 February 1985, *Gravier v Ville de Liège*, 293/83, ECLI:EU:C:1985:69. See analysis in Chapter 4.

[253] ibid para 61 with reference to *Tetik*, C-171/95 and Judgment of 26 February 1991, *The Queen / Immigration Appeal Tribunal, ex parte Antonissen*, C-292/89, ECLI:EU:C:1991:80.

[254] *Akman*, C-210/97, para 38.

[255] Judgment of 21 January 2010, *Bekleyen*, C-462/08, ECLI:EU:C:2010:30.

[256] ibid paras 25, 30.

[257] ibid para 31.

[258] Judgment of 7 July 2005, *Gürol*, C-374/03, ECLI:EU:C:2005:435.

education.[259] What is more, children also have access to advantages related to education.[260] Essentially, the purpose of Article 9 Decision 1/80 is to guarantee equal opportunities to Turkish children and nationals of the host state.

In providing this extensive protection to children of migrant workers, the Court emphasized the aim of the Agreement to progressively secure free movement of workers. But this aim is only the explicit basis for attribution of such rights. Implicit in the Court's findings is the functional role of education in preparing migrants to be more readily available to take up work.

5.3.1.4 Economic and Social Considerations Behind the Attribution and Consolidation of the Rights of Turkish Workers

The EEC-Turkey Agreement created a special status for Turkish workers, which distinguished them from other third-country national workers. The adoption of the Agreement and its implementing decisions took place in years characterized by significant socio-economic changes. Throughout these years, the presence and importance of Turkish workers on Member States' territory was massive for the economic development of the EU. This allowed a better negotiating position for Turkey during the development of the Association. The aim of the Agreement and the initial – yet never materialized – purpose of eventual accession has been acknowledged as a basis of analogous interpretation in the case-law. However, this aim has not been the only consideration in the reasoning of the Court.

The system set up by Decision 1/80 and the progressive attribution of rights to migrant workers allowed the Court to infer a residence right from an effective protection of a right to work. Migrant workers who continuously contributed to a national labour market ought to enjoy full protection of the rights granted in Decision 1/80, and those who could no longer do so could not secure a right to remain. Here we see the significance of the functional role of the Turkish worker to the EU development project as a basis for attribution of rights in ways very similar to the case of EU workers. Similar considerations of economic and social sustainability as expressed in the parallel pursuit of economic growth and social progress underpin the rights of both these categories of migrants.

As regards the protection of family life, the Court has been very explicit about the social purpose served by family reunification and has ensured an extensive protection for family members. This was done both by limiting state restrictions on entry and residence in light of the importance of family life for the enjoyment of work-related rights, and through an autonomous protection of the family members after a certain period of residence. Relatedly, in the case of children of Turkish workers, we see how access of a specific cohort of migrant children to vocational

[259] ibid para 30.

[260] ibid para 44 concerning a grant for pursuing studies abroad.

education becomes the basis for autonomous residence rights. Children of Turkish workers are not only significant as family members. They are also significant as part of a future labour force that is trained in the host state at its expense.

In all the cases analysed above, in relation to different rights and factual circumstances the Court developed and gave life to a system which consolidated the rights of Turkish workers and their families. This consistently broad interpretation on the part of the Court took place not only in light of the purpose of the Association Agreement, whose main elements shifted over the years, for reasons that are related to geopolitical evolutions and circumstances external to legal reasoning. The interpretation of the Court is also driven by the function of the migrant workers for the host state and the corollary need for social advancement of the migrants in host societies. These considerations implicitly convey the pursuit of economic and social sustainability in the regulation of migration. To what extent similar considerations play out in relation to Agreements signed by the EU, where eventual accession was never foreseen, will be traced in the next section.

5.3.2. Non-discrimination in the Field of Social Security

In the field of social security, *Kziber* stands out as the case which provided the foundation for a full extension of equal treatment to migrant workers and their families covered by Association Agreements.[261] The case concerned the refusal of Belgian authorities to grant an unemployment allowance to the daughter of a Moroccan pensioner in Belgium. She claimed that she was entitled to this allowance as a family member of a former Moroccan worker under the equal treatment provisions of the EEC-Morocco Association Agreement.

The benefit at stake was also the subject of the *Deak* case, where a family member of a former Community migrant worker claimed access to it.[262] There the Court held that the specific benefit could not be attributed to family members of migrant workers as a derived right. It was rather granted to former workers due to their own personal situation. Despite this, the Court found that the children of Community workers, to the extent that they were dependent on the Community worker, were entitled to this benefit under Article 7(2) Regulation 1612/68 as a social advantage.

In the present case, AG Van Gerven employed a rather conservative approach. He highlighted that, in *Deak,* and previously in *Kermaschek*, the Court had held that this benefit could not be granted under Regulation 1408/71, which regulated social

[261] Judgment of 31 January 1991, *Office national de l'emploi / Kziber*, C-18/90, ECLI:EU:C:1991:36.

[262] Examined in Chapter 4, Section 4.4.3, Judgment of 20 June 1985, *ONEM v Deak*, 94/84, ECLI:EU:C:1985:264.

security for Community workers.[263] Instead, the benefit was granted to Community workers' families under Regulation 1612/68, which did not fall under the field of social security. In light of the purpose of the Cooperation Agreement, he found that the equal treatment clause of Article 41, which referred to equality of treatment in the field of social security, could not be the legal basis for granting this type of rights to families of Moroccan workers. According to the AG, such an outcome would imply that social security rights of TCN workers and their families were more extensive than those granted under free movement of workers.[264] A derived right for the TCN worker's family would be recognized in the field of social security, while the same right was not applicable to Community workers.

The AG then drew a distinction between the objective served by Regulation 1612/68, as interpreted in *Deak,* and the cooperation agreement at hand. He held that equal access to advantages had formed the basis of broad interpretations by the Court in light of the special position of free movement of workers under primary law.[265] That is in the sense that if EU migrant workers were not granted advantages for their family members, they would not be able to effectively exercise their rights to free movement and they would be forced to leave the host Member State. Unlike the free movement framework, the purpose of the Cooperation Agreement with Morocco was not to facilitate the access of Moroccan workers to the Community labour market and to ensure the effective exercise of free movement rights, but rather to ensure equal treatment for Moroccan workers already admitted to the labour market.[266]

Following this different rationale, the AG held that the rights of TCN workers who were already part of the labour market in the host Member State could not be given such a broad interpretation. He then tried to examine whether the daughter of the Moroccan worker could be considered a worker in her own right and have a personal right to the advantage.[267] Under this line of argument, he pointed out again that a broad interpretation of the personal scope of Article 48 EEC was intended to broaden the sphere of application of Community law. The same could be said about the Agreement at hand, which aimed at protecting those who had already migrated.

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[263] Opinion of Advocate General Van Gerven delivered on 6 December 1990 in *Office national de l'emploi v Kziber*, C-18/90,ECLI:EU:C:1990:447 para 18; See also Judgment of 23 November 1976, *Kermaschek v Bundesanstalt für Arbeit*, 40/76, ECLI:EU:C:1976:157.

[264] Opinion of Advocate General Van Gerven in *Kziber*, C-18/90 para 18.

[265] ibid para 19.

[266] ibid.

[267] ibid para 20.

However, a broad interpretation should not apply to facilitate access to the internal market or actively support the migration of Moroccans to the Community.[268]

Contrary to the distinction made by the AG, the Court took a broader approach to the matter and resolved the case with reference to the provisions of the Cooperation Agreement. The Court found that the principle of non-discrimination as provided for in Article 41(1) of the Agreement had direct effect.[269] What is more, it found that social security benefits under Article 41(1) of the Agreement were identical to those provided under Regulation 1408/71 and that the unemployment benefit at issue fell under them. By basing the attribution of the respective rights directly on Regulation 1408/71, the Court took the social rights of TCN workers and their families a step further than those of Community workers. The findings of the Court in *Kziber* have been consistently applied in a series of cases covering various social security benefits, Association Agreements, and family members.[270]

The extensive application of non-discrimination in the field of social security was also confirmed with regard to Turkish workers. Decision 3/80 regulated the application of social security schemes to Turkish workers.[271] Article 3 of the Decision provided for equal treatment of Turkish workers and nationals of the Member State. The Court established the direct effect of provisions of the Decision

[268] ibid.

[269] *Kziber*, C-18/90 paras 20-22.

[270] See Judgment of 20 April 1994, *Yousfi / Belgian State*, C-58/93, ECLI:EU:C:1994:160 on disability allowances; Order of 12 February 2003, *Alami*, C-23/02, ECLI:EU:C:2003:89 on unemployment benefit calculation; Order of 17 April 2007, *El Youssfi*,C-276/06, ECLI:EU:C:2007:215 on guaranteed income for elderly persons. See Judgment of 5 April 1995, *Krid / Caisse nationale d'assurance vieillesse des travailleurs salaries,* C-103/94, ECLI:EU:C:1995:97 on supplementary allowance from the national security fund for widows of workers where the Court held that Article 39 (1) of the EEC-Algeria Agreement had direct effect. See also Judgment of 15 January 1998, *Babahenini / Belgian State*, C-113/97, ECLI:EU:C:1998:13 where the Court found that it covered a disability allowance for the spouse of an Algerian worker, and rejected the Belgian government's attempt to reopen the question of distinguishing between personal and derived rights as in the case-law on Community workers. Similarly in Order of 13 June 2006, *Echouikh*, C-336/05, ECLI:EU:C:2006:394 it found the direct effect of Article 65 of the Euro Mediterranean Agreement with Morocco. Judgment of 3 October 1996, *Hallouzi-Choho / Bestuur van de Sociale Verzekeringsbank*, C-126/95, ECLI:EU:C:1996:368 where the court held that the concept of family member covered the non-working spouse who claimed to be entitled to the transitional arrangements provided in Dutch legislation relevant to old age insurance. Also Judgment of 11 November 1999, *Belgian State / Mesbah*, C-179/98, ECLI:EU:C:1999:549 concerning the mother-in-law of a Moroccan worker, who, however, had already become a Belgian national by naturalization in the mid-1970s, where the Court stated that 'family members' under Article 41(1) referred to spouse, descendants and persons having a close relationship with the worker, such as relatives in the ascending line of the worker or their spouse, subject to the condition that they live with the worker.

[271] Decision no 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families.

and held that its purpose was similar to that of Regulation 1408/71, which applied to Community workers.[272] In *Sürül*, the Court addressed the question of whether a Turkish national covered by Decision 3/80 would have to hold a specific residence permit in order to be granted family allowances in a case where residence was the only requirement applicable to nationals of the state.[273] The applicant, Sürül, had entered Germany as student and was employed for 16h/week in parallel with his studies, while his spouse was authorized to join him, and gave birth to their child there. The family had an authorization to reside, but not a residence permit. The crux of the question addressed by the Court was whether the Sürül family should have access to family allowances under the same terms as nationals, for whom residence in the territory was a condition to access the benefit, or under the conditions applicable to aliens, for whom a residence permit was required.

In resolving the case, the Court aligned the application of non-discrimination to Turkish workers and their families to the interpretation it had provided on other Association Agreements.[274] Specifically, the Court found that non-discrimination, as it appears in Article 3(1) of Decision 3/80, was a specific expression of the general non-discrimination principle laid in Article 9 of the EEC-Turkey Agreement, which referred to the general non-discrimination principle under Article 7 of the EEC Treaty.[275] As a result, it held that national legislation requiring Turkish workers to possess specific residence document to access family allowances, where such documents were not required for Germans, constituted an unjustified discrimination under the Decision.[276]

The extensive protection of migrant workers under the principle of non-discrimination is not limitless. Rather its limits should be seen in relation to the purpose served by its attribution. In this respect, in *Fahmi and Esmoris Cerdeiro-Pinedo Amado* the Court held that the prohibition of discrimination regarding access to social security did not cover workers who returned home and claimed child allowance benefits for children who studied in the state of origin.[277] The Court found

[272] See Judgment of 10 September 1996, *Taflan-Met and others*, C-277/94, ECLI:EU:C:1996:315 para 37, where the Court held that provisions of the decision might have direct effect, without mentioning which though. Instead in para 38, it found that Articles 12 and 13 of the Decision which were applicable in the case did not have direct effect. Then the direct effect of Article 3(1) was established in Judgment of 4 May 1999, *Sürül*, C-262/96, ECLI:EU:C:1999:228 para 64.

[273] *Sürül*, C-262/96, para 64.

[274] See analysis in Chapter 4, Section 4.3.2 and *Sürül*, C-262/96 paras 62-74 where the Court held that in light of the aim of the EEC-Turkey Association Agreement, its relevant findings from the interpretation of Association Agreements with Mediterranean neighbours should apply *a fortiori*.

[275] *Sürül*, C-262/96, para 64.

[276] ibid paras 103-104.

[277] Judgment of 20 March 2001, *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, C-33/99, ECLI:EU:C:2001:176.

this in light of the wording and spirit of the provision. Specifically, Article 41(3) of the EEC-Morocco Agreement, which was applicable to the facts of the case, provided that family allowances were granted for family members who resided in the Community. In light of this, and the fact that the purpose of the Agreement was to consolidate the positions of workers and their families living in the Member States, the Court found that the right to non-discrimination could not extend as far as providing access to entitlements to those outside its territory.[278] After all, non-discrimination ensures the social advancement of the migrant worker and the members of their family in the host state, and is granted to support the migrant in the provision of their work. If the migrant worker is no longer engaged in economic activity in the EU, there is no reason why non-discrimination should apply and support their life outside the exercise of such activity.

After an overview of the relevant case-law one is left wondering why equal treatment as provided under all the different the Association Agreements examined in this section is protected by the Court in such an extensive manner. The special purpose of the EEC-Turkey Agreement is always emphasized by the Court, but the Association Agreements with Mediterranean countries did not foresee eventual accession, and, unlike the EEC-Turkey Agreement, did not make any reference to guidance by the provisions of the EU free movement framework. Despite this, the Court made the link between non-discrimination in all the relevant Agreements and the general non-discrimination principle enshrined in the Treaty. What the Court added by its interpretation is that, regardless of state competence on the regulation of migration, whoever falls within the scope of EU law must not be discriminated against in the specific economic activity that they pursue. Based on this, it can be argued that the significant advancement of the social position of the migrant workers covered under these Agreements by the interpretation of the Court is closely connected to the migrants' contribution to the EU development project, which is also the reason why they fall under social security schemes in the first place. The extensive protection of social rights of the migrant is closely connected to their contribution to the EU development project. This close connection reveals the interdependence of economic development and social progress behind the rights of migrants in a way which would be demanded today by economic and social sustainability in the regulation of migration.

[278] ibid para 56.

5.3.3 A Permanent Safeguard: Non-discrimination Behind a Limited Right to Remain

The significance of the principle of non-discrimination for migrant workers is further highlighted through the case-law of the Court in *El Yassini*.[279] In this case, the Court addressed non-discrimination regarding working conditions as the source of legal certainty, which demanded that a residence right should be ensured for as long as someone was granted a right to employment, subject to clearly construed limitations.

El Yassini concerned a worker covered by the EEC-Morocco Agreement. El Yassini entered the UK as a visitor and was granted leave to remain, due to a subsequent marriage to a British national. The marriage was eventually dissolved, and he was engaged in lawful employment in the UK. Upon refusal by the UK authorities to grant him leave to remain, El Yassini claimed that the equal treatment provision of the Agreement should guarantee his right to continue his employment, by the creation of a derivative residence right for the remaining time of his employment contract.

In his Opinion, AG Léger set out to compare three types of legislation that were relevant for migrant workers' rights, and the different purposes non-discrimination served in each of them, namely the Community free movement framework, the EEC-Turkey Agreement and the EEC-Morocco Agreement.[280] He suggested that the non-discrimination principle of Article 48(3) EC served the purpose of implementing free movement for Community workers, and for this reason it entailed the right to access the internal labour market and the right to freely reside in Member States' territory in order to work there.[281] As to the EEC-Turkey Agreement, its aim extends beyond mere economic cooperation to foster Turkey's development, and, as a result, it grants certain rights to Turkish workers who are duly registered as belonging to the labour force of a Member State, while not going as far as granting free access to the internal Community labour market.[282] In contrast, the EEC-Morocco Agreement is exclusively aimed at contributing to the economic and social development of Morocco.[283] In light of this and of the absence of any rights regulating the personal situation of Moroccan workers in the Agreement, the AG suggested that Community law had no relevance in the specific dispute as to the

[279] Judgment of 2 March 1999, *Eddline El-Yassini*, C-416/96, ECLI:EU:C:1999:107.

[280] Opinion of Advocate General Léger delivered on 19 May 1998 in *El-Yassini*, C-416/96, ECLI:EU:C:1998:243.

[281] ibid paras 36-39.

[282] ibid paras 41-46.

[283] ibid paras 49-50.

treatment of Moroccan workers, who belonged to the labour force of Member States.[284]

The AG supported this exclusion from Community law not only on the basis of the sovereign right of states to decide their immigration policy, but also on the EU law obligation to ensure priority access to national labour markets for Community workers in the first place, and Turkish workers in the second.[285] The Opinion could have concluded at that stage. But it did not. Instead, the AG held that the principle of non-discrimination demanded that when a worker was authorized by a Member state to take up employment for a specific period of time, the effectiveness of that principle implied that he should have a right to reside in the host state during that time.[286] In light of this, he suggested that, while Member States can in principle terminate a residence permit before an employment contract has expired, they cannot do so in order to address economic problems.[287]

The Court, following the AG Opinion, acknowledged the distinction in terms of purpose and rights of migrant workers under the different schemes and held that the Agreement did not in principle prohibit the refusal of Member States to grant a right to reside, despite the existence of paid employment.[288] It then qualified the statement by holding that such discretion on the part of Member States was allowed only if the initial reason for granting leave to remain no longer existed by the time the right to reside expired.[289] If, however, a person was granted a work permit for a specific duration of time and a residence permit for a shorter period, then potential non-renewal of the residence permit would have to be justified by the protection of legitimate national interest, such as public policy, public security or public health.[290]

In so doing, the Court construed a limited right to reside from the effective enjoyment of non-discrimination regarding working conditions. This right exists only if legitimate employment is ongoing, and only for migrants who initially entered the host state as workers. In practice this means that Member States are allowed to terminate the right to reside of workers covered by Association Agreements who are in ongoing employment, but only where this termination is unrelated to economic considerations. Where Member States proceed in premature termination of the right to reside, non-discrimination leads to the application by analogy of the case-law on Turkish workers, as there is nothing differentiating

[284] ibid paras 51-54.

[285] ibid para 60-61.

[286] ibid para 64 with reference to *Kus*, C-237/91.

[287] ibid para 66.

[288] *El-Yassini*, C-416/96 paras 57-62.

[289] ibid para 67.

[290] ibid paras 65, 67.

foreign workers engaged in gainful employment of the same kind in a host state.[291] Non-discrimination cannot be a basis of the right to remain on its own, but as the Court held, in specific circumstances it might have effects on the right to remain by imposing specific limits on state discretion as regards migration. [292]

5.4 The Backlash to Extensive Judicial Protection

This emphasis of the Court on safeguarding the effective application of equal treatment for migrant workers and the families in the field of social security was not welcomed by Member States. A potential application of the *Kziber* line of case-law to TCN workers coming under Agreements concluded by the EU with third states could have significant financial repercussions for the social security systems of the Member States, as AG La Pergola insinuated in his Opinion on a case related to similar issues under the EEC-Turkey Agreement.[293] For this reason, all the Agreements negotiated and concluded after *Kziber* was issued avoid providing for the application of non-discrimination in the field of social security. *Kziber*, next to the EEC-Turkey Agreement case-law, showed the teeth of the non-discrimination principle. The Member States tried to limit the power of this principle by drafting the Agreements that were concluded in the 1990s a lot more carefully. The following sections investigate the evolution of different Association Agreements in light of the preceding case-law, showing that the scope of equal treatment was renegotiated in Agreements with Mediterranean countries (5.4.1) and construed in a limited manner in the Europe Agreements signed with the Central and Eastern European Countries (CEECs) (5.4.2).

5.4.1 Renegotiating Cooperation to Limit the Scope of Equal Treatment

Given the economic and political circumstances of the 1990s, new objectives of regulation of migration in the Euro-Mediterranean region were formulated in the Barcelona conference.[294] These sought to reduce migratory pressures through

[291] See in this Opinion of Mr Advocate General Léger in *El-Yassini*, C-416/96 para 68.

[292] See also Judgment of 14 December 2006, *Gattoussi*, C-97/05, ECLI:EU:C:2006:780 para 43.]

[293] This was stated by Advocate General La Pergola in his Opinion delivered on 17 December 1998 in *Sürül*, C-262/96, ECLI:EU:C:1998:55, para 45. See also Thym (n 194) 35 who claimed that this was the effect of the case-law on Turkish workers according to discussions with the German negotiating Team. Niessen (n 13) 680.

[294] By economic and political circumstances I refer to the instability in the Mediterranean paired with rise in population, the unemployment in Member States and finally the fall of the Soviet Union, which created the potential of migratory pressure. On these see The future of relations between

assistance to the host states, to ensure the rights of all migrants legally residing in the territories of Member States and to address illegal immigration.[295] At this stage, the contribution of the migrant workers to the development of the EU meant that their rights could not be sidelined where they were employed in the Member States.[296] However, this economic contribution was no longer enough to allow support the attribution of more extensive rights.

Against this backdrop, the new generation of Agreements signed with third countries in the region aimed at cooperation that would support 'harmonious economic and social relations' between the parties.[297] Among the agreements concluded, the ones with Morocco, Tunisia and Algeria were the only ones including clauses that attributed rights to migrant workers.[298] This was due to the

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the Community and the Maghreb, SEC(92)401 final. See also Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership COM(94)427 final; HAEU, GJLA-246, Commission of the European Communities, Directorate General External Relations, Task force Enlargissement, Enlargement and the Community's Relations with its Mediterranean Neighbours, Brussels 2 March 1992, RDM/m, 4.

[295] Euro-Mediterranean Conference, 27 and 28 November 1995, Working Programme.

[296] See Chris Patten, Javier Solana and Romano Prodi (2003) Strengthening the EU's partnership with the Arab world, Paper for the attention of Franco Frattini, President of the Council, 4 December 2003 D(2003) 10318 p 8 'Arab immigrants make a substantial contribution to the development of Europe. The EU is firmly committed to fight all manifestations of racism and discrimination in all its forms. Full respect for the rights of immigrants in Europe is a consistent policy throughout Europe'.

[297] Art 1(2) Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L 97/2; Article 1(2) Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L 70/2; Article 1(2) Algeria Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's `Democratic Republic of Algeria, of the other part [2005] OJ L 265/2.;Article 1(2) Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L 129/3 with reference to balanced economic and social relations and improving living and employment conditions; Article 1(2) Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L 143/2 with reference to the prosperity of Lebanon and its people; Article 1(2) Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L 147/3 and improvement of living and employment conditions; Article 1(2) Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Arab Republic of Egypt, on the other part [2004] OJ L 304/39 on balanced economic and social relations

[298] The Euro-Med Agreement with Jordan with did not contain provisions on equal treatment of migrant workers but rather a declaration of the parties that they are willing to set up such rights in case Jordan so wished. Similar wording was inserted in Article 62 in the Euro-Med Agreement with Egypt. No such clauses were included in the Euro-Med Agreement with Lebanon. The Euro-

fact that these were the main countries of the region that supplied migrant labour to the EU.[299] Much like the previous Cooperation Agreements, the Euro-Mediterranean Agreements maintained the provisions on non-discrimination for all migrant workers as regards working conditions, remuneration and dismissal and the equal treatment for them and their families in the field of social security.[300] Further, the Agreements stated that their provisions would only cover lawfully residing TCN workers, and they must not apply to migrants working illegally in the territories of the host countries.[301] Hence, illegality of residence was included explicitly as a condition which stripped an individual of rights.[302] Furthermore, under a Joint Declaration to the Agreements, the parties declared that they would examine issues related to access to the labour market for the spouse and children of migrant workers.[303] In the same Declaration they stated that equal treatment ought not be invoked to obtain a renewal of a residence permit. This Declaration must have been made to dissociate any potential extension of the interpretation of *El Yassini* to the new Agreements of cooperation with the Mediterranean countries. [304]

The Court has confirmed the direct effect of the equal treatment provisions of the new Agreements. In *Echouikh*, the Court held that Article 65 of the Euro-Mediterranean Agreement with Morocco should be interpreted in the same way as Article 41(1) of the Association Agreement that predated it.[305] The Court also held that this Article was a specific expression of the principle of non-discrimination under Article 12 of the EC Treaty.[306] As to the Declaration, it was invoked in the

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Med Agreement with Israel mentions arrangements on social security issues but no equal treatment provisions.

[299] See, for example, the demographic information in Commission of the European Communities, Directorate General for Information, Europe Information Development, The countries of the Greater Arab and Maghreb and the European Community. DE 68, January 1991, which mentions that 1.8 million immigrants from the Maghreb live in the Member States and they include: Algerians mainly in France, Moroccans and Tunisians mainly in France but also in the Netherlands, Belgium, Germany, Italy, and some Moroccans in Spain. Every worker from the Maghreb has at least three dependents with him. Very few Libyan or Mauritanian workers are present.

[300] Articles 64, 65 Euro-Med Agreement with Morocco and Tunisia; Articles 67,68 Euro-Med Agreement with Algeria.

[301] Article 66 Euro-Med Agreement with Morocco and Tunisia; Article 69 Euro-Med Agreement with Algeria.

[302] This was the case also in the EEC Turkey as interpreted in *Kol*, C-285/95. See however Judgment of 5 November 2014, *Tümer*, C-311/13, ECLI:EU:C:2014:2337.

[303] Joint Declaration relating to Article 64 of the Agreement.

[304] Joint Declaration relating to Article 64 of the Agreement para 2.

[305] In *Echouikh*, C-336/05 concerning armed services invalidity pension.

[306] *Echouikh*, C-336/05 para 63.

case of *Gattoussi*, which concerned the rights of Tunisian nationals under the Euro-Mediterranean Agreement.[307] Despite this invocation, the analysis of *El Yassini* was fully confirmed by the Court, which maintained that the effective application of non-discrimination could not leave Member State discretion on migration unaffected. The Court found that, in principle, Member States were not prohibited from taking measures against the right to remain of TCN workers whom they had authorized to enter their territory for the purpose of employment.[308] After all, immigration policy comes with a wide margin of discretion. But, as AG Ruiz-Jarabo Colomer suggested, this margin is limited by obligations of the Member States under Community law, as they cannot use migration measures as a justification for infringement of the free movement of workers framework or of international obligations of the Community.[309]

The Member States' obligation to guarantee the effectiveness of non-discrimination demands the protection of legitimate expectations of the worker and, relatedly, legal certainty.[310] This is why in cases where Member States have granted migrant workers specific rights in relation to employment that are more extensive than the rights of residence conferred on them by that State, it cannot then reopen the question of that worker's situation on grounds unrelated to the protection of a legitimate national interest such as public policy, public security or public health.[311] Overall, what we see in the Euro-Mediterranean Agreements is a more careful drafting and limitation of rights granted to migrant workers to avoid the potential extension thereof by rulings of the Court.[312]

In parallel to these evolutions, the cooperation with the ACP evolved by the transition from Lomé IV to Cotonou. Article 13 of the Cotonou Agreement refers more broadly to migration cooperation between the parties. Under Article 13(3) equal treatment is granted to legally employed migrant workers from ACP countries as regards working conditions, remuneration and dismissal. There is no longer reference to equal treatment of migrant workers and their families as regard social security, which was previously found in the Declarations attached to Lomé. What is more, respect for human rights and the elimination of discrimination is reaffirmed

[307] *Gattoussi*, C-97/05, para 33

[308] ibid para 36 with reference to *El-Yassini*, C-416/96 paras 58-62.

[309] Opinion Of Advocate General Ruiz-Jarabo Colomer delivered on 6 April 2006 in *Gattoussi*, C-97/05 para 58 with reference to Judgment of 26 October 1982, *Hauptzollamt Mainz/Kupferberg & Cie*.,104/81, ECLI:EU:C:1982:362 paras 11 to 14, where it was held that the effects of the provisions of agreements must not be diminished by national measures.

[310] *Gattoussi*, C-97/05 paras 39-41.

[311] *Gattoussi*, C-97/05 para 40.

[312] The main fear of the Member States was that the extensive interpretations of the EEC-Turkey Agreement would find analogous application in this case. See also Thym (n 194) 35.

under Article 13(1) based on existing obligations of international law. Finally, Article 13(2) of the Cotonou Agreement mentions fair treatment of third-country nationals who are legally resident in EU Member States, and the objective of granting them rights and obligations comparable to citizens by integration policy, enhancement of non-discrimination in economic, social and cultural life, and the development of measures against racism and xenophobia.[313] Even if at first glance this provision seems more extensive, it can be argued that this is not the case. First of all, the fair treatment mentioned in Article 13(2) of the Cotonou Agreement is not equal treatment. Second, as regards the objectives of granting extra rights to migrants, these are framed more like guidelines in the cooperation between the parties, rather than clauses that could be directly invoked by individuals under EU Law.

5.4.2 Structuring Europe Agreements to Avoid Extensive Interpretations by the Court

Shortly after the fall of the Iron Curtain, and with the expressed will of the post-Soviet states to accede to the EU, the latter progressively entered into Association Agreements with most of the CEECs.[314] These Agreements, which were called Europe Agreements to mark their political importance in reuniting Europe, were prepared so as to assist the economic reform of CEECs and to create closer political

[313] These are the provisions relevant to labour migration. There are also paragraphs which deal with other categories of migration, like para 4 on the aim of reducing poverty and improving living conditions with a view to creating employment opportunities at home and hence 'normalising' migration flows and para 5 on illegal migration, return and readmission.

[314] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [1993] OJ L 348/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part [1993] OJ L 347/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part [1994] OJ L360/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [1994] OJ L 359/2; Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part [1994] OJ L 357/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L 358/3; Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part [1998] OJ L 26/2; Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part [1998] OJ L 51/2;Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia [1999] OJ L 51/3. Estonia was the only country, with which an EA was not concluded.

relations with the Community.[315] The Agreements sought to establish a free trade area between the Community and the associated states, and were adopted in order to prepare the latter for their eventual accession to the Community.[316] A ten-year transitional period split into two five-year stages was envisaged in most of the Agreements.[317] The central focus of the Agreements was to assist the CEECs in their transition to market economy.[318] That is why liberalization of free movement would only be considered after the social and economic conditions of the acceding Member States was brought in line with those of the Community.[319]

Free movement of workers was not provided for in these Agreements. Rather, certain minimum measures were put in place to improve the situation of migrant workers legally resident in the Member States.[320] Specifically, the agreements provided for the application of equal treatment regarding working conditions, remuneration or dismissal.[321] The Agreements did not impose an obligation to grant residence rights to family members of workers,[322] and the right of family members to access the labour market was explicitly limited to the spouse and children of the

[315] Commission Communication, Association Agreements with the Countries of Central and Eastern Europe, a General outline, COM(90)398 final, Annex Association Agreements 2-3.

[316] While this was not the initial purpose of the agreements as expressed ibid, the preambles of all the Europe Agreements acknowledged the eventual aim of accession to the EU.

[317] One year in case of Latvia and Lithuania and six years divided in periods of four and two for Slovenia.

[318] See also Avis du Comite Économique et Social sur l' élargissement futur de la Communauté [1992] OJ C 313/40, point 3.1; Communication de la Commission au Conseil Au-Delà des Accords Européens: Préparation des pays d'Europe Centrale et Orientale à l'adhésion COM(94)320 final 5.

[319] Association Agreements with the Countries of Central and Eastern Europe, a General outline, COM(90)398 final, Annex Association Agreements 2-3.

[320] For a detailed analysis of the rights of migrant workers under the EA agreements see Iris Goldner Lang, *From Association to Accession: How Free Is the Free Movement of Persons in the EU* (Eleven, Internat Publ 2011) 70–92.

[321] Article 37 EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 38 EA with the Czech Republic, EA with Slovakia, EA with Slovenia EA with Romania, EA with Bulgaria. See also Judgment of 29 January 2002, P*okrzeptowicz-Meyer*, C-162/00, ECLI:EU:C:2002:57; Judgment of 8 May 2003, *Deutscher Handballbund*, C-438/00, ECLI:EU:C:2003:255 and Elspeth Guild, 'Workers' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European enlargement: a commentary on the enlargement process* (TMC Asser press 2002).

[322] See Declarations by the European Community 1, Chapter I of Title IV, included in all the EAs but the ones concluded in the late 1990s with Bulgaria, Latvia and Slovenia.

worker during the worker's stay.[323] These limited rights of family members excluded seasonal workers or workers covered by bilateral agreements.[324]

The Agreements also left a great deal of discretion to Member States to take into account their labour market situation in the context of progressive attribution of rights to labour migrants from associated countries. Specifically, the only obligation for Member States was to preserve access to employment accorded under bilateral agreements for already legally resident workers.[325] Potential improvements of the treatment of such workers or attribution of more rights could be considered by the Member States 'if possible'.[326] The Association Council had discretion to examine the granting of improvements, taking into account both the national labour market situation and the Community one.[327] Finally, following the end of the foreseen transitional period, the Association Council would examine other ways to improve the movement of workers in light of the social and economic conditions in the associated countries and the employment situation in the Community. These agreements, together with the identical provisions of the Stabilization and Association Pact in the case of Croatia[328] set the basis for cooperation between the candidate countries and the EU until the conclusion of the enlargement, which is examined in Chapter 6, Section 6.1.

Similar protection for migrants is afforded by the Partnership and Cooperation Agreements (PCAs) agreements concluded with Russia and several states from Southern Caucasus and Central Asia. These Agreements provide a basis for economic, social, financial and cultural cooperation. They all provide for equal treatment as regards working conditions, remuneration or dismissal of TCN workers originating from these states.[329] However, they do not grant any rights of access to

[323] Article 37 EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 38 EA with the Czech Republic, EA with Slovakia, EA with Slovenia EA with Romania, EA with Bulgaria.

[324] ibid.

[325] Article 41(1) EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 42(1) EA with the Czech Republic, EA with Slovakia, EA with Slovenia EA with Romania, EA with Bulgaria.

[326] ibid.

[327] Article 41(2) EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 42(2) EA with the Czech Republic, EA with Slovakia, EA with Slovenia EA with Romania, EA with Bulgaria.

[328] See Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and the Republic of Croatia, of the other part [2005] OJ L 26/3, Chapter I Movement of workers.

[329] Article 17(1) Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member states, of the one part, and the Republic of Tajikistan, of the other part [2009] OJ L 350/3; Article 23 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member states, of one

the labour market for the workers' family, nor do they foresee a potential progressive attribution of more rights to migrant workers.[330] Unsurprisingly, the similarly worded provision of the Cooperation Agreement with Russia granting equal treatment as regards working conditions has been held by the Court to be directly effective.[331]

In this we see that the cost of ensuring an extensive protection for migrants' rights, as provided by the Court, limited the scope of application of non-discrimination only to the specific field of working conditions, remuneration and dismissal. The Court had proceeded in extensive interpretations to ensure the social rights of migrants under international agreements. Short term considerations related to risks of migration flows that could be caused by the underdevelopment of the CEECs at times when Member States did not have unlimited labour demands led to the limitation of the non-discrimination clauses in International Agreements concluded during this period. This has far-reaching implications in limiting the rights of migrants. However, as we shall in Chapter 6, these implications can be contained in light of the incremental shaping of secondary law on the rights of migrants legally resident in the Member States. Before concluding this chapter however, the next section will turn to the cooperation of the EU with economically developed European states. The analysis will point to the extensive attribution of rights to nationals coming from countries with higher development levels -and thus less prone to migrating for economic reasons.

part, and the Russian Federation, of the other part [1997] OJ L 327/3; Article 19(1) Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member states, of the one part, and the Republic of Uzbekistan, of the other part [1999] OJ L 229/3; Article 20(1) Partnership and Cooperation Agreement between the European Communities and their Member states, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L 246/3; Article 19(1) Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member states, of the one part, and the Kyrgyz Republic, of the other part [1999] OJ L 196/48.

[330] Unlike the SAAs which create an obligation for Member states to preserve access to employment accorded under bilateral agreements for already legally resident workers and to examine the possibility of improving it.

[331] See Judgment of 12 April 2005, *Simutenkov*, C-265/03, ECLI:EU:C:2005:213, which concerned sporting rules that limited the number of players from non-member countries who may be fielded in national competitions. The Court found that non-discrimination as regards conditions of employment provided under Article 21 of the relevant agreements meant that such law could not apply to a Russian footballer lawfully employed in Spain.

5.5 The Non-issue of Extending Free Movement Rights to Nationals of Developed European States

In the EEA Agreement, we see how the economic and social development of all countries involved and their long-standing economic cooperation and interdependence shaped the basis for a privileged partnership, which granted labour migrants from the EFTA countries rights that are equally extensive to the rights enjoyed by EU workers.[332]

EFTA was created in the 1960s to promote free trade and economic integration of its Member States.[333] The relation of the EU and EFTA dates back to the 1970s, when the EFTA states concluded bilateral free trade agreements with the EEC that did not include any right to free movement of workers.[334] The completion of the single market created new impetus in the relation of EFTA states with the Community and led to the signature of the EEA Agreement in 1992.[335] The original Agreement included Switzerland, Austria, Finland, Sweden, Iceland, Lichtenstein and Norway. Eventually Switzerland did not ratify the agreement, whereas Austria, Finland and Sweden became EU Member States during that period. As it currently

[332] Agreement on the European Economic Area [1994] OJ L 1/3. The Agreement initially involved Switzerland, Austria, Finland and Sweden. Switzerland did not ratify the agreement whereas Austria, Finland and Sweden eventually joined the EU. See also Resolution A3-0306/92 on economic and trade relations between the European Economic Community and the EFTA countries in the European Economic Area [1992] OJ C 305/564, points A-C.

[333] The European Free Trade Association (EFTA) was established by a Convention signed in Stockholm on 4 January 1960.A revised Convention, the Vaduz Convention, was signed on 21 June 2001 and entered into force on 1 June 2002. The original parties were Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. Iceland joined in 1970. Denmark and the UK left to join the EEC in 1972. Portugal left in 1985 to join the EEC. Lichtenstein became a member in 1991.

[334] Agreement between the European Economic Community and the Portuguese Republic [1972] OJ L 301/165; Agreement between the European Economic Community and the Kingdom of Sweden [1972] OJ L300/9; Agreement between the European Economic Community and the Republic of Austria [1972] OJ L 300/2; Agreement between the European Economic Community and the Swiss Confederation [1972] OJ L 300/189; Agreement between the European Economic Community and the Portuguese Republic [1972] OJ L 301/165; Agreement between the European Economic Community and the Kingdom of Norway [1973] OJ L 171/2. In these agreements, the Commission thought it was not necessary to include free movement of workers see Communication, Contenu possible d'Accords éventuels avec les États de l'AELE non candidats à l'adhésion, COM(71)701 45. The Communication in pages 45-48 mentioned the problems of discriminatory treatment of Community workers in Switzerland and, to a more limited extent, in Sweden and Finland due to the preferential treatment of workers in the Nordic Labour market. See also Declaration concerning workers, Agreement between the European Economic Community and the Swiss Confederation [1972] OJ L 300/189.

[335] See also Address by Jacques Delors to the European Parliament on 17 January 1989, Bulletin of the European Communities 1989, Supplement 1/89.

stands, the Agreement applies to EU Member States on the one hand and Iceland, Lichtenstein and Norway on the other.

The aim of the Agreement under Article 1(1) was to promote a continuous and balanced strengthening of the economic relations of the parties in light of a creating a European Economic Area (EEA). The parties included both economic and social objectives in the preamble.[336] The framing of the objectives of the EEA Agreement in the preamble is very similar to the objectives of the Community as expressed in the Maastricht Treaty, which had recently been adopted at that time.[337]

In light of the alignment of objectives and of the similar development level of the EFTA and the EU Member States, it should not come as a surprise that the Agreement provided for extension of free movement of workers to EFTA nationals under Article 28 EEA Agreement. The article, which is framed similarly to the provision of Article 45 TFEU, grants nationals of the parties the right to accept offers of employment made to them, to move freely within the territory of the EEA states in search of employment, to reside in those states for the purpose of employment, as well as the right to remain there after being employed. Similarly to the EU framework, Article 28(2) EEA Agreement provides for the application of non-discrimination as regards employment, remuneration and working conditions for nationals working in EEA states. While the Agreement did not provide for rights of family members, Annex V thereto referred to the EU secondary law, which is applicable in the case of free movement of workers between the parties.[338] For this reason, protection of family life for EFTA workers is guaranteed at levels equal to those guaranteed for EU workers.

The Agreement did not provide for safeguard measures specific to risks created from movement of workers, but rather had a general safeguard clause under Article 112, similar to those existing under the EU framework,[339] which allowed the parties to unilaterally resort to the measures deemed necessary in case of economic, social or environmental difficulties of sectorial or regional nature. Such measures were subject to the procedure of Article 113 that provided for notification to the EEA

[336] Recital 6 on promotion of harmonious development and reduction of economic and regional disparities, Recital 11 on the social progress, full employment, and improved living and working conditions.

[337] See Article 2 TEU in the Maastricht version, which stated the task of the Community to promote 'the harmonious and balanced development of economic activities, … a high level of employment and of social protection, the raising of the standard of life and quality of life, and economic and social cohesion and solidarity among Member States'.

[338] See Annex V to the EEA Agreement, Free movement of workers.

[339] See Article 223 Treaty of Rome, but also Article 135, Treaty of Accession of Denmark, Ireland and the United Kingdom [1972] OJ L 73.

Joint Committee and the Contracting parties and consultation in order to find an appropriate solution.

Iceland attached a declaration to specify its understanding of Article 112 EEA Agreement to mean that safeguard measures may be applied to address serious disturbances on the labour market caused by large-scale labour movements due to the Agreement in specific geographical areas, types of jobs or industrial branches.[340] Iceland justified this declaration on the basis of the 'one-sided nature of its economy and the fact that its territory is sparsely populated'.[341] It can be assumed that the inclusion of this declaration by Iceland could mean that free movement of workers between EEA states was not thought of as having the potential to cause risks for Community states in general.

Switzerland signed the EEA Agreement, but it did not eventually ratify. It rather proceeded in the signature of a bilateral Agreement, which guarantees free movement of persons between that country and the EU.[342] The Agreement regulates movement of both economic and non-economic actors, as well as the right of establishment and the provision of services. On workers, the Agreement guarantees general rights of entry and residence, to access employment, as well as a general non-discrimination right.[343] What is more, the Agreement provides for family reunification rights and the right of family members to take up economic activity.[344] Further, the children of migrant workers enjoy access to education under equal treatment.[345] Article 10(1) of the Agreement provided for a transitional regime, which allowed Switzerland to maintain quantitative limits for a period of maximum six years as regards access to economic activity for workers who wished to enter and reside for a period of longer than four months.[346] Moreover, for two years after the entry into force of the Agreement, the parties were allowed to maintain controls on the priority of workers integrated in the regular labour market and wage and

[340] Declaration by the Government of Iceland on the use of safeguard measures under the EEA Agreement.

[341] A similar declaration was inserted by Switzerland with reference to its particular geographical and demographic situation as reasons to potentially limit the immigration from EEA Countries. Declaration by the Government of Switzerland on safeguard measures, EEA Agreement.

[342] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L 114/6.

[343] Articles 2- 4 Bilateral Agreement with Switzerland.

[344] Article 3 and Annex I Bilateral Agreement with Switzerland.

[345] Article 3(6) Bilateral Agreement with Switzerland.

[346] See also Article 10(2) Bilateral Agreement with Switzerland on a quota system to ensure that in the first 5 years certain residence permits will be guaranteed for EU workers and self-employed, and Article 10(4) on unilateral measures to limit migration from EU Member States to a specific number in case of increased migration from the EU in the period of 5-12 years after entry into force of the Agreement.

working conditions.[347] The Agreement also included a standstill clause to prevent the introduction of more restrictive measures towards the nationals of the parties.

In light of the objective circumstances of the Agreement and the fact that it regulated movement between a single highly developed country and all the EU Member States, the risks posed by migration could only materialize for the Swiss economy. It then appears understandable that there is not only an extensive attribution of rights equating EU workers and Swiss workers, but also a series of guarantees incorporated in the Agreement to protect the Swiss economy from the sudden influx of EU migrants.

The EEA and the Swiss Bilateral Agreement have not been subject to much contestation before the Court as regards the rights of migrant workers covered thereby. As to the former, the EFTA Court established under the Agreement to ensure its judicial control and interpretation in the EFTA states has produced case-law on the rights of labour migrants under the EEA agreement in the EFTA states. The Court of Justice of the EU has not been called to interpret any provision regarding worker's rights.[348] As regards the Swiss Agreement, limited case-law has addressed with the application of the principle of non-discrimination as regards taxation, family benefits and contributions to social security.[349]

In two cases concerning the coordination of social security systems between EU and EEA and Switzerland, the Court had the opportunity to clarify the reason behind the extensive rights attributed to EEA and Swiss nationals.[350] The UK, supported by Ireland, went against the Council, requesting the annulment of two Decisions adopted on the coordination of social security systems under these Agreements.[351]

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[347] Article 10(2) Bilateral Agreement with Switzerland.

[348] See however Judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262 which concerned protection against extradition under the principle of non-discrimination by extension of the Judgment of 6 September 2016, *Petruhhin* , C-182/15, ECLI:EU:C:2016:630 to a naturalized Icelander (who was previously a Russian asylum seeker there) who was arrested during vacation in Croatia and held for extradition based on an international wanted persons notice issued in Moscow.

[349] Judgment of 19 November 2015*, Bukovansky*, C-241/14, ECLI:EU:C:2015:766; Judgment of 21 September 2016, *Radgen*, C-478/15, ECLI:EU:C:2016:705; Judgment of 19 September 2013, *Hliddal and Bornand*, C-216/12 and C-217/12, ECLI:EU:C:2013:568; Judgment of 28 June 2018, *Crespo Rey*, C-2/17, ECLI:EU:C:2018:511.

[350] Judgment of 26 September 2013, *United Kingdom / Council*, C-431/11, ECLI:EU:C:2013:589; Judgment of 27 February 2014, *United Kingdom / Council*, C-656/11, ECLI:EU:C:2014:97

[351] Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement [2011] OJ 2011 L182/12; Council Decision 2011/863/EU of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as

They claimed that Article 48 TFEU, which was mentioned as the substantive legal basis of the Decisions, was not appropriate, as it referred to the competence of the EU to adopt measures regarding EU workers. Instead, they argued that the relevant Decisions should have been adopted on the basis of Article 79(2)b TFEU, which referred to the competence of the EU to adopt measures as regards the rights of third-country nationals.

The Court confirmed Article 48 TFEU as the appropriate legal basis for the adoption of Decisions, justifying the finding with reference to the objectives of the two Agreements. Specifically, the Court repeated that the EEA agreement had the objective of the fullest possible realization of free movement within the whole EEA, with the purpose of extending the EU internal market to the EFTA states.[352] Similarly, the Bilateral Agreement with Switzerland was concluded with the aim of bringing free movement of persons on the basis of the rules applicable at Community level.[353] The objectives pursued by the Agreements in question were emphasized by the Court as the reason behind the extensive attribution of rights. There is nothing novel in this. The objective and context of an Agreement as elements to be taken into account in its interpretation are provided for by Article 31 VCLT, and this rule of interpretation has been applied by the Court in the interpretation of International Agreements in general.[354]

Similarly to the EEA Agreement, the accession of Austria, Sweden and Finland, which were EFTA states, did not involve discussions on the risk of migration. The candidate countries were equally developed, they were EFTA members and parties to the EEA Agreement signed in 1992, whose provisions had already provided for the extension of the free movement of workers regime between them and the EU Member States.[355] Austria was the only candidate that already had a large amount of labour migration from Southern and Eastern Europe.[356] For this reason, mirroring the first accession, Austria attached a Declaration which recognized its right to

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regards the replacement of Annex II to that Agreement on the coordination of social security schemes [2011] OJ L 341/1.

[352] *United Kingdom / Council*, C-431/11 para 50.

[353] ibid para 55. See also Judgment of 18 November 2010, *Xhymshiti*, C-247/09, ECLI:EU:C:2010:698 para 31, which mentions that on the application of EU secondary law on social security, Switzerland is to be equated with a Member State.

[354] See Judgment of 9 February 1982, *Polydor and others / Harlequin and others*, 270/80, ECLI:EU:C:1982:43.

[355] Austria and Sweden were founding members of EFTA, while Finland joined in 1986. On free movement of workers see Article 28 Agreement on the European Economic Area [1994] OJ L 1/3.

[356] The Challenge of Enlargement, Commission Opinion on Austria's application for membership, Document drawn up on the basis of SEC (91) 1590 final, 1 August 1991. Bulletin of the European Communities, Supplement 4/92.

address the EU institutions in case of difficulties arising from free movement of workers, in order to find potential solutions.[357] The general safeguard clause was also included, but provided for a shorter period of two years in case of eventual need for protective measures.[358]

The analysis above highlights that the absence of migration related risks in the context of cooperation of the EU with third states, and relatedly the possibility of maintaining economic growth and social progress for all the parties involved at similar levels, led to full attribution of rights of migrants from specific third states. Both the EEA Agreement and the Bilateral Agreement with Switzerland provide for protection of migrant workers from EFTA and Switzerland at levels similar to those afforded to EU workers. On the law-making side we see that, in the case of such extensive attribution of rights for migrant workers, safeguard clauses are incorporated in the Agreement, so that the parties have mechanisms in place to address potential risks that might be caused by massive migration. Essentially, the economic development of the host countries, their similar demographic patterns and the lack of massive migratory movements therefrom to the EU are the reason behind such an extensive protection in the framework created by the Agreements. Similar considerations existed in the accession of Finland, Sweden and Austria, with immediate attribution of free movement rights and incorporation of the general safeguard clause. The lack of economic risks dictates the full attribution of rights. At the same time, for the system to be sustainable, that is, to be able to address economic and social objectives in the long-term, safeguard clauses are incorporated which allow derogations if need appears.

5.6 The Contrasting Dynamics of Political Aspirations

The period examined in this chapter is characterized by an aspiration to move towards a transformed EU political and legal order. In spite of this uniform aspiration, there was clear differentiation between different actors as to how a political transformation would play out, what rights it would create and for whom.

Section 5.1 showed that the political aspiration did not deliver much in secondary law on the rights of EU migrants. While the Commission tabled different proposals, the Council was hesitant to extend residence and social rights to all EU nationals. The Court, on the other hand, took the political aspiration at face value and tried to

[357] Joint declaration on the free movement of workers by Austria, Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C 241.

[358] Article 152 Act concerning the Austria, Finland Sweden Accession Treaty [1994] OJ C 241.

shape the rights of EU migrants by limiting their connection to economic considerations in light of their new citizen status.

Section 5.2 investigated the different approaches of EU institutions on the rights of TCNs in a transformed EU. The analysis pointed to a long-term approach to the regulation of migration by the Commission, guided by an emphasis on implicating TCN migrants in a common project of growth and ensuring social and mobility rights to make the best use of the available human capital. This approach did not gain support from the Council. On the contrary, the Council consistently emphasized the importance of restricting migration, holding that the economy did not need more labour, despite projections to the contrary. Despite the prevalent disagreements, the institutions eventually agreed that all resident migrants should enjoy a minimum set of rights. This led to the adoption of the Family Reunification Directive and the Long-Term Residents Directive. The latter represents an extremely watered-down version of the initial ambition of the Commission to create a civic status for all the migrants who had been contributing to the EU project for so long.

Section 5.3 examined the case-law of the Court on the rights of TCN migrants. Fully aligned with the reasoning it followed in the case of EU migrants in the previous period, the Court emphasized the contribution of migrants as a reason for the enjoyment of extensive rights. The Court thereby broadened the scope of application of equal treatment provisions of different Association. Relatedly, this led to the backlash of Member States examined in Section 5.4. There the investigation showed the restructuring of different Association Agreements with a view to limiting potential extensive interpretations by the Court.

Finally, Section 5.5 showed the lack of tension on the cooperation of the EU with developed northern states when it comes to the attribution of rights to migrant workers. The full extension of free movement rights to nationals of EFTA states and later to nationals of Switzerland, as well as the immediate application of free movement in the accession of Austria, Sweden and Finland is a stark reminder of the economic considerations behind the attribution of rights to migrants. In the case of developed northern states, the presumption was that their nationals could not advance their position by migrating, and as a result, the full attribution of rights was not seen to pose any risk for the economy of the Member States.

This second period of development of EU migration law started with the aspiration to transform the EU legal order, to breathe political elements into it, and to grant rights to all migrants resident in EU territory. The parallel pursuit of economic and social objectives guiding the development of EU law limited these aspirations. For EU migrants, the aspiration of engaging them in a political project could not lead to the granting of unlimited social rights. A full extension of social rights without economic limitations would undermine the pursuit of economic objectives and would thus be economically unsustainable. For TCN migrants, on the other hand,

granting them rights was acceptable, but it was impossible to reach a consensus on admission due to the short-term approach of the Council to the economic objectives served by migration. Despite the interests of different institutions, the strong basis of equal treatment rights in relation to working conditions was not contested, as such rights acted as the minimum guarantee to ensure an economically socially sustainable EU. The EU labour market could not effectively function without this as the outcome would be unfair competition and social dumping. National societies would also be characterised by grave injustice and exclusion, were it not for these minimum rights, and would also be socially unsustainable. The real challenge, which existed for both EU and TCN migrants and affected them equally, was access to social security rights. While granting full equal treatment on social security rights would be in line with the social objectives of the EU, it would simultaneously have the potential of disrupting the redistribution system of different Member States and it could undermine the economic objectives. Searching for economic and social sustainability behind the regulation of social rights of migrants was a challenging endeavour that would continue to tantalize the EU institutions in the next period.

Chapter 6. Realization and Paradoxes from the Failed Constitutional Treaty to Lisbon and Beyond

Following the aligned approach to the regulation of migration in the early years of the Community and the differentiation triggered by the political momentum of the 1990s, the period reviewed in this chapter can be characterized as one of realization and paradoxes. In this final period, I primarily analyse valid law. Secondary law on migrants' rights was amended for EU migrants and adopted for TCN migrants during the time. The analysis first identifies the ultimate the balancing of economic and social objectives behind the limitation of rights of EU migrants as a manifestation of a sustainable migration framework. Second, the investigation reveals the central role of economic considerations in the regulation of migration from third countries. In this regard, it also suggests that national contestation and the lack of long-term considerations in the Council are among the reasons why the regulation of migration for TCNs cannot serve economic and social sustainability. Finally, concluding the historical analysis of the regulation of migration which started in Chapter 4, this chapter reveals the paradoxes and tensions that arise from the way in which economic and social objectives are pursued through EU migration law. In doing so, it paves the way for the suggestions that will be made in the chapter that follows in response to the limits and potentials of an EU sustainable migration.

The period under review began with the failure of the Constitutional Treaty signed in 2004, which left unfulfilled the political promises of transformation of the EU into a fully-fledged polity. The Lisbon Treaty subsequently incorporated most of the changes suggested in the text of the Constitutional Treaty and gave binding force to the Charter of Fundamental Rights. During the same period, the EU was up against many challenges, both internal – like the unprecedented enlargement of the new millennium, the economic crisis that hit the Member States shortly after the Monetary Union was put in place and Brexit – and external – political unrest and displacement in the European neighbourhood, the COVID-19 pandemic, climate deterioration and most recently, a war on the EU's borders.

These challenges have brought to the forefront the question of if and how the EU can maintain its aspiration for growth by relying on the human potential available in the best possible way. At times of economic and social tensions, this led to

questioning the extensive protection of EU migrants' rights. How could unlimited social rights be sustainable in a system of diverse interdependent economies which are under stress? At the same time, the ageing EU population is a stark reality, pointing to the inability of the current and projected demographics to support economic growth in the long run. Admitting a TCN workforce into the EU and enabling its mobility have thus become necessary. However, diverse political challenges, also linked to national unemployment, have strengthened populist dynamics on the ground, precluding the easy acceptance of admission of TCNs by national electorates. Moreover, criticism is prevalent in the scholarly output of this period.[1] Different reasons drive these criticisms: primary law is no longer used by the Court to support extensive interpretations of individual rights; integration through law has reached its limits and scholars call for more room for political debate of EU policies; and spaces of liminal legality are created in areas where EU law does not – willingly or unwillingly – reach.[2]

In response to these concerns, the chapter develops as follows. The first section engages with the enlargement of the EU during the new millennium. This massive enlargement through the accession of many states with very diverse economies reveals the importance of transitional arrangements and legal safeguards for the economic and social sustainability of the EU. The differentiation of clauses and transitional periods, compared to previous Accession Treaties, brings to the forefront the way economic considerations dictate the attribution of rights to soon-to-be EU migrants. This section draws attention to the limitation of rights for nationals of the Central and Eastern European Countries (CEECs) in contrast to the full attribution of rights to nationals of acceding states who were not thought of as posing risks to economic development. The analysis highlights the different legal tools devised to ensure that migration remains sustainable in the framework of accession.

Section 6.2 turns to the way in which the tension between economic and social objectives was resolved regarding the rights of EU migrants. The hopes created by the establishment of EU citizenship in primary law did not remove economic considerations from the picture. Rather, the balancing was moved to secondary law. In this section, I also engage with the Court's approach to this balancing and the

[1] 'Editorial Comments: The Critical Turn in EU Legal Studies' (2015) 52 Common Market Law Review 881.

[2] See Alezini Loxa and Vladislava Stoyanova, 'Migration as a Constitutional Crisis for the European Union' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022); Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); Iris Goldner Lang, 'Towards "Judicial Passivism" in European Union Migration and Asylum Law?' in Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022).

judicial review, which is more restricted when it comes to EU migrants and more extensive regarding EU children. In all cases, it becomes clear that it is impossible to disconnect the rights of EU migrants from economic considerations without putting an unsustainable burden on the diverse social security systems of Member States. The persistent of economic considerations conditioning EU migrants' rights and their balancing against extensive social rights frame the free movement framework as a sustainable migration framework.

Section 6.3 analyses the framework regulating migration from third countries. It is only in this period that the relevant secondary law was fully formed. The analysis reveals the extensive attribution of rights to those TCN migrants the EU most needs, i.e., those who are considered crucial for the EU development project. In parallel, economic safeguards of different kind appear in the system to ensure that TCN migration can in no way pose risks to the EU project. Next to the legislative framework, the examination of the case-law of the Court highlights the consolidation of social objectives by an emphasis on Charter rights in review of national measures transposing secondary law. In this section, the investigation further shows the complete elimination of migrants' rights from Agreements concluded by the EU with third countries. While the EU does incorporate migration-related provisions in Agreements concluded with a view to eventual accession, the elements of cooperation with third countries on migration have shifted. With secondary law on admission and rights in place, the EU no longer concludes Agreements that include provisions on migrants' rights. Rather, operational cooperation of different kinds is prioritized as a means to deflect migration, often without the use of any binding instruments. This has been criticized for creating spaces of liminal legality and taking away judicial guarantees from individuals since such cooperation cannot be reviewed for compliance with EU law and the Charter.[3] At the same time, though, having a system in place which guarantees rights for all legally residents TCNs means that no migrant is excluded from protection – or at least not those who physically make it to the EU.

Finally, Section 6.4 engages with specific cases delivered during this period by the Court, which point to paradoxes that have arisen from the failed political aspirations of the previous period. The emphasis on the different status of rights of EU and TCN migrants and the incoherence in the framing of secondary law have led to case-law solutions which appear paradoxical at times. The cases examined in this section should be seen as indicative examples of how EU institutional discourse does not always follow through in secondary law, and how this leads to conflation in judicial

[3] Violeta Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law' in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research handbook on EU migration and asylum law.* (Edward Elgar Publishing 2022); See also contributions in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019).

reasoning. In the concluding chapter of the dissertation I will offer suggestions as to how such situations could be avoided in the future if the Court followed an understanding of EU migration law as one that results from historical investigation, that is a legal system firmly grounded in the economic and social objectives of the EU that have historically conveyed the economic and social pillars of sustainability at the core of EU law.

6.1 Enlargement Limiting the Reach of Law in order to Safeguard the EU

A massive enlargement of the EU during the new millennium had been progressively prepared since the 1990s to ensure that acceding Member States would not pose challenges to the EU project of growth and development. Eventually, accession took place via the Accession Treaties signed with the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, Slovakia, Malta and Cyprus in 2003, Romania, Bulgaria in 2005 and Croatia in 2012. While the enlargement had the political significance of reuniting Europe, the drastic increase of EU population due to this accession was perceived as a risk, due to the fact that the EU was struggling with internal unemployment, restrained growth and an ageing society.[4] The most complicated transitional regime was thus put in place to avert risks. At the same time, the accession process put a lot of focus not only on growth aspects (unlike the previous enlargements), but also on the social advancement demanded from the candidate states and their obligation to equally support the European social model put in place by that stage.[5]

Overall, the process of enlargement stretched over more than a decade, beginning with the Europe Agreements reviewed in the previous chapter for the CEECs, and the Stabilization and Association Pact in the case of Croatia. The negotiations emphasized the economic and social considerations behind the regulation of labour migration from the candidate countries in different ways.[6] First, there was a fear of migration flows due to the difference in development levels between the candidate

[4] Communication de la Commission européenne, Agenda 2000 Pour une Union plus forte et plus large, Vol I COM(97)2000 final 7.

[5] HAEU, GJLA-180, Union Européenne, Le Conseil, Rapport du Groupe "Élargissement" en date du 2 Octobre 1997 au COREPER, Objet: Élargissement, Examen des avis de la Commission sur les demandes d'adhésion à l'Union présentées par les pays associés d'Europe centrale et orientale, 11125/97 LIMITE ELARG 18.

[6] See Michael Dougan, 'A Spectre Is Haunting Europe... Free Movement of Persons and the Eastern Enlargement' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Bloomsbury Publishing Plc 2004) who looks into these considerations in relation to the measures negotiated.

countries and the EU.[7] This was linked to the effects of migration for social and economic development more broadly, and the potential of adverse effects to the EU labour market.[8] Anticipated migration flows from the East were discussed in comparison the south enlargement, where similar fears of uncontrolled migration existed – but these in fact never materialized.[9] During the time of negotiation, many academic studies were examined by the Commission in order to explore the migration potential of these enlargements, but there were no conclusive indicators on anticipated migration.[10] The anticipation of migration flows was expressed as a pressing concern due to high levels of unemployment in the Member States.[11] In

[7] Agenda 2000, Vol II COM(97)2000 final 1, 20. Also Avis de la Commission sur la demande d'adhésion de la Roumanie à l'Union Européenne, COM(97)2003 final 48,88; Avis de la Commission sur la demande d'adhésion de la République tchèque à l'Union Européenne, COM(97)2009 final 23,46; Avis de la Commission sur la demande d'adhésion de la Pologne à l'Union Européenne, COM(97)2002 final 30,49; Avis de la Commission concernant la demande d'adhésion à l'Union européenne présentée par la Bulgarie, COM(97)2008 final 25,44; Avis de la Commission sur la demande d'adhésion de l'Estonie à l'Union Européenne COM(97)2006 final 23,43; Avis de la Commission sur la demande d'adhésion de la Hongrie à l'Union Europeenne COM(97)2001 final 28,48; Avis de la Commission concernant la demande d'adhésion à l'Union Européenne présentée par la Lituanie, COM(97)2007 25,41; Avis de la Commission sur la demande d'adhésion de la Slovaquie à l'Union Européenne COM(97)2004 final 42,75; Avis de la Commission sur la demande d'adhésion de la Slovénie à l'Union Européenne COM(97)2010 final 27,47;Avis de la Commission sur la demande d'adhésion de la Lettonie à l'Union Européenne, COM(97)2005 final 45; Avis sur la demande d'adhésion de la Croatie à l'Union Européenne COM (2004)257 final 98 on the development levels of the candidates and a detailed analysis of the unemployment situation of each state, future prospects and the general characteristics of the labour force.

[8] Agenda 2000, Vol I COM(97)2000 final 16; See also HAEU, GJLA-206, European Commission, Secretary General, The free movement of persons for the pursuit of economic activity in the context of Enlargement, Information note by M Verheugen addressed to the Members of the Commission, Directors Generals and Heads of service, 12 April 2000 O/139/2000 SEC(2000)663/3.

[9] Agenda 2000, Vol II COM(97)2000 final 20, 36; HAEU, DORIE-204, Annexe 2 a l'avis de la section des relations extérieures, de la politique commerciale et du développement du Comite économique et social sur «L' élargissement de l'Union Européenne» 24 Oct 1997: Rapporteur M Masucci CES 856/97 fin annexe 2 I-RD/CH/ic point 5.3.

[10] See HAEU, GJLA-204, Commission Information note by M Verheugen, The free movement of persons for the pursuit of economic activity in the context of Enlargement, 12 April 2000, SEC (2000) 663/3, Section 3 Findings of academic research on enlargement; Commission, Information note on the Free Movement of Workers in the context of Enlargement, 6 March 2001, Annex 1, 2 and 3. See also answers given by Mr Verheugen on behalf of the Commission on 28 February 2003 to Written Question E-0113/03 by Mogens Camre (UEN) to the Commission (28 January 2003) with the subject: Migrant workers from the new Member states [2004] OJ CE 88/587.

[11] Agenda 2000, Vol I COM(97)2000 final 7; HAEU, DORIE-205 Rapport sur la communication de la Commission "Agenda 2000 - Pour une Union plus forte et plus large" (COM(97)2000 - C4-0371/97) A4-0368/97/PARTIE C, Avis des commissions parlementaires et lettres des délégations du Parlement Européen aux commissions parlementaires mixtes PE 224.339/Partie C/def, Avis (article 147 du règlement) à l'intention de la commission des affaires étrangères, de la sécurité

this context, a potential collapse of national employment markets could arise as a) migrants from acceding states, who were more skilled, could take up employment and no jobs would be left for the unskilled workers in Member States,[12] and b) migrants from the acceding states could take up work for lower wages and with more flexible arrangements, disrupting the potential of national workers to find work.[13]

Second, candidate countries and their labour force were considered to pose risks for the EU due to their social model.[14] Following the fall of communism and with the fast-track transition to market economy, the candidate countries had not managed to put in place a framework that could ensure social protection at work at levels similar to those offered by the EU, where social policy covered a broad range of subjects from living and working conditions, health and safety at work, equal opportunities, dialogue between social partners and social protection among others.[15] This meant that the costs of the industrial sector, were they to use labour force from the candidate countries, would be extremely low, which could lead to distortion of competition and social dumping.[16] For this reason, for the first time in accession negotiations, we see an emphasis by the Commission on the full incorporation of the European social model in the candidate states, a model which, according to the Commission is characterized by a balance between social justice and economic efficiency.[17]

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et de la politique de défense, Rapporteurs: M. Oostlander et M Baron Crespo, Commission de l'emploi et des affaire sociales, Rapporteur pour avis: M Harald Ettl, point 24 and B.

[12] Agenda 2000, Vol II COM(97)2000 final 20, 36 and HAEU, DORIE-204, Annexe 2 (n 9) point 5.4.

[13] Agenda 2000, Vol II COM(97)2000 final 20. See HAEU, GJLA-206, European Commission, Secretary General, Corrigendum to the Information note by M Verheugen addressed to the Members of the Commission, Directors Generals and Heads of service, 14 April 2000 O/139/2000 SEC(2000)663/3 following the meeting of the heads of cabinet of 13 April 2000.

[14] Agenda 2000, Vol II COM(97) 2000 final, Section 6.1

[15] ibid.

[16] HAEU, DORIE-204, Annexe 2 (n 9) point 5.4.; Agenda 2000, Vol II COM(97) 2000 final, Section 7.2; Parlement Européen, Résolution sur la communication de la Commission intitule " Agenda 2000-Pour une Union plus forte et plus large" première partie, chapitre II, "Cohésion économique et sociale" (COM (97) 2000- C4- 0523/97), A4-0210/98, 1998-06-18, PE 270.314/15 point M.

[17] Agenda 2000, Vol II COM(97) 2000 final, Section 6.1. See also Commission Opinion on Romania, COM(97)2003 final p 90; Commission Opinion on the Czech Republic COM(97)2009 final p 85; Commission Opinion on Poland COM(97)2002 final p 97; Commission Opinion on Bulgaria, COM(97)2008 p 80, 48 on the possibility of applying the acquis to ensure to ensure access to employment for migrant workers and the application of non-discrimination principle. And especially Commission Opinion on Estonia COM(97)2006 final p 44; Commission Opinion on Hungary, COM(97)2001 final p 89; Commission Opinion on Lithuania COM(97)2007 p 43; Commission Opinion on Latvia, COM(97)2005 final p 83; Commission Opinion on Slovenia,

Finally, the need for sustainable development of the acceding countries was also set in light of their emigration patterns.[18] There was a constant pressure on the candidate countries to accelerate their development both economically and in terms of social standards to ensure that they keep their nationals in their territories.[19] This emphasis has a double face: one related to eliminating push factors for migration, and a second one related to making use of human resources needed to restructure their economies, which would eventually become part of the EU economy.[20] The issue of antagonism between the labour of migrants from the acceding states, and the TCN migrant labour and the potential effects for the EU external relations also appeared in a marginal ways.[21]

In this regard, transitional measures had to be put in place with due account of the different risks.[22] The Central and Eastern European enlargement had the potential to restore security in Europe, providing the basis for making the EU a global actor

COM(97)2010 final p 49 on the lack of provision of a right to reside for family members in case of termination of employment.

[18] HAEU, DORIE-207, Rapport sur la communication de la Commission "Agenda 2000" - Première partie. Chapitre II COM(97)2000 C4-0371/97, A4-0210/98, PE 225.091/def, Avis (article 147 du règlement) à l'intention de la commission de la politique régionale, commission de l' emploi et des affaires sociales, Rapporteur pour avis: M Hans Lindqvist, Point 9 et Avis (article 147 du règlement) à l'intention de la commission de la politique régionale, commission de la pèche, Rapporteur pour avis: M Pat the Cope Gallagher.

[19] Agenda 2000, Vol II COM(97) 2000 final 41.

[20] HAEU, DORIE-205, Rapport sur la communication de la Commission "Agenda 2000 - Pour une Union plus forte et plus large" (COM(97)2000 - C4-0371/97) A4-0368/97/PARTIE C, Avis des commissions parlementaires et lettres des délégations du Parlement Européen aux commissions parlementaires mixtes PE 224.339/Partie C/def, Avis (article 147 du règlement) à l'intention de la commission des affaires étrangères, de la sécurité et de la politique de défense, Rapporteurs: M. Oostlander et M Baron Crespo, Commission de libertés publiques et des affaires intérieures, Rapporteur pour avis: M Maria Berger point 1.3.

[21] Agenda 2000, Vol II COM(97) 2000 final, Section 6; HAEU-GJLA 246, Commission of the European Communities, Directorate General External Relations, Director General Note for the attention of MM Prat, Cadieux, Abbott, Avery, Benavides, Nuttall, Coher, Rhein, DG I, Burghardt, Secr. Gen, Brussels 05.03.1992 003389.

[22] Agenda 2000, Vol II COM(97) 2000 final p 20, 36.; HAEU, DORIE-205, Rapport sur la communication de la Commission "Agenda 2000 - Pour une Union plus forte et plus large" (COM(97)2000 - C4-0371/97) A4-0368/97/PARTIE C, Avis des commissions parlementaires et lettres des délégations du Parlement Européen aux commissions parlementaires mixtes PE 224.339/Partie C/def, Avis (article 147 du reglement) à l'intention de la commission des affaires étrangères, de la sécurité et de la politique de défense, Rapporteurs: M. Oostlander et M Baron Crespo, Commission de l'emploi et des affaire sociales, Rapporteur pour avis: M Harald Ettl point 24; Parlement Européen, Résolution du 3 avril 1998 sur les effets de l'élargissement de l'Union Européenne sur la coopération dans le domaine de la justice et des affaires intérieures, A4-0107/98 [1998] OJ C 138/214 point 17; Résolution du Parlement Européen sur le rapport global de suivi sur le degré de préparation à l'adhésion à l'UE de la République tchèque, de l'Estonie, de Chypre, de la Lettonie, de la Lituanie, de la Hongrie, de Malte, de la Pologne, de la Slovénie et de la Slovaquie A5-0111/2004 [2004] OJ C 102E/829 point 15.

and enriching the internal market by, *inter alia*, human capital.[23] An immediate accession without specific safeguards could not guarantee the integration capacity of the EU or support its project of growth and progress. As a result, following the consideration of different options that could ensure a smooth transition, free movement of workers was regulated in the relevant Accession Treaties as follows.[24]

Labour migration in the first two years following accession would take place subject to national measures or bilateral agreements. Member States would be allowed to extend this two-year period by three more years.[25] In case of serious disturbance to the labour market, Member States could maintain national measures for a total of seven years.[26] Nationals of the acceding states already employed at the date of accession for more than 12 months or accepted to a national labour market following accession for a period longer than 12 months would enjoy access to the labour market of that state.[27] What is more, labour migrants employed at the Member States during the transitional period would benefit from non-discrimination, as the application of Article 7 of Regulation 1612/68 was not subject to the transitional arrangements. At the same time, the transitional arrangements required that nationals of the acceding countries and their families should not be treated more restrictively than those of third countries working in that Member State.[28]

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[23] Agenda 2000, Vol II COM(97) 2000 final 4; HAEU, EN-2228, Study group on enlargement formed within Directorate F of the Commission and produced a report called 'A strategy for enlargement', November 1991, 4.

[24] For an overview of the options see Georg Ziegler, 'The Accession Negotiations on Free Movement of Workers' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European enlargement: a commentary on the enlargement process* (TMC Asser press 2002).

[25] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 2; Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 2; Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community [2012] OJ L 112, Article 18, Annex V, Paragraph 2.

[26] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 4; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 4; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 4.

[27] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 2; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 2; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 2.

[28] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 14; ; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 14; Act

The Accession Treaties also provided for the possibility to review the transitional provisions within two years following accession.[29] Considerable discretion was left to Member States as to how they would unilaterally regulate labour migration from the acceding states in the transitional period. Specifically, they were allowed to individually open their labour markets to the nationals of the acceding states two years after accession.[30] At the same time, such Member States would be allowed to go back to restrictions within the first seven years if they underwent or foresaw disturbances on their labour market which could threaten the living standards or employment levels in a particular region or occupation.[31] In such a case, the Commission would review the Member State's request and decide on the extent to which the application of the relevant EU law provisions could be wholly or partially suspended. This type of resort to domestic law could 'in urgent and exceptional cases' take place by *ex post* notification.[32] What is more, where old Member States decided to suspend the application of free movement provisions, the acceding Member States were also protected insofar as they could restrict the application of free movement for migrant workers from all the other acceding Member States, to seal themselves from disturbances in their developing labour markets.[33]

Rights of family members were regulated as follows. For migrants from acceding Member States who had already been employed in EU Member States for longer than 12 months, family members residing with them at the date of accession would

concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 14.

[29] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 3; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 3; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 3.

[30] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, paragraph 2. In some cases, even earlier. See paragraph 12 'Any present Member State applying national measures in accordance with paragraphs 2 to 5 and 7 to 9, may introduce, under national law, greater freedom of movement than that existing at the date of accession, including full labour market access'.

[31] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 7; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 7; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 7.

[32] ibid.

[33] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 11; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 11; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 11.

have immediate access to the labour market of the specific state.[34] Family members who resided with the worker following accession and during the application of the transitional regime would have access to the Member State labour market after residence there for at least 18 months, or from the third year following the date of accession.[35]

Finally, Member States also addressed the issue of posted workers. Germany and Austria were allowed to limit the application of EU law and thereby the movement of posted workers to their national labour markets to address serious existing and threatened disturbances in specific service sectors.[36] These services or sectors were mentioned in detail for each of these countries. By a declaration, Germany and Austria expressed their understanding of the phrase 'certain regions' to potentially comprise of the entire national territory.[37] In general, during the period of transitional arrangements, Member States were required to ensure that no new restrictions to the rights of migrant workers would be introduced (standstill clause) and that they gave preference to workers from the acceding Member States over those who are nationals of third countries as regards access to the labour market.[38]

Malta and Cyprus were not covered by these detailed arrangements. Instead, they joined immediately the free movement *acquis*. The higher economic and social development of these countries compared to the CEECs was the reason behind the immediate application of the free movement framework.[39] The stance of the

[34] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 8; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 8; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 8.

[35] ibid.

[36] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 13; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 13; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 18, Annex V, Paragraph 13.

[37] Declarations no 19, Joint Declaration by the Federal Republic of Germany and the Republic of Austria on the free movement of workers: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia, Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236.

[38] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 24 Annexes V, VI, VIII, IX, X, XII, XIII and XIV, Paragraph 14; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 20, Annex VI, VII, Paragraph 14; Act concerning the conditions of accession of Croatia, Article 18, Annex V, Paragraph 14.

[39] Avis de la Commission sur la demande d'adhésion de Malte à la Communauté, COM(1993)312; Avis de la Commission sur la demande d'adhésion de la République Chypre à la Communauté, COM(1993)313. In Malta the unemployment level was even lower than that of the Community

Commission, as expressed in archival documents, is that Malta and Cyprus stood out from the rest of the candidate countries for three reasons: they did not share common borders with any Member States; the difference of wage levels between them and the Member States was not as marked; and the relevant research did not identify them as posing migration-related risks to the EU Member States most affected at the time (Germany and Austria).[40] For the same reasons, Malta was even allowed to unilaterally resort to procedures restricting the movement of EU workers to its territory for a period of seven years if it underwent or foresaw labour market disturbances that could seriously threaten the living standards or employment in a specific region or occupation.[41] A similar derogation on the application of free movement provisions was not envisaged for the EU Member States with respect to Maltese nationals. Similarly, the transitional arrangements on Cyprus provided for no restriction on the free movement of workers *acquis*.[42]

Similarly to all the previous Accession Treaties, a general safeguard clause was incorporated allowing for the potential adoption of protective measures for three years after accession in case of difficulties related to the economic situation of the old and new Member States.[43] In addition to this, another safeguard clause was added which provided for similar measures where new Member States failed to enforce the commitments undertaken during the accession negotiations, thereby causing a serious breach or an imminent risk of such breach to the functioning of the internal market.[44]

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states at the time. Also Rapport de mise à jour de l'avis de la Commission sur la demande d'adhésion de Malte COM(1999)69 final, section 3.5, 25.

[40] HAEU, GJLA-204, European Commission, Directorate General Enlargement, Argumentaire on the Transitional Arrangement for the free movement of persons, For use in the candidate countries, Brussels, 31 May 2001, ELARG/FC D(2001); HAEU, GJLA-206, Final version of Communication from Mr Verhaugen in Agreement with Mrs Diamantopoulou, Essential elements for the draft Common Positions concerning "Freedom of movement of persons", version of 6 April 2001 sent to the Secretary General for the college on 18.04.01.

[41] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L 236, 2 (Act concerning the conditions of the 2003 Accession Treaty) Annex XIV Malta, paragraph 2.

[42] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Annex VII.

[43] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 37; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 36; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 37.

[44] Act concerning the conditions of the 2003 Accession Treaty [2003] OJ L 236, Article 38; Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, Article 37; Act concerning the conditions of the Croatian Accession Treaty [2012] OJ L 112, Article 38. See also Article 39, Protocol concerning the conditions of the 2005 Accession Treaty accession [2005] OJ L 157, which also provides for the potential postponement of accession for one year in

In the Accession Treaties of 2003 and 2005, Member States attached Declarations in recognition of the elements of 'differentiation and flexibility that applied to the free movement of workers regime'.[45] They acknowledged their intention to grant increased access to the acceding states' nationals under domestic law and to improve the employment opportunities in Member States upon accession. Finally, they declared their intention to 'move as quickly as possible to the full application of the acquis in the area of free movement of workers'.[46] The overview of the main provisions of the Accession Treaties points to the extremely detailed temporal limitation of the rights of migrant workers and the more flexible review process on the transitional arrangements not only by the EU institutions, but also by the Member States, which could unilaterally decide how to address labour migration from acceding states based on their national needs. A feature of past accession processes was that workers-nationals of the acceding states, who had been already legally employed in the territory of the Member States, would immediately enjoy their rights as EU workers. This was because of the recognition that such migrants were already actively contributing to EU growth and could not cause disruptions to national labour markets. This feature was also differentiated in the Central and Eastern European enlargement. No longer was prior lawful economic activity enough: migrants employed in Member States prior to accession were required to show a more concrete tie to the labour market. They had to have already been connected to the EU market for a period of longer than a year to be able to enjoy a broader set of rights. This incrementality in the attribution of rights for already employed migrants from acceding states was established precisely to avoid economic risks at times of more limited labour demand, and thereby to ensure that the accession would not take place in a way that would make it unsustainable for the economic development of the EU.

6.2 Economic and Social Objectives Behind the Rights of EU Migrants

In Chapter 5, I discussed the political aspirations of generalizing free movement rights for EU citizens and their reflection in the case-law, which broadened the protection of EU migrants in light of the primary law citizenship provisions. For

case of failure of the acceding states to implement the acquis to an extent that they would be unable to meet the requirements for membership.

[45] Declarations no 6,7,10,11,13,14,15,16,18, Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236; Joint declaration on the free movement of workers 1 and 2, Treaty of Accession of the Republic of Bulgaria and Romania [2005] OJ L 157

[46] ibid.

some time, political scientists and legal scholars alike investigated primary law and its invocation in the case-law as a basis for the construction of a direct link between EU migrants *qua* citizens and the EU legal order.[47] In parallel, the Treaty provided that free movement rights of all citizens were to be exercised in accordance with the conditions and limitations of secondary law. The Commission thus issued a proposal for a Directive which would regulate the exercise of these rights in light of the legal and political environment created by the citizenship of the Union.[48] The aspiration of the Commission was that

> Union citizens should, mutatis mutandis, be able to move between Member states on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country. Any additional administrative or legal obligations should be kept to the bare minimum required by the fact that the person in question is a "non-national".[49]

The proposal of the Commission suggested the extension of residence rights without any conditions for up to six months, the removal of conditions of differential treatment between EU migrants and Member State nationals after four years of residence, and the limitation of restrictions to family reunification.[50] These aspirations were watered down by the Council.[51] A closer investigation of the final text of Directive 2004/38, which now regulates these rights, as well as of the case-law of the Court, show that economic objectives dictate both the conditions and the limitations of the right to reside, the social rights enjoyed by EU migrants, as well as family reunification rights.[52] After reviewing how such objectives are reflected

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[47] See Sandra Mantu and others (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020); Willem Maas, 'The Genesis of European Rights' (2005) 43 Journal of Common Market Studies 1009; Dora Kostakopoulou, 'The Evolution of European Union Citizenship' (2008) 7 European Political Science 285; Dora Kostakopoulou, Sergio Carrera and Moritz Jesse, 'Doing and Deserving: Competing Frames of Integration in the EU' in Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), *Illiberal liberal states : immigration, citizenship, and integration in the EU* (Ashgate 2009).

[48] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member states COM(2001)0257 [2001] OJ C 270E/150, Section 1.3.

[49] ibid Section 1.3.

[50] ibid.

[51] On the main changes introduced by the Council see Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member states, SEC(2003)1293 final - COD 2001/0111.

[52] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives

in secondary law in Section 6.2.1, in Section 6.2.2 I examine the evolution of case-law, which rather than ensuring more extensive protection via primary law, now accepts the balancing of economic and social objectives decided by the legislature. In Section 6.2.3 I identify the more extensive protection of migrant workers as reflected in law and case-law. Finally, Section 6.2.4 examines family reunification provisions and the way in which economic and social considerations affect their interpretation in the relevant case-law. The analysis reveals the centrality of economic and social considerations for the rights of EU migrants, showcasing the free movement framework as the perfect example of sustainable migration whereby migrants are attributed extensive social rights if they have an economic function, and these rights are limited precisely in order to ensure the economic sustainability of their move.

6.2.1 Economic Preconditions of Legal Residence

An analysis of the provisions of Directive 2004/38 shows how economic objectives condition free movement rights. The Directive provides the detailed conditions under which the right of free movement and residence should be exercised by EU migrants and their family members, their rights to permanent residence, and the limitations of such rights for public policy, public security, and public health reasons.

First, all EU migrants enjoy a right of residence for up to three months under Article 6 Directive 2004/38. This right is generally thought of as unlimited, owing to the special status of EU citizenship. Even this limited right to enter and reside in a Member State free from any administrative requirement is dependent on a negative condition, namely that EU migrants should not become an unreasonable burden on the social assistance system of the host state under Article 14(1) Directive 2004/38. Subsequently, if EU migrants wish to reside in a Member State for a period longer than three months, they need to comply with the conditions of Article 7 Directive 2004/38. Recital 9 of the Directive suggests that Member States may allow more favourable treatment to job-seekers; however, there are no more specific provision on this in the text of the Directive.

A closer look at Article 7 Directive 2004/38 points to the economic considerations conditioning the security of residence of EU migrants in a Member State. Specifically, residence over three months is guaranteed only for EU migrants who cannot pose a risk to the economy of Member States. Residence is guaranteed for workers, self-employed persons, and their family members. Where EU migrants are not engaged in economic activity, their security of residence is dependent on them

64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

having sufficient resources and comprehensive health insurance.[53] Economic activity or, at the very least, self-sufficiency, functions as a guarantee that they will positively contribute, or at least will not negatively affect the economies of the Member States. The primary law guarantee of movement and residence derived from the EU citizen status is conditioned by the EU legislature to align free movement under the Directive with the Treaty objectives of growth and progress.

Directive 2004/38 allows some leeway for economic inactivity, but this is clearly delimited. Under Article 7(3), EU migrants can retain the status of worker or self-employed, and hence security of residence, if they are temporarily unable to work due to illness or accident, and if they are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as job-seekers.[54] In case of involuntary unemployment after less than a year of employment they must have registered as job-seekers. In this case, EU migrants maintain the status of worker for no less than six months if they pursue vocational training. However, the retention of worker status in this case presupposes that the training is related to their previous employment, unless they became voluntarily unemployed.

The intimate connection of security of residence to economic considerations appears under Article 14 Directive 2004/38 on the retention of the right of residence. This article provides that EU migrants and their family members can retain the right to reside as long as they do not become an unreasonable burden on the social assistance system of the host state. Incorporating the considerations of the case-law, Article 14(3) provides that expulsion should not come as an automatic consequence of recourse to social assistance.[55] This means that Member States can remove EU migrants if they consider that such migrants negatively affect their economies, but to do so they need to comply with the principle of proportionality and to take into account various considerations. Recital 16, which was inserted by the Council during the negotiations of the Directive, mentions what national authorities should consider in such a scenario: whether the migrant is facing temporary difficulties, the duration of their residence, their personal circumstances, and the aid granted to them. [56]

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[53] Article 7(1) (b) and (c) Directive 2004/38 which repeats the same conditions for students.

[54] Judgment of 19 June 2014, *Saint Prix,* C-507/12, ECLI:EU:C:2014:2007; Judgment of 20 December 2017, *Gusa*, C-442/16, ECLI:EU:C:2017:1004; Judgment of 19 September 2019, *Dakneviciute*, C-544/18, ECLI:EU:C:2019:761.

[55] Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458; Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488 reviewed in Chapter 5, Section 5.1.2.

[56] See Council Document ST 13263 2003 ADD 1 – Projet d'exposé Des Motifs Du Conseil 10/11/2003, Position commune arrêtée par le Conseil en vue de l'adoption d'une directive du Parlement européen et du Conseil relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des États membres, modifiant

Security of residence becomes decoupled from economic considerations after five years of residence in a host state. That is when EU migrants can access permanent residence under Article 16 Directive 2004/38.[57] Under Recital 17, this right is attributed with a view to contributing to the social objectives of the EU by strengthening social cohesion. Finally, Article 24 provides for equal treatment of EU migrants and their family members within the scope of the Treaty allows for derogation. Article 24(2) provides that Member States have no obligation to grant equal access to social assistance during the first three months of residence or to migrants who entered as job-seekers. The same provision allows Member States to restrict equal treatment regarding maintenance aid for studies to economically active migrants and their families and to only allow such aid to economically inactive migrants after the acquisition of a right of permanent residence.

Despite these safeguards, which were put in place to avert the potential economic repercussions of unlimited free movement rights, Member States have time and again voiced their concerns on how the provisions of the Directive set the scene for 'benefit tourism'.[58] The Commission has tried to communicate to Member States how the limitations in place ensure the proper functioning of the system, stressing that economically inactive citizens and people who enter as job-seekers are excluded from social assistance to begin with.[59] Social assistance is granted to people whose income falls below a specific threshold, and they require support by states to meet a life in dignity. EU migrants who enjoy a right to reside in Member States do so under the condition of sufficient resources (either via employment or through proof of self-sufficiency) anyway, which would mean that their income must be higher than that under which social assistance is granted. Thus, they cannot pose a risk to public finances.

Overall, Directive 2004/38 operationalizes free movement rights for EU migrants under specific limitations and conditions as provide by Article 21(1) TFEU. The rights granted to EU migrants and the limitations thereto to protect national economies express a balancing between economic and social objectives so as to

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le règlement (CEE) n° 1612/68 et abrogeant les directives 64/221/ CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE Orientations Communes Délai de consultation:14.11.20.

[57] Article 18, Directive 2004/38 for family members.

[58] The concerns escalated in the Member States' intention to limit equal treatment also for workers Cf Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe'(2018) 43 European Law Review 477 where the author examined the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union [2016] OJ C 691/3 in light of the Court's case-law.

[59] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, Free movement of EU citizens and their families: Five actions to make a difference, COM(2013)0837 final, Section 2.2.

guarantee that migration is sustainable in the long-term, and that public finances are not affected by unlimited EU migration. The limitations regarding economically inactive and not self-sufficient EU migrants condition both the right to reside and access to social rights. This is not a surprise. Secondary law has always imposed such conditions on the rights of EU migrants. Nevertheless, equal treatment is provided not only under the Directive, but also under primary law, which was extensively used by the Court to extend both social and residence rights beyond the limits of secondary law during the 1990s and early 2000s, as discussed in the previous chapter. The next section examines the case-law and shows how the tension between primary law and the limitations set by secondary law under Directive 2004/38 were dealt by the Court during this period.

6.2.2 Legal Residence under EU Law as a Condition of Social Rights

The previous section has show how economic considerations underlie the rights of EU migrants in two ways. First, they appear behind the conditions of access to residence rights for a period longer than three months, and second, they exist as a limitation behind the attribution of equal treatment rights for those not fulfilling the conditions of Article 7 Directive 2004/38. In this section I investigate how the Court has engaged with the balancing, opted for by the EU legislator, behind the need to promote EU citizen status, and the limitation of the rights of EU migrants so that they do not adversely affect the EU project of growth.

One of the first cases issued under the new framework was *Brey,* which concerned the residence rights of a German pensioner who claimed a compensatory supplement provided for under Austrian legislation to supplement his German pension.[60] The Court followed the wording and purpose of the Directive 2004/38 and confirmed that lawful residence was dependent on the self-sufficiency of an EU migrant. It emphasized that freedom of movement was the rule, and the conditions set for it under the Directive should be interpreted strictly and in line with proportionality, in order to assess whether the grant of social security benefits to an individual might burden the social assistance system of the Member State as a whole.[61] In that case the Court suggested that the proportionality assessment should take place with reference to the personal circumstances of the applicant and on a case-by-case basis. Jesse and Carter call this the 'swansong' of the Court's qualitative approach, examined in Chapter 5, Section 5.1.2.[62]

[60] Judgment of 19 September 2013, *Brey*, C-140/12, ECLI:EU:C:2013:565.

[61] *Brey*, C-140/12, paras 70-72.

[62] Moritz Jesse and Daniel William Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dimitry Kochenov and Elise

Subsequently, *Dano*, where the Court religiously followed the conditions prescribed by Directive 2004/38 came out with a bang.[63] In this case, the Court held that access to social benefits under equal treatment presupposed not lawful residence of any kind, but lawful residence in accordance with the conditions of the Directive.[64] By setting these conditions, the EU legislature aimed at preventing the movement of people who could pose risks to the social assistance system of the Member States.[65] According to the Court, if EU migrants do not comply with the conditions of the Directive on residence rights, they may not claim equal treatment under the EU primary law, as this would run contrary to the objective of secondary law, 'namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State'.[66] The Court also suggested that by setting these conditions, Article 7(1)(b) Directive 2004/38 sought to prevent economically inactive EU migrants from using the host states' welfare system as means to fund their subsistence.[67]

This approach was confirmed in *Alimanovic* and later, in *Garcia Nietto*, which concerned access to benefits during the first three-month period of unconditional residence.[68] The Court confirmed that only residence that complied with the conditions set by the Directive qualified for equal treatment, and not any kind of lawful residence. As put by AG Whatelet in *Garcia Nietto*,

> That interpretation is consistent with the objective of maintaining the financial equilibrium of the social security system of the Member States pursued by Directive 2004/38. Since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a three-month stay, it is legitimate not to require Member States to be responsible for them during that period. Otherwise, granting entitlement to social assistance to Union citizens who are not

Muir (eds), *European Citizenship under Stress, Social Justice, Brexit and Other Challenges*, vol 16 (Brill Nijhoff 2020) 144.

[63] Catherine Barnard, 'The Day the Clock Stopped: EU Citizenship and the Single Market' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017); Julio Baquero Cruz, 'Partial Eclipse of Union Citizenship: From Grzelczyk to Dano', *What's Left of the Law of Integration?* (Oxford University Press 2018); Niamh Nic Shuibhne, 'What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano' (2016) 23 Maastricht Journal of European and Comparative Law 908.

[64] Judgment of 11 November 2014, *Dano*, C-333/13, ECLI:EU:C:2014:2358, para 70.

[65] *Dano*, C-333/13 para 70 and Directive 2004/38 Recital 10.

[66] *Dano*, C-333/13 para 74 and Directive 2004/38 Recital 10.

[67] *Dano*, C-333/13 para 76.

[68] Judgment of 15 September 2015, *Alimanovic*, C-67/14, ECLI:EU:C:2015:597; Judgment of 25 February 2016, *García-Nieto and others*, C-299/14, ECLI:EU:C:2016:114.

> required to have sufficient means of subsistence could result in relocation en masse liable to create an unreasonable burden on national social security systems.[69]

The economic conditioning of a right to reside as a basis of equal treatment was confirmed more clearly in *Commission v the UK*.[70] The case concerned a UK law which required the existence of EU residence rights as a condition to access child benefit. The UK would essentially screen applicants who claimed this benefit and then expel them if they did not meet the conditions of Directive 2004/38 regarding residence in the UK. The Court confirmed its finding in *Brey* and *Dano* and linked these to *Bidar* and *Grzelckyck*. While acknowledging that the requirement of legal residence under EU law constituted indirect discrimination, the Court found this justified.[71] Specifically, it held that such limitations were in line with EU law and could achieve the legitimate objective of protecting public finances.[72]

One could suggest that the system in place is remedied in light of the guarantees of equal treatment after five years of residence, which prove integration and extend the rights of EU migrants in the host state in light of social considerations. Nevertheless, a look at the case-law of the Court on permanent residence creates room for more problematization. In *Ziolkowski & Szeja*, the Court engaged with the right to permanent residence of Polish nationals during the transitional period of the Accession Treaties.[73] The Polish nationals in that case had legal residence in Germany on the basis of humanitarian grounds. The Court held that the applicants could indeed access permanent residence under Directive 2004/38, since there were no transitional arrangements regarding this. However, it also held that, to qualify for permanent residence under the Directive, one had to have legal residence that satisfied the conditions of the Directive.[74] This means that an EU migrant needs to be self-sufficient and to not pose a burden to the welfare system of the Member State, if they are to qualify for permanent residence under EU law. The length of residence is not the only qualifying factor and social ties in a Member State are not a sufficient factor either. Economic conditions of having proven worthy, or not having adversely impacted the economy of the host state are also attached to this status. As the applicants enjoyed legal residence on humanitarian grounds, this did

[69] Opinion of Advocate General Wathelet delivered on 4 June 2015 in *García-Nieto and others*, C-299/14, ECLI:EU:C:2015:366 paras 70-71, reference omitted.

[70] Judgment of 14 June 2016, *Commission / United Kingdom,* C-308/14, ECLI:EU:C:2016:436.

[71] *Commission / United Kingdom*, C-308/14 para 77. For a critique see Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom' (2017) 54 Common Market Law Review 209.

[72] *Commission / United Kingdom*, C-308/14 para 80.

[73] Judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, ECLI:EU:C:2011:866.

[74] ibid para 51.

not presuppose their self-sufficiency and, hence, they were excluded from the scope of the Directive.

Muir has referred to this progressive case-law development as 'deconstitutionalization'.[75] By looking at the Treaty provisions on citizen's rights, Muir suggested that Article 21 TFEU functioned both as a benchmark against which the activities of EU and national authorities could be reviewed and as a legal basis for the adoption of further legislation.[76] Indeed as she showed, this double function is not uncommon in EU law and in the field of citizen's rights where 'the process by which political institutions have thought to circumscribe EU intervention may be reviewed against the very primary right that the legislation is intended to shape'.[77] Muir has rightly pointed out that the Court's view on primary law 'more ostensibly competes with those expressed by political authorities.'[78] Having these in mind, Muir looked at how the Court shifted its attention from the rights enshrined in primary law to the rights provided in secondary law, and suggested that this 'deconstitutionalization' allowed more space for political dialogue.[79] Thym has also referred to the evolution of the case-law presented above as a stark reminder of the limits of integration through law.[80]

Looking at these evolutions in light of the demand for economic and social sustainability driving the development of EU law, one could also add the following. Before the adoption of secondary law implementing the free movement rights of EU citizens, the Court emphasized the primary law objective of creating an ever-closer Union of the peoples of Europe. It used this political aspiration as a means to review secondary law in place, and to disconnect the economic limitations of the secondary law adopted in the 1990s from the social and political considerations of EU citizenship status inserted in the Maastricht Treaty. After the legislator balanced the different economic and social objectives and gave them concrete expression in Directive 2004/38, the Court refrained from using the broader framing of primary law as means to review secondary law. Rather, it restricted its interpretation by confirming the balancing between economic and social considerations chosen by

[75] Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2019) 2018 European Papers - A Journal on Law and Integration 1353.

[76] ibid 1357.

[77] ibid 1358.

[78] ibid.

[79] ibid 1360, 1376.

[80] Daniel Thym, 'When Union Citizens Turn into Illegal Migrants: The Dano Case' (2015) 40 European Law Review 249, 260.

the EU legislature.[81] Taking a different approach would have made the system of free movement unsustainable. As Nic Shuibhne has also suggested, the aspiration of the greatest possible freedom might be legitimate, but it does not allow for sustainability of free movement rights under the current framework.[82] Having presented the evolution of judicial interpretation, the next section explores how the current framework still privileges the social rights of EU migrant workers, as they are the ones contributing to the project, and differentiates their treatment from that of economically inactive EU citizens.

6.2.3 The Differentiated Status of Workers and Job-seekers

Despite the aim of the Directive 2004/38 to harmonize the conditions of residence for all EU citizens, the treatment of economically active EU migrants is differentiated both by exceptions applicable to them in the Directive and through the parallel existence of other instruments granting them rights.

First, in the Directive, there are exceptions that allow more privileged access to permanent residence to workers, self-employed persons and their family members under Article 17. The detailed provisions provide for the acquisition of permanent residence after a period, which is significantly shorter than the five years required for other EU nationals. Under Recital 19 Directive 2004/38, the differentiated rights of economically active migrants are based on Regulation 1251/70 and Directive 75/34 and have been maintained as acquired rights.[83] What is more, workers, self-employed and the members of their families enjoy full equal treatment rights and do not fall under the derogation of Article 24(2) Directive 2004/38.

Further, under Article 14(4) Directive 2004/38, workers, first time job-seekers and members of their families can in no case be expelled for economic reasons. Specifically, this Article provides that expulsion may in no case be adopted against economically active migrants, or EU migrants who entered the territory to seek employment. Such an expulsion would go against the longstanding right of EU migrants to move to take up work. Article 14(4)(b) provides, however, that the individuals need to be able to prove that they are indeed seeking employment, and

[81] Jesse and Carter (n 62) 170 mention that the critique should be directed to the legislature and not to the Court.

[82] Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 European Law Review 477, 509 looking at free movement case-law and the politics surrounding Brexit.

[83] Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24; Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10.

that they have a genuine chance of being employed. In short, the claim of job-seeking is not without restrictions.

The differentiation in this, and the broader attribution of rights under Directive 2004/38, lies in the presumption that workers, by virtue of their status, cannot become a burden, but will rather be net contributors to the system. What is more, even if workers were entitled to equal treatment under Article 24, the chances are that they would not overburden the national welfare systems, as they would be excluded from it for other reasons. Specifically, social assistance is usually aimed at supporting persons through mechanisms of solidarity so that they can have a decent livelihood. Workers and self-employed individuals would most probably be excluded on the basis of their finances, as they would have sufficient resources to ensure their livelihood without the need of state support.

In parallel to this, the Commission codified Regulation 1612/68 for reasons of clarity in line of the amendments it had undergone. Without creating new rights compared to the 1968 framework, free movement of workers is regulated under Regulation 492/2011, which provides for a broader application of equal treatment under Article 7 in line with the broad interpretation of the concept of social and tax advantages in the Court's case-law.[84] Family reunification rights of workers are no longer regulated by this instrument, but rather fall under Directive 2004/38.[85] Nevertheless, in Article 10, the Regulation maintains the rights of children of workers and former workers to access education or vocational training under equal conditions to Member States nationals. Even after moving the conditions of family reunification to Directive 2004/38, the Regulation still provides for differentiated treatment not only to workers themselves, but, most importantly, to former workers and their family members.

The Court had already acknowledged the complicated link between the rights of residence of family members of workers and the rights of residence of former workers via their family members. Early on, the Court held that children of workers derived a right of residence from Article 12 Regulation 1612/68 to be able to access education in the host state.[86] This derived right of residence becomes autonomous when the parent loses the status of worker, in order to ensure that the child can continue their education.[87] The reasoning is that a worker who wants to move should not be exposed to the risk that if they lose their worker status, this would lead to the

[84] See analysis in Section 4.4.1, Chapter 4. Articles 7-9, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1, which also include equality in trade union membership and rights, and equality as regards access to housing.

[85] See also Article 38(1) of the Directive 2004/38.

[86] See the analysis of the case-law in Section Chapter 2.

[87] Judgments of 17 September 2002, *Baumbast and R,* C-413/99, EU:C:2002:493

disruption of their children's education. A need to promote mobility, and thereby growth, is thus tied to an extended consideration of the importance of the protection of workers' children and their access to education.

In *Baumbast,* analysed in Section 5.1.2, of Chapter 5, the Court held that where a child enjoys a residence right to access education under Regulation 1612/68, this right can create residence rights for their primary carer.[88] Essentially, the loss of the status of worker by an EU migrant parent has no effect on the right of residence of their children. In subsequent case-law, the residence of the children of former workers created the basis for residence of their EU migrant parent. In *Ibrahim*, the Court confirmed *Baumbast*. Most importantly, it stated that EU migrants parents of children who had a residence right based on Regulation 492/2011 could enjoy a derived right of residence from their children without the need to satisfy the conditions of Directive 2004/38, that is, without the need to have sufficient resources and health insurance.[89] The existence of a worker status in the family at some point in time trumps the need to prove self-sufficiency to enjoy residence rights. The differentiation is based on a different function served by free movement of workers and free movement of citizens. Free movement of workers develops by extensive interpretations to promote mobility and, thereby, growth. The rights enjoyed by workers are based on the objective of creating the best possible condition for the integration of family members of people on the move.[90] Free movement of citizens develops with clearly construed limitations in secondary law to minimize the negative impacts of movement on national economies. The limitation of rights under the relevant Directive is based on the objective of maintaining the financial equilibrium of the Member States.[91]

This extensive protection of residence rights lies behind the more extensive application of equal treatment in access to social assistance for former workers. In *JD,* the Court held that parents of children who enjoyed a right of residence under Regulation 492/2011 should have access to social assistance under the more favourable conditions of Article 7(2) of Regulation 492/2011 and should not be covered by the derogation of Article 24(2) Directive 2004/38.[92] JD was a worker in Germany, where his daughters were attending school by virtue of Regulation 492/2011. Due to disruptions in his work, JD received social protection benefits for

[88] *Baumbast and R*, C-413/99, EU:C:2002:493; Judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83.

[89] Judgment of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, para 59.

[90] See also Judgment of 6 October 2020, *Jobcenter Krefeld v JD*, C-181/19, ECLI:EU:C:2020:794 para 51.

[91] *JD*, C-181/19 para 66.

[92] *JD*, C-181/19.

a period of nine months (subsidiary unemployment benefits and subsistence benefits for daughters), which were discontinued. Due to the length of the period during which JD was unemployed, the German authorities deemed that he could no longer retain the status of a worker, but he was rather considered a job-seeker. His right of residence at that stage was derived from the fact that his daughters were attending school by virtue of Regulation 492/2011. So, the national court wondered how the derogations from equal treatment, which were meant to apply to job-seekers under Directive 2004/38, should apply to persons who had the right of residence under Article 10 Regulation 492/2011, and who could no longer be considered workers.

As AG Pitruzzela mentioned in his Opinion, this case demanded that the Court clarify the limits of social solidarity.[93] And it did so by reference to the different objectives of free movement of workers and free movement of persons. In light of the objective of Directive 2004/38, the limitation to equal treatment is established as a means to minimize the negative economic impact of attribution of rights to migrants. In the case at hand, the Court held that that there was an 'appreciable distinction' to be made between a EU migrant who worked in a Member State and had children in school there and then became unemployed (residence under Article 10 Regulation 494/2011), an EU migrant who resided in a Member State for less than three months (residence under Article 6(1) Directive 2004/38),[94] and an EU migrant who resided in a Member State as a first-time job-seekers (residence under Article 14(4) Directive 2004/38).[95] The latter two categories were those excluded from equal treatment in social assistance under Article 24(2) of the Directive 2004/38. The appreciable distinction which the Court mentioned essentially refers to the fact that an EU migrant has worked and contributed to growth in the first scenario. Due to this, their subsequent unemployment, together with the fact of having children in the host Member State, means that their claim to equal treatment should be accepted, as it would not adversely affect the economy of Member States.[96]

The above analysis shows that both secondary law and case-law acknowledge a clear link between the economic contribution of an EU migrant and the more extensive social rights they are entitled to. The economic function of the migrant is once more the source of more extensive social rights, as has been the case from the early years of EU law. The connection between economic objectives served by migrant labour and the social safeguards that should guide the economic

[93] Opinion of Advocate General Pitruzzella delivered on 14 May 2020 in *JD*, C-181/19, ECLI:EU:C:2020:377 para 1.

[94] *García-Nieto and others*, C-299/14 scenario.

[95] *JD*, C-181/19 para 67.

[96] Essentially if the children did not have an autonomous right stemming from JDs initial work, JD would not be able to claim a residence right without self-sufficiency, trumping the limitations of the Directive 2004/38.

development reflects the way economic and social sustainability shapes EU migrants' rights. The next section will investigate how this connection appear in the regulation of family reunification for EU migrants.

6.2.4 The Case of Family Reunification: Social Objectives Furthering the Reach of EU Law within Defined Limits

Directive 2004/38 regulates family reunification for EU migrants. Family members mentioned in Article 2 are entitled to accompany or join the EU migrant in the host state, and have a right to work there under Article 23. The Directive protects the rights of family members not in light of a functionalist narrative, but rather in connection to an aspiration to preserve family unity under the Charter.[97] Article 3 also mentions a wider group of family members whose reunification should be facilitated by Member States. The scope of family members falling under the Directive and the conditions of family reunification are considerably more extensive than the family reunification rights of legally resident TCNs under the Family Reunification Directive. However, this does not mean that the framework in place is completely stripped of economic considerations acting as a limit to migrants' rights.

First, the way family reunification rights are enjoyed by EU migrants is differentiated based on their economic function. EU workers or self-employed persons are not subject to conditions on income or housing as a precondition for reunification. This is not the case for students, pensioners, and self-sufficient EU migrants, who need to prove they have sufficient resources and comprehensive insurance. When it comes to family reunification for students, the circle of family members that can claim a right to family reunification is more limited.[98] In addition, as in the case of workers, permanent residence can be acquired under more favourable conditions for family members of EU migrants who contribute as workers or self-employed.[99]

Aside from the legal regulation of the matter, the Court has engaged with the rights of EU migrants to family reunification in a significant amount of case-law which highlights the way economic and social objectives persist behind the attribution of rights. Section 6.2.4.1 examines the persistence of economic movement as a precondition for the rights of circular migrants, while in Section 6.2.4.2 I investigate

[97] Proposal on citizen's rights Directive COM(2001)0257 final, section 2.4.

[98] See Article 7(4) Directive 2004/38, which limits the beneficiaries to the spouse, registered partner and dependent children. What is more, the circle of other family members is limited based on this Article to dependent direct relatives in the ascending line of the student and their spouse or partner.

[99] The more favorable conditions of Article 17(1) apply to the family members by virtue of Article 17(3) Directive 2004/38.

the social orientation of the case-law behind the protection of the rights of EU children.

6.2.4.1 The Impossibility of Disconnecting Economic Considerations from the Rights of Circular Migrants

Economic objectives served by family reunification rights were apparent in the historical development of the EU legal framework.[100] Social objectives are achieved by the extensive reach of EU law. By this, I suggest that the importance of attributing family reunification rights to EU migrants lies not so much in them being accompanied by their family member in a host state, but rather in the fact that they can claim such rights upon return to their state of origin. The link between an EU migrant and EU law, created by virtue of the migrant's contribution to growth, is strong enough to break the restrictions imposed by national law to its own nationals.

The case-law of the Court safeguarded the rights of EU migrants to be joined or accompanied by their family members in light of the need to guarantee that workers moved in liberty and dignity, and could thus be integrated in the host state.[101] The Court saw family life as a necessary precondition for promoting the living standards and social cohesion within Member States. Having established such rights in secondary law and having fortified them in the case-law, as examined in Chapter 4, the Court used the functional imperative of free movement to promote the rights of EU migrants in their home state.

In *Singh*, the Court held that the extension of the reach of EU law to trump national restrictions was necessary in order to remove obstacles to the free movement of workers.[102] The formula is classic. An EU migrant would be deterred from leaving their country of origin and pursue economic activity if they knew that, upon return, their family members could not join them under conditions at least equivalent to those which they would normally enjoy in the host state.[103] The privileged treatment of returning EU migrants was linked with the abolition of obstacles to free movement, which was necessary for the promotion of the objectives of the Treaty.[104]

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[100] See Chapter 4, Section 4.2.2

[101] See *Baumbast* para 50, Judgment of 13 November 1990, *Di Leo / Land Berlin*, C-308/89, ECLI:EU:C:1990:400 para 13.

[102] Judgment of 7 July 1992, The Queen / Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department, C-370/90, ECLI:EU:C:1992:296.

[103] *Singh*, C-370/90 para 19. See also Judgment of 25 July 2002, *MRAX*, C-459/99, ECLI:EU:C:2002:461 para 53, Judgment of 11 July 2002, *Carpenter*, C-60/00, ECLI:EU:C:2002:434 on services para 38.

[104] Judgment of 11 December 2007, *Eind*, C-291/05, ECLI:EU:C:2007:771 para 32, the right is conferred to ensure the useful effect of free movement.

Against this backdrop, EU law demanded the application of secondary law on family reunification rights when EU migrants returned to their home state. In *Eind*, the Court further held that there was no need for the migrant to continue the pursuit of economic activities upon return to their home state.[105] Such a requirement would run counter to the objectives of EU law to ensure that nationals of Member States took up work abroad. What is more, the personal motivation of the migrant to move to another Member State is irrelevant. The extended protection of EU law is not dependent on whether EU migrants moved to take up work or to circumvent national migration law, as long as they genuinely engaged in economic activity abroad.[106]

Following the adoption of Directive 2004/38, the reasoning of the Court shifted. It no longer emphasized the need to guarantee the specific free movement of economic actors, but rather focused on the aim of strengthening the rights of free movement and residence of all EU migrants regardless of whether they were net contributors.[107] In this context Court mentioned the need to abolish obstacles to free movement of all persons under Article 3(1)(c) EC Treaty rather than on the specific functional imperatives of the free movement provisions.[108] The Court further stated that free movement for EU citizens implies the right to leave one's Member State of nationality and to become established in another Member State under the same conditions. [109]

But does this imply the elimination of economic considerations from the mix? A literal reading of the Court's case-law would require an unconditional right for EU migrants to establish themselves across the EU, and it would demand the elimination of economic objectives served by such move. It would further demand the more extensive protection of EU law applicable to all EU migrants, regardless of whether their move served economic ends or not. This, however, is not the case. The Court has held that if EU migrants wanted to claim the privileged treatment of Directive 2004/38 against their home country upon return, their movement would need to be in line with the conditions of Article 7 of the Directive.[110] Only if they have established themselves under conditions of self-sufficiency or economic contribution can they enjoy such rights and circumvent national limitations. As discussed earlier, this would require a type of movement that, even without

[105] *Eind*, C-291/05 para 44.

[106] *Singh*, C-370/90 para 23, Judgment of 23 September 2003, *Akrich*, C-109/01, ECLI:EU:C:2003:491 para 55.

[107] Judgment of 25 July 2008, *Metock and others*, C-127/08, ECLI:EU:C:2008:449 para 59.

[108] ibid para 68

[109] ibid. The case overturned *Akrich*, C-109/01.

[110] Judgment of 12 March 2014, *O.*, C-456/12, ECLI:EU:C:2014:135. See also Judgment of 12 March 2014, *S. and G.*, C-457/12, ECLI:EU:C:2014:136 which recognized that similar rights can be derived from Article 45 TFEU in the case of frontier workers.

contributing to growth, at the very least does not hinder it. This means that as a minimum, EU migrants would have to be self-sufficient in the host state. Scholars have discussed how this is not a condition that can be met by all EU migrants, leading to exclusion from protection for those who could pose risk to the growth project.[111] This implication is actually the consequence of shaping migrants' rights with due regard to economic and social sustainability.

6.2.4.2 The Social Orientation Behind the Extensive Rights of Union Children

The emphasis on the safeguarding Member States' economies is not reproduced with the same force in the case-law on family reunification rights for EU children. In a series of cases concerning residence rights for TCN parents of minor children with EU nationality, the Court has used the citizenship provisions as a basis of extending the rights of their migrant parents. This is, perhaps, the only type of case-law where social considerations regarding the protection of children are capable of significantly extending the rights of TCNs. Even in this socially oriented case-law, economy enters the mix through the persistent requirement that the TCN parent needs to be able to provide resources to enjoy residence rights.

The residence rights of TCN parents of EU children are judicially constructed by reference to primary law, as they fall outside the scope of Directive 2004/38. Directive 2004/38 provides for family reunification of dependent relatives in the ascending line. In the cases examined by the Court on this matter, it is not the TCN parents that were dependent on the EU children, but vice versa. This did not stop the Court from establishing residence rights by reference to Union citizenship and the need of genuine enjoyment of the substance of rights conferred by Article 20 TFEU.[112] The genuine enjoyment of Union citizenship rights is linked to respect for family life under Article 7 of the Charter and the obligation to take into account the best interests of the child under Article 24(2) of the Charter. This emphasis on rights is not sufficient to take away any economic guarantees underlying the residence rights of EU children and their TCN parents. Rather, the legality of residence of the child is based on a combination of Article 21 TFEU and Directive 2004/38, which has been interpreted to mean that the sufficiency of resources is considered by reference to the resources of the TCN parent.[113]

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[111] Eleanor Spaventa, 'Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G' (2015) 52 Common Market Law Review 753.

[112] See Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:639; Judgment of 8 March 2011, *Ruiz Zambrano,* C-34/09, ECLI:EU:C:2011:124 and Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675 in purely internal situations. Judgement of 13 September 2016, *CS*, C-304/14 ECLI:EU:C:2016:674; Judgment of 10 May 2017, *Chavez-Vilchez* and others, C-133/15, ECLI:EU:C:2017:354; Judgment of 8 May 2018, *KA and Others*, Case C-82/16 ECLI:EU:C:2018:308.

[113] See in this also Judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, ECLI:EU:C:2013:645.

The ultimate limit to residence under a combination of Article 21 and Directive 2004/38 is that the TCN parent must be able to fulfil the conditions of Article 7 of Directive 2004/38 in all cases.[114] If this is not possible because the parent cannot prove sufficient resources and comprehensive sickness insurance, then in extreme cases a right to reside could be based on Article 20 TFEU, but that would only be the case if the Union child had to leave the territory of the EU altogether because of the impossibility of granting a residence right to their TCN parent.[115]

A case which highlighted the tension of economic and social considerations behind the attribution of rights to TCN parents of Union children was *Bajratari*.[116] In that case, the children's sufficiency of resources was based on income obtained from unlawful employment, as the parents had lost their residence permit. The Court had to engage with how to achieve the balance between the social and economic objectives pursued by Directive 2004/38, more specifically, the objective of strengthening the rights of Union citizens to move and reside freely in the Member States and promoting social cohesion on the one hand, while protecting the public finances of the Member State on the other.[117] In his Opinion, AG Szpunar elaborated on the reason why the sufficiency of resources was evaluated with regard to the parent rather than the child in line with the case-law in *Chen* and *Zambrano*:

> If it is accepted that a child may demonstrate that it has sufficient resources from the person who is its primary carer, it would be absurd to refuse that person a right of residence and, therefore, an opportunity to work. In the event of such a refusal, the situation would be that of a snake biting its own tail, that is to say, the issue is a circular one which would render nugatory the practical effect of Article 21 TFEU and Directive 2004/38. Such a refusal would mean that no minor who is a Union citizen, in a situation such as that at issue in the main proceedings, could fulfil the conditions of Article 7(1)(b) of that directive. It should be noted that, if they were adults, such children would have not only Union citizenship, which is destined to be the fundamental status of nationals of the Member States, but also the status of worker.[118]

It is worth taking a moment to emphasize this final sentence of the excerpt of the AG Opinion. This sentence was not needed to reach the conclusion that sufficiency of resources could also be evaluated by reference to income from unlawful employment. In this Opinion, issued in 2019, nearly thirty years after the establishment of EU citizenship, the final sentence is a stark reminder of what links

[114] See also *Alokpa and Moudoulou*, C-86/12, para 31.

[115] *Alokpa and Moudoulou,* C-86/12 para 32 and Judgment of 8 May 2013, *Ymeraga and Ymeraga-Tafarshiku*, C-87/12, ECLI:EU:C:2013:291 para 36.

[116] Judgment of 2 October 2019, *Bajratari*, C-93/18, ECLI:EU:C:2019:809.

[117] Opinion of Advocate General Szpunar delivered on 19 June 2019 in *Bajratari*, C-93/18, ECLI:EU:C:2019:512 paras 36-47.

[118] Opinion of Advocate General Szpunar in *Bajratari*, C-93/18, para 83, reference omitted.

EU migrants to the EU legal order. It could be argued that reference to the worker status is made in support of the fact that as an adult, an EU national would have the opportunity to exercise their rights by fulfilling the conditions of Article 7 Directive 2004/38. But this is certainly not the case, as those conditions could be fulfilled by an adult as a worker, a self-employed, a student or a self-sufficient person. What this final point emphasizes is that the rupture of the link between the EU migrant and their state of origin, and relatedly, the basis of claims made against that host state is to a large extent due to financial solidarity owed by Member States to EU migrants based on their economic contribution.

The Court followed the AG Opinion and explained the way the balancing took place by implying that such an evaluation was the lesser of two evils. Specifically, the Court recalled that the resources available to EU children would always be evaluated with reference to the income of their parents. However, when the parent is in a precarious situation due to unlawful residence, the Court suggested that the risk of losing the sufficient resources required and of the Union child becoming a burden on the social assistance system would be greater.[119] While on first reading the exclusion of income from unlawful employment could achieve the objective of protecting public finances, this objective is already ensured by the safeguards provided in Article 14 Directive 2004/38, which allows Member States to check if the conditions of the Directive are fulfilled throughout the period of residence.[120] In light of this, introducing a condition regarding the lawfulness of income of the parent was found to constitute a disproportionate interference, which went beyond what is necessary to achieve the objective pursued.[121]

The more protective approach the Court takes regarding children has been linked in scholarship with the fortification of the status of EU citizenship or with a recognition of children as actors in their own right and not as appendices to economic actors.[122] I would argue that while the latter might be true, the derivative rights of parents of EU children should not be understood as transforming the basis of free movement rights and disentangling them from effective market contribution. This is because similar arguments have failed with regard to the claims of EU nationals who have never left their state of origin and their partners. Already since *McCarthy* and *Dereci*, the Court insisted on the necessity of movement meeting the conditions of Directive 2004/38 to be able to claim family reunification rights under EU law.[123]

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[119] *Bajratari*, C-93/18 para 37.

[120] *Bajratari*, C-93/18 paras 38-41.

[121] *Bajratari*, C-93/18 paras 42.

[122] Clare McGlynn, Families and the European Union Law, Politics and Pluralism (Cambridge University Press 2006).

[123] Judgment of 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277; Judgment of 15 November 2011, *Dereci and others*, C-256/11, ECLI:EU:C:2011:734.

Arguments on the dependency of adult EU nationals to a TCN as a basis for claiming the more protective treatment of EU law have not succeeded. Instead, the Court has insisted that a relationship of dependency – one that would be so strong to create a right of residence under Article 20 TFEU and the effective enjoyment of rights test – would be conceivable only in exceptional cases where there could be no form of separation imaginable between the EU national and the member of their family on which they were dependent.[124] Emotional ties would not be enough. The differentiation should thus be understood in line with the greater vulnerability of children whose interests fall to be protected by societies at large in line with the need to promote the social objectives of the EU. The consistent invocation of Article 24 of the Charter in the relevant case-law would support that.

6.2.5 Consolidation of Balancing and No More Attempts to Tip the Scale

Different scholars have commented with great disappointment the different judicial evolutions of this period which point to the continued economic basis of the rights EU migrants enjoy from EU law.[125] Ultimately, the economic limitations set to the exercise of EU migrants' rights under secondary law, and the hesitation of the Court to review them for compliance with primary law proves the strong economic basis of EU free movement rights. At the same time if we look at this evolution having in mind both how the EU legal order created rights for migrants and that economic and social objectives sit at the core of this legal order a more nuanced explanation could arise. This explanation would have as a starting point the impossibility of maintaining economic growth and social progress, by the creation of unlimited residence rights and corresponding social rights for all EU migrants. If the EU legal order is to deliver on the parallel pursuit of economic and social objectives, then, the balance could not be tipped in favour of unlimited social rights for EU migrants.

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[124] See Judgement of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real v RH,* Case C-836/18, ECLI:EU:C:2020:119 para 56. Such would not be emotional ties. See also Judgement of 8 May 2018, *K.A. and Others (Family reunification in Belgium),* C 82/16, EU:C:2018:308, para 65.

[125] Moritz Jesse and Daniel Carter, 'The "Market Insider": Market-Citizenship and Economic Exclusion in the EU' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020); Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Dimitry Kochenov and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019); Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review 1597; Síofra O'Leary and Sara Iglesias Sánchez, 'Free Movement of Persons and Services' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); Sybe Alexander de Vries and others (eds), *EU Citizens' Economic Rights in Action: Re-Thinking Legal and Factual Barriers in the Internal Market* (Edward Elgar Publishing 2018).

In other words, sustainability under EU law demands the economic and social sustainability of EU migrants' rights.

During this period, the legislative evolution by the adoption of Directive 2004/38 shows the intention to create residence rights for all EU migrants in light of the ever-closer Union of peoples. However, such rights meet an ultimate limit of self-sufficiency. It is accepted that EU migrants should be able to enjoy rights, even if they are not net contributors to the host state. Nevertheless, this does not mean that rights could be created for those that negatively impact the public finances of the Member States. In parallel, social cohesion within the Member States is promoted by the creation of a permanent status that disconnects the attribution of social rights from economic considerations. Next to this broader scope of migrants enjoying EU law rights, those who actively contribute by their economic activity are still privileged in the rights granted by EU law. In this set up, the due consideration of a parallel pursuit of economic and social objectives, as well as the related attribution and limitation of social rights to EU migrants, frame the free movement framework as a sustainable migration framework.

Regarding the case-law, unlike the previous period discussed in Chapter 5, when the Court emphasized the political aspirations of the citizenship status to extend the reach of secondary law, during this period it deferred to the legislature. It acknowledged the balancing of economic and social objectives as they were transposed in secondary law, and no longer invoked primary law to alter this balancing. The Court continues to emphasize the special citizen status when it comes to cases related to Union children, recognizing a particular vulnerability. But it does so when the attribution of rights does not come with extra costs for the host state. To do otherwise under the current consolidation of balancing behind secondary law would be unsustainable. Having concluded the historical investigation of EU migrants' rights, the next section will look at how economic and social consideration eventually shaped the regulation of migration in third countries.

6.3 Economic and Social Objectives Behind an Incoherent System of Regulation for TCNs

Following the Tampere Council and the unfulfilled promise of regulating migration for TCNs, investigated in the previous chapter, the Hague Programme set the political guidelines at the beginning of the period under review.[126] Acknowledging the importance of legal migration for the economic development of the EU, the Council invited the Commission to develop a framework on the regulation of legal

[126] Council of the European Union, The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1.

migration with due regard to demands for migrant labour by 2005, while noting that the determination of volumes of admission was a competence of Member States.[127] In response to this call, the Commission issued a plan on the legislative initiatives that could be adopted to meet the competitiveness goals of the Lisbon strategy.[128] In this policy plan, the Commission pointed to the advantages of a horizontal admission framework for the last time.

Without support by the Member States and after the failed efforts to regulate migration presented in Chapter 5, the Commission suggested the adoption of one horizontal instrument and different sectoral directives in order to grant labour migrants a minimum set of rights, while at the same time attracting specific categories of migrant workers crucial for the development of the EU economy.[129] The Commission decried the fact that, years after Tampere, the EU migration policy remained incomplete despite the acknowledgement of the demographic and economic needs that should guide the relevant harmonization.[130] The sectoral approach in the regulation of admission was the only viable option to overcome Member States' reservations and align migration law with the economic objectives of the EU.[131]

And so, during this period, the regulation of migration took shape in the following way. Admission is regulated under a sectoral regime which provides entry and residence to specific categories of third-country nationals: researchers and students, intra-corporate transferees, highly skilled workers, and seasonal workers.[132] These

[127] The Hague Programme Section 1.4.

[128] Communication from the Commission, Policy Plan on Legal Migration COM(2005)0669 final Section 1.2

[129] Policy Plan on Legal Migration COM(2005)0669 Section 2.

[130] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a Common Immigration Policy COM(2007)0780 final 4.

[131] Towards a Common Immigration Policy COM(2007)0780 final 4, 7-8.

[132] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing (recast) [2016] OJ L 132/21; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/ 17 (Blue Card Directive 2009) and Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1 (Blue Card Directive 2021); Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375.

sectoral instruments provide for specific rights attached to each category of migrants. The admission of researchers was first regulated in a Directive adopted in 2005, which was recast.[133] Currently the admission of researchers and students is regulated in a single instrument, the Researchers and Students Directive. This recasting and unification did not alter the economic and social considerations behind their admission. Further, the admission of highly skilled workers is regulated in the Blue Card Directive adopted in 2009, which was amended in 2021. In the analysis that follows, all these instruments, that is both the 2005 and the 2016 Directives on researchers and the two Blue Card Directives, are taken into account. The changes they introduced and potential shifts in the way economic and social considerations appear therein are commented when necessary.

In parallel, the Single Permit Directive and the Family Reunification Directive regulate horizontally the rights of all migrants legally resident in the EU regardless of whether they enjoy residence rights under national or EU law.[134] Finally, the Long-term Residents Directive extends the protection and the rights afforded to migrants due to their long presence and integration in the Member States.[135] These instruments and their interplay are examined below. Through a horizontal examination of the conditions for entry and the rights they establish, the economic and social objectives behind the current form of regulation of migration from third countries becomes clear. The analysis in Section 6.3.1 highlights how economic objectives lie behind the differentiation of rights TCNs enjoy under the instruments. In Section 6.3.2, I examine how economic fears significantly dilute social rights and the effectiveness of these instruments. Finally, Section 6.3.3 investigates how the rights of TCN migrants are reconstructed in the case-law through a strong emphasis of the Court on the Charter.

[133] Before Directive 2016/801 the admission of researchers was regulated under Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15 and of students under Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

[134] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1 and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

[135] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/ 44.

6.3.1 The Failure of the System of Admission to Promote Economic Objectives

All the sectoral directives that regulate admission have been put in place to contribute to the economic objectives of the EU. The harmonization of admission aimed at ensuring that the necessary human capital would be available to drive the desired growth.[136] This becomes clear if we look at the recitals of the different Directives, all of which are aligned with the economic targets set by EU during the years they were adopted.[137] At the same time, national contestation and fear about the effects of the attribution of rights to national economies have limited both the extent of rights TCNs are entitled to under the different instruments, as well as the instruments' contribution to achieving the economic objectives of the EU.[138]

In any case, considering this shared objective, the instruments present crucial similarities which are examined in this section. As a rule, admission is based on the fulfilment of certain conditions and the absence of grounds for limitation of admission (negative conditions).[139] Provided that an applicant meets the conditions of admission, they are entitled to a residence permit for a period of time, the minimum and maximum duration of which are defined in the relevant Directives as per the following table.

[136] Also confirmed in the European Council, The Stockholm programme, An open and secure Europe serving and protecting citizens [2010] OJ C 115/1. See for example Researchers and Students Directive Recital 3; Intra-Corporate Transfers Directive Recital 4; Blue Card Directive 2021 Recital 1; Seasonal Workers Directive Recital 6.

[137] See Researchers Directive Recital 2; Blue Card Directive 2009 Recital 3 mentioning the Lisbon European Council objective of making the Community the most competitive and dynamic knowledge-based economy in the world by 2010; See also Blue Card Directive 2009 Recital 4; Seasonal Workers Directive Recital 4 and Researchers and Students Directive Recital 3; Intra-Corporate Transfers Directive Recital 3; Blue Card Directive 2021 Recital 1 on the Europe 2020 strategy for Smart, sustainable and inclusive growth.

[138] Cf Kees Groenendijk, 'Equal Treatment of Workers from Third Countries: The Added Value of the Single Permit Directive' (2015) 16 ERA Forum 547; Jean-Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 22 European Journal of Migration and Law 198.

[139] See also Judgment of 4 April 2017, *Fahimian*, C-544/15, ECLI:EU:C:2017:255 which refers to public security exceptions as negative conditions to the right to entry.

Table 1, Security of Residence

	Length of permit	Potential renewal
Researchers Directive	Minimum one year unless the research project is planned for less	Renewable under conditions
Researchers and Students Directive	Minimum one year unless the research project is planned for less	Renewable under conditions for researchers and trainees
	Minimum two years for researchers covered by EU or multilateral programmes including mobility measures Maximum one year for au pairs	Renewable for maximum six months at justified request for aupairs
	Maximum six months for trainees unless the duration of the agreement is longer	
2009 Blue Card Directive 2009	Minimum one and maximum four years. If the contract is for less than one year, for the duration of the contract plus three months	Renewable under conditions
2021 Blue Card Directive	Minimum two years. If the contract is for less, then for that period plus three months.	Renewable under the conditions
Seasonal Workers Directive	Five to nine months in any 12-month period.	Extension for a maximum period of nine months in total
		Facilitation of re-entry for seasonal workers admitted at least once in the past five years and who have respected the conditions of the Directive

Looking more closely into the Directives, we find many similarities on the substantive conditions that need to be met for entry to the EU to ensure the admission of individuals who will actively contribute to EU growth, while minimizing the potential economic risks, thus aligning migration to economic sustainability. Such similarities are framed differently in the relevant texts, which is due to their sectoral nature.[140] Despite the different framing, all the Directives require sufficient resources on the part of the TCN who applies for admission and an appropriate health insurance. At the same time, the legislative texts emphasize the need to ensure that in all cases the migrant does not become a burden on the social security system of Member States.[141] In the case of highly skilled workers, sufficient resources are proven by the contract the applicants need to provide and by the requirement that their employment meets a certain salary threshold.[142] When it

[140] Commission Staff Working Document, Executive Summary of the Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5 page 52.

[141] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5.

[142] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM(2007)0637 final, explanatory memorandum, Article 5; Proposal for a Directive of the European Parliament and of the Council

comes to researchers, the Directives specify that the applicants need to have sufficient means of subsistence.[143] As for seasonal workers, the work agreement required for admission has to specify remuneration. The need to do so in this case also serves social objectives in parallel to the economic ends served by the seasonal workers' admission. The specification of remuneration was deemed vital to avoid unfair advantages for the employer and, relatedly, exploitation of workers.[144] All the Directives also require a proof of address. However, when admission relates to migrant groups that are considered more vulnerable to exploitation, the requirement of proof of address turns into a requirement of adequate accommodation that meets specific characteristics, as is the case for seasonal workers, au pairs, and trainees.[145] Behind the requirement of adequate accommodation lies the consideration that these migrant groups are more vulnerable to exploitation, and the requirement indirectly enshrines social objectives in the regulation of admission. As can be seen in Table 2 below, admission conditions are essentially framed so as to ensure that migrant admission will not pose the slightest risk to economic growth, and that relatedly migration will be economically sustainable.

on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment COM(2016)0378 final, Explanatory memorandum, Article 5.

[143] Explicit requirement on sufficient means in Researchers Directive 6(2)(b) and Researchers and Students Directive 7(1)(e) which can be provided either in the form of employment by the research institution or through any other grant, while for students this entails proving sufficiency of resources, Seasonal Workers Directive 5(3) and 6(3).

[144] Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010)379, Explanatory Memorandum to Article 5.

[145] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5 page 52; SWD, Recital 41. Though for the latter this requirement is placed as a potential.

Table 2, Admission Conditions

	Employment	Sufficient Resources not to have recourse to social assistance	Sickness Insurance	Accommodation
Researchers Directive	Hosting agreement by research institution	Condition for signing the hosting agreement	✓	
Researchers and Students Directive	Hosting agreement by research institution, trainee agreement or agreement with the host family for au pairs	Possibility to request that the host entity takes responsbility for subsistence for researchers students and trainees and possibility to set a minimum sum of pocket money to be paid for au pairs	✓	Possibility to request that the host entity takes responsibility for accommodation
2009 Blue Card Directive	Contract/offer of at least one year	Specific salary thresholds	✓	Possibility to require address
2021 Blue Card Directive	Contract or offer for at least six months	Specific slaray threshold	✓	Possibility to require address
Seasonal Workers Directive	Contract/offer	✓	✓	Requirement of adequateaccommodation

Table 3, Grounds for refusal, withdrawal, and non-renewal

	Fraud	Public policy	Employer obligations	Illegal migration	Volumes of admission	Union preference
Researchers Directive	✓	✓				
Researchers and Students Directive	✓	✓	✓	✓	✓	✓
2009 Blue Card Directive	✓	✓		✓	✓	✓
2021 Blue Card Directive	✓	✓	✓	✓	✓	✓
Seasonal Workers Directive	✓	✓	✓	✓	✓	✓

The grounds for refusal, withdrawal and non-renewal of permits are also to a large extend unified as Table 3 above shows. In all the Directives, the central ground for rejection or non-renewal is repeated as almost self-evident – that is, the failure to

fulfil the criteria of admission. In addition, we find grounds that exist as negative conditions for admission: the inexistence of fraud in the application process, and the requirement that the applicant should not be a threat to public policy, public security, and public health. The Directives also contain limitations linked to the fight against irregular migration. Such limitations appear either related to the nature of the employer (to what extent economic activity effectively takes place or whether an employer is set up for the purpose of facilitating entry) or to the risk of overstaying one's initial permit (found in the Seasonal Workers Directive). Essentially, most of the grounds of refusal, withdrawal or non-renewal are connected to public order considerations.

However, social objectives also condition certain of these grounds for rejection or non-renewal, to ensure that migration will be aligned with some minimum social guarantees for the migrants. Specifically, all the relevant Directives contain clauses allowing rejection or non-renewal due to failure of the employer to meet their labour law obligations.[146] Social considerations in relation to the external world also appear in the Blue Card Directives, both of which include a clause on ethical recruitment. Under this clause, Member States have the possibility to reject an application for Blue Card where professionals come from developing countries in sectors suffering from a lack of personnel. These clauses stem from the EU commitment to tackle – or at least to not contribute to – the shortage of healthcare workers and the education sector in developing countries.[147] While similar considerations were mentioned in the recitals of the Directives on researchers, they were not incorporated in the legal provisions.[148] Additionally, only the Blue Card Directive includes provisions related to the right of Member States to withdrawal or non-renewal of a permit where the worker has no resources, and needs recourse to the social assistance system for subsistence. This is connected to the fact that Blue Card holders are the only migrants entitled unemployment benefit during their stay. This more privileged treatment is related to the bigger demand for highly skilled workers in the EU. As will be discussed later in relation to the differentiated rights enjoyed by TCN migrants, in the current system of regulation, the demand for the migrant (rather than their contribution) becomes the reason for attribution of more extensive rights.

[146] These clauses were not included in the initial Researchers Directive and Blue Card Directive 2009, but after revision they now appear in all the relevant texts.

[147] See Blue Card Directive 2009 Recital 22; Blue Card Directive 2021 Recital 41, which mention Council and Member states' conclusions of 14 May 2007 on the European Programme for Action to tackle the critical shortage of health workers in developing countries (2007 to 2013) and the Union's commitment to the 2010 World Health Organization's Global Code on the International Recruitment of Health Personnel.

[148] See Researchers Directive Recital 6; Researchers and Students Directive Recital 13.

The Directives further contain provisions which allow withdrawal or non-renewal of a residence permit where the TCN was admitted for purposes other than those for which their admission was authorized. Looking at the legislative history of the Researchers and Students Directives, we see that the Council insisted on the introduction of this clause. This was, in turn, subject to reservation by both the Commission and the Parliament. In the end, the clause was inserted in the Directive, and was accompanied by a common statement of the Commission and the Parliament, in which these institutions tried to qualify the provision and emphasized that it should not constitute a precedent for the future legal migration instruments.[149]

While I have not been able to trace the reasons behind the Council's insistence on inserting this clause as a negative condition of entry, the timing of the revision seems too close to the *Ben Alaya* case to be coincidental.[150] *Ben Alaya* concerned the admission of students under the Students Directive. In this case, the German government rejected the applicant's application for admission because it entertained doubts as to whether he was truly motivated to study in Germany. Upon referral of the case to the Court, it held that Member States were not allowed to introduce more conditions than those stated in the Directive, as such action would be contrary to its objective to promote mobility of TCNs.[151] Contrary to the suggestion of AG Mengozzi, who made reference to the possibility of rejecting an application for entry if there was precise and specific evidence that pointed to abuse or misuse of the Directive,[152] the Court affirmed the right to entry created for TCNs in the relevant Directive. In light of this case, which affirmed that the Students Directive created a right of residence for TCNs, it is not hard to imagine the motivation of the Council to incorporate clauses which would allow broader discretion for the Member States.

Economic considerations also appear as a blanket ground to limit entry. In general, the right to entry of TCN migrants is without prejudice to the right of Member States to regulate the volumes of admission of TCNs under Article 79(5) TFEU. This right was given expression via specific clauses in all the relevant Directives. Essentially, Member States can refuse admission, even if a migrant meets all requirements, in order to protect their labour markets. The legal fitness check on secondary law on migration, conducted by the Commission in 2019, questioned the open framing of

[149] Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the Position of the Council on the adoption of a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing COM(2016)0184 final.

[150] Judgment of 10 September 2014, *Ben Alaya*, C-491/13, ECLI:EU:C:2014:2187.

[151] ibid para 27.

[152] Opinion of Advocate General Mengozzi delivered on 12 June 2014 in *Ben Alaya*, C-491/13, ECLI:EU:C:2014:1933.

the provisions transposing Article 79(5) TFEU in the Directives and enquired whether admission quotas could be fixed at zero level and, thus, undermine the *effet utile* of the *acquis*.[153] In light of this risk, it was suggested that the provision be incorporated in the Directives in a clear and precise manner that could guide the practical application of secondary law in the Member States.

What is more, the relevant framework is shaped under the umbrella principle of Union preference. This principle formed part of the previous attempts of the Commission to horizontally regulate entry and residence of TCNs,[154] and was articulated in a 1994 Council Resolution.[155] Union preference suggests that TCNs may enter the EU labour market provided a post cannot be filled by a worker who is already part of the labour market. This so-called labour market test, guided by the Union preference principle, means that Member States maintain discretion to reject admission where a vacancy can be filled by an EU national, a TCN legally resident in a Member State and already part of its labour market, or a long-term resident in any Member State. In the 2001 Proposal, the Commission suggested a system to operationalize this principle and prove the fulfilment of the labour market test by Member States.[156] In the current framework, even though the test is included as a reason to reject an application for admission, there is no procedure to be followed for it.

It is important to note here that the labour market test was not included in the first Researchers Directive. This can be explained by the economic need for researchers at the time when the Directive was proposed and adopted. Specifically, in the 2004 proposal, there was particular emphasis on the number of researchers needed by the EU to reach the Barcelona target of GDP growth in research activities.[157] Acknowledging that it was impossible to meet this target without external recruitment of TCNs, the Commission emphasized that researcher admission could not be subject to the discretion of Member States to control numbers of admission.[158]

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[153] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5.

[154] See Chapter 5, Section 5.2.1.1.

[155] Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member states for employment [1996] OJ C 274/31.

[156] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001)0386 final [2001] OJ C 332E/248.

[157] Communication from the Commission to the Council and the European Parliament on the presentation of a Proposal for a Directive and two Proposals for Recommendations on the admission of third-country nationals to carry out scientific research in the European Community (2004)0178 Section 1.3.

[158] Proposal for a Council Directive on a specific procedure for admitting third-country nationals for purposes of scientific research COM(2004)0178 final-CNS 2004/0061, Explanatory Memorandum Section 1.5. See also Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European

However, the possibility of subjecting the recruitment to Union preference came back in the recast Directive, adopted in 2016. The proposal for the recast does not elaborate on why these new grounds were added. Instead, the explanatory memorandum mentions that these were standard conditions under the existing migration Directives.[159] This, connected to the fact that the current Directive includes this test as a ground for non-renewal but excludes researchers from its ambit, must mean that the alignment came on a technical level, but the differentiation as to the treatment of researchers persists.

Overall, looking at the criteria for admission, the following observations can be made. The Commission's ambition to put in place a harmonized system of admission was clearly tied to the need to promote the economic objectives of the EU by supplying it with the migrants needed to fulfil the demands of its economy, thereby aligning the regulation of migration with economic sustainability. At the same time, the way national fears regarding the economic repercussions of migration appear in both primary and secondary law set the system up for failure. Specifically, some of the conditions of admission included in the Directives can significantly limit the right to entry created in secondary law.[160] Such limitations can prove detrimental to the very objective served by the regulation of migration, which is to ensure the economic sustainability of the EU. Among the different conditions that appear in the Directives, the discretion of Member States under their right to regulate the volumes of admission is the most problematic. The inclusion of this requirement in primary law shows the limits of Member States' understanding of the role of migration for the EU collective project. But next to that, the fact that the Directives do not introduce a system of review by the EU institutions means that Member States can apply this right in very diverse ways and limit the effectiveness of EU law. Having explained how economic objectives, economic fears and certain social demands are reflected in secondary law, the next section examines the differentiated protection introduced by the Directives for migrant workers depending on how essential they are deemed to be for the EU project of growth.

Community [2005] OJ L 289/26 point 1.b. calling on Member states to refrain from using quotas for this type of admission.

[159] Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [RECAST] COM(2013)0151 final, Explanatory memorandum to Articles 18, 19, 20.

[160] *Ben Alaya*, C-491/13; Judgment of 4 March 2010, *Chakroun*, C-578/08, ECLI:EU:C:2010:117. See also Opinion of Advocate General Szpunar delivered on 29 November 2016 in *Fahimian*, C-544/15, ECLI:EU:C:2016:908 on the right to entry para 42.

6.3.2 Differentiated Rights and Privileged Statuses

Under EU migration law as it stands today, TCNs enjoy different rights depending on how much their contribution is needed to the EU development project. On a basic level, the Single Permit Directive lays down a minimum core of rights for all migrants, resident in EU territory, regardless of from where they draw their right to reside, whether national or EU law.[161] The Single Permit Directive is primarily aligned with the social objectives of the EU, as it aims to guarantee fair treatment to all migrants at EU level. Of course, as has been emphasized throughout this historical investigation, the social objectives of the EU are closely connected with the economic ones, and relatedly, the economic and social pillars of sustainability expressed in the primary objectives are pursued in parallel in the regulation of migration. In this regard, a closer look at the history and the recitals of the Single Permit Directive reveals that the attribution of rights is also related to economic objectives. Specifically, Recital 19 of the Directive provides that

> Such provisions [on rights and equal treatment] are intended to establish a minimum level playing field within the Union, to recognise that such third-country nationals contribute to the Union economy through their work and tax payments and to serve as a safeguard to reduce unfair competition between a Member State's own nationals and third-country nationals resulting from the possible exploitation of the latter.

In this recital, and in the corresponding attribution of rights, we see the reproduction of the considerations of the EU institutions and the Court behind the rights of EU migrants at the initial stages of the EU project.[162] The first such consideration is that TCNs equally contribute through their work to the EU project and, therefore, they should enjoy a set of rights. Secondly, granting equal rights throughout EU territory to TCNs ensures that there is no unfair competition between the Member States, but also between TCN and EU migrants, thus avoiding social dumping and migrant exploitation.[163] In reproducing such considerations, the Single Permit Directive constitutes yet another attempt to align migration with the economic and social objectives of the EU, as well as with with economic and social sustainability. In

[161] Article 3(2) Single Permit Directive excludes from the scope of the instrument the following: family members of EU nationals covered under Directive 2004/38; EEA, Swiss Nationals and their families enjoying rights equivalent to those of EU nationals; posted workers; intra-corporate transferees; seasonal workers and au pairs; beneficiaries of international protection and temporary protection; long-term residents; migrants whose removal is suspended; self-employed, seafarers.

[162] See especially the first period, Chapter 4.

[163] See also Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State COM(2007)638, 3 and 7. See also Judgment of 25 November 2020, *INPS (Prestations familiales pour les titulaires d'un permis unique),* C-302/19, ECLI:EU:C:2020:957 para 34.

parallel, each sectoral Directive includes more specific provisions and grants rights of different kind and extent to TCN workers.

The analysis below maps the rights TCN workers enjoy under all these instruments. The first section engages with the extension of rights for categories of migrants deemed crucial for the EU economy. Subsequently, Section 6.3.2.2 shows the dilution of equal treatment in secondary law through the introduction of fragmented provisions and various limitations. Finally, Section 6.2.3.3 investigates how equal treatment was erased from the cooperation of the EU with third countries during this period. The examination reveals the problematic way in which economic objectives served by specific types of migrant admission shape the differentiation of migrants' rights.

6.3.2.1 Attribution of Rights in Order to Maximize Economic Benefits

The rights migrants enjoy under EU migration law are defined horizontally in the Single Permit Directive, and differentiated based on the function of different categories of migrants for the EU economy. The table below shows how the rights are differentiated between the different categories of migrants.

Table 4, Rights

Rights	Entry, stay, and access to the Member State territory	Right to exercise specific activity	Mobility rights to exercise economic activity
Single Permit Directive	✓	✓	x
Researchers Directive		Apart from the specific activity, teaching is also allowed	✓
Researchers and Students Directive		Apart from the specific activity, teaching is also allowed for researchers and economic activity is allowed to students subject to conditions	✓
2009 Blue Card Directive		Free access to any employment after two years	✓
2021 Blue Card Directive		Possibility to change employer in the first 12 months following notification or check of labour market situation. Possibility to subject change of employer after 12 months to notification. Possibility to allow taking up parallel self-employed activity. Right to seek work during unemployment	✓
Seasonal Workers Directive		Exercise of the concrete employment activity authorized	

We see that all migrants enjoy the right to enter, stay and move within the territory of the host state, and to exercise the activity for which their stay was authorized under the Single Permit Directive. Researchers are also allowed to teach next to their scientific work, while highly skilled workers are the only category that enjoys access to any type of employment after some time of legal residence.[164] On the other side of the rights spectrum, seasonal workers are restricted to the exercise of a specific activity. However, to protect them from exploitation, the Directive recognizes their right to change employer within the specific field of activity in line with social considerations.

Section 6.3.1 above showed that security of residence is dependent upon the Directive form which TCN migrants draws residence rights from. In most cases, security of residence is attached to a job contract and can be provided for a period of minimum and maximum time provided in the Directives.[165] Certain TCNs also enjoy a right to reside in order to find work. Specifically, student and researchers can enjoy residence as job-seekers for a limited period. The reason for this is to allow the Member States to tap into the employment potential of the already trained and qualified workforce. Specifically, Recital 53 of the Researchers and Students mentions that

> As part of the drive to ensure a well-qualified workforce for the future, students who graduate in the Union should have the possibility to remain on the territory of the Member State concerned for the period specified in this Directive with the intention to identify work opportunities or to set up a business. Researchers should also have that possibility upon completion of their research activity as defined in the hosting agreement … Member States should be able to check, after a minimum time period established in this Directive, if they have a genuine chance of being employed or of launching a business.

A similar right to reside beyond the specific employment exists for highly skilled workers. Highly skilled workers have the possibility of being unemployed for a period of time without risking the validity of their residence permit.[166]

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[164] The Blue Card Directive 2009 provided for the possibility to enjoy access to any employment after two years. In Blue Card Directive 2021 this right was extended: TCNs can change employer in the first 12 months following notification or appraisal of the national labour market situation. After 12 months, blue card holders are allowed to change employer (this right can also be subject to notification) and to take up parallel self-employed activity.

[165] See Table 1.

[166] In the Blue Card Directive 2009 this period was only for three months. However, in the recast Blue Card Directive 2021 this period was extended to a maximum of 12 months in case of illness, disability, or parental leave, and in cases of unemployment for other reasons the maximum period is three months for TCNs holding a permit for less than two years and six months for TCNs having a permit for more than two years.

All TCNs legally resident in any Member State are also allowed to move within the EU territory for up to 90 days in any 180-day period. This movement refers to short term mobility and is based on Schengen.[167] In this type of mobility, TCNs are not allowed to exercise economic activity in another Member State. Free movement for the purpose of economic activity is provided only to specific categories of migrants. Specifically, the Researchers and Students Directive provides for temporary mobility to allow migrants to carry out their work in another Member State. Further, the Blue Card Directives and the Student and Researchers Directive allow for long term mobility, that is, the possibility to move permanently to another Member State and take up work there.[168] It is purely economic objectives that dictate the free movement rights of highly skilled workers and researchers. The Researchers Directive proposal suggested that mobility of researchers for work within the Member States was vital for the EU to become internationally competitive.[169] With regard to highly skilled workers, the Directive makes it clear that intra-EU mobility rights are provided because those persons are necessary for EU growth. Notably, Recital 53 of the 2021 Blue Card Directive mentions that

> The occupational and geographical mobility of highly qualified workers from third countries should be recognised as an important contributor to improving labour market efficiency across the Union, to addressing skills shortages and to offsetting regional imbalances. Mobility within the Union should be facilitated.[170]

The mobility of researchers and highly skilled workers also creates free movement rights for their family members. Specifically, for migrants falling under the scope of the Researchers and Students Directive, the Blue Card Directive and the Long-term Residents Directive, family members enjoy intra-EU mobility rights in order to be able to follow their sponsor in case of move.

Notably, however, economic needs served by the admission of researchers and highly skilled workers are the reason behind the introduction of derogations from the Family Reunification Directive. Specifically, the Blue Card Directives and Researchers and Students Directive include more favourable provisions on family reunification for the categories of migrants falling within their scope. These more favourable provisions, which cover not only the conditions of family reunification,

[167] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1.

[168] This is of course aside from long term residents, whose mobility rights were discussed in Chapter 5, Section 5.2.2.2.

[169] Proposal for Researchers Directive COM (2004)178 final, Explanatory memorandum to Article 13.

[170] Blue Card Directive 2021 Recital 53. But see also very similar Recital 15 in Blue Card Directive 2009.

but also to the rights enjoyed by family members, are linked to the need to make the EU more attractive as a destination to these particular migrants.[171] Indicatively, access to employment is easier for family members of highly skilled workers and researchers. The analysis undertaken in the previous chapter showed that access of family members to employment can be limited to ensure that their migration does not become an economic liability for Member States in times of recession.[172] This limitation does not apply to Blue Card holders and researchers. The Blue Card Directive includes a derogation from such limitation and demands the direct access of family members to employment.[173] The Researchers and Students Directive on the other hand, provides that access of family members to employment should not be limited, unless exceptional circumstances exist, such as particularly high levels of unemployment.[174] Overall, in derogating from the minimum standards of the Family Reunification Directive and introducing more relaxed conditions for reunification and more extensive rights for the specific groups of migrants, the objective is no longer ensuring migration in dignity for the worker. Rather, family reunification is used instrumentally as means to attract migration of specific kind.

In addition to this, the Blue Card Directive is the only instrument that derogates from the Long-term Residents Directive by granting preferential conditions for access to the long-term resident status. Specifically, the 2009 Directive provided that the Blue Card holder and their family members could accumulate periods of residence in different Member States in order to fulfil the five-year duration requirement.[175] It also provided that the long-term resident status would not be lost in case of absence of the highly skilled worker from EU territory for a period of 12-18 months, which could be extended to 24 months, if Member States preferred.[176] These derogations were considered necessary to make the Blue Card scheme more attractive to these migrant workers and to promote their geographic mobility and circular migration.[177]

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[171] See also Researchers Directive Recital 18; Council Recommendation of 12 October 2005 [2005] OJ L 289/26 Recital 9 and point 3; Researchers and Students Directive Recital 11; Blue Card Directive 2009 Recital 23, Blue Card Directive 2021 Recital 50, Intra-Corporate Transfers Directive Recital 40.

[172] See Article 14 Family Reunification Directive. See analysis in Chapter 5, Section 5.2.2.1.

[173] Article 15(6) Blue Card Directive 2009; Article 17(6) Blue Card Directive 2021.

[174] Article 26(6) Researchers and Students Directive.

[175] Article 16(2) Blue Card Directive 2009 6 in which case two years prior to the application for long-term residence should be spent to the Member state that grants the long-term residential status. See also Article 18, Blue Card Directive 2021.

[176] Article 16(4) Blue Card Directive 2009.

[177] See Proposal for a Blue Card Directive, COM(2007)0637 final; Blue Card Directive 2009 Recital 20; Blue Card Directive Recitals 51 and 52.

Economic considerations behind this differentiated access of Blue Card holders to the long-term resident status appears in the following way. The EU needs highly qualified personnel to maintain growth, so it is shaping a framework where such highly qualified personnel get easier access to a set of rights, in order to make the EU an attractive destination for these workers. This is fully understandable in terms of marketing the EU as an attractive destination for specific migrants; however, it is highly questionable from the perspective of non-discrimination in the adoption and implementation of EU law. This is even more so in relation to researchers. They are also needed by the EU economy and enjoy mobility rights by EU law. Since their rights to move between Member States to cover demands of the labour market are based on EU and not national law, they should not be penalized for exercising them. The relevant derogations from the Long-term Residents Directive should also extend to researchers, who enjoy similar intra-EU mobility rights.[178]

In this sense, it becomes clear that the legal system put in place attributes more rights to those who are seen as crucial for the development of the EU project. In parallel, while there is an understanding of the need to promote mobility for certain individuals crucial to the project of growth, the economic fears of Member States, their short-term approach to migration and their possibility to attract such individuals by parallel national schemes has led to the introduction of so many conditions for the exercise of mobility rights that in practice it is hard to meet them all. As a consequence, the economic objectives pursued by the attribution of mobility rights to specific categories of migrants fail to be achieved in practice. This is so because the requirement for cross-border movement under both the Blue Card Directive and the Researchers and Students Directive are very close to requirements for entry, thereby hampering the objectives of the instruments, which is to abolish obstacles to mobility as a means to promote growth and relatedly to align the regulation of migration to the economic sustainability of the EU. Similar problems appear in relation to the pursuit of social objectives in the instruments. As the next section will discuss, the instruments regulating the rights of TCN migrants offer a diluted version of equal treatment in EU law.

[178] Cf Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) COM(2022)650 final, Explanatory Memorandum Article 4 on intention of the Commission to extend the scope of protection for long-term residents by allowing the cumulation of legal residence in different Member States to meet the five year residence requirement. See also Council Document, Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) - Presidency compromise text, ST 10528/1/23 REV 1, Brussels 21 June 2023, Article 4 which, instead of following the Commission proposal, suggests the extension of the derogation applicable for Blue Card Holders to highly skilled workers with national permits, researchers, intra-corporate transferees, their family members and the family members of EU long-term residents.

6.3.2.2 The Dilution of Equal Treatment in Secondary Law

Equal treatment between TCN migrants and nationals of the Member States is guaranteed in all the relevant Directives. However, unlike the broad clauses inserted in Association Agreements concluded in the 1970s and 1980s, the framework in place now provides detailed enumeration of the areas where equal treatment must be granted, as well as the acceptable limitations to these areas.[179] The force of general equal treatment clauses in EU law has shaped very extensive protection for individuals.[180] In view of this, and of the extensive interpretations of the Court on equal treatment of migrants, it should not come as a surprise that Member States tried to restrict the formulation of equal treatment in the relevant Directives. The table below shows the areas where the Directives provide for equal treatment rights, as well as the potential limitations that can be introduced to equal treatment.

[179] The initial proposals by the Commission provided entitlements to equal treatment and during negotiation various limitations were inserted. Cf Ana Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 European Journal of Migration and Law 210.

[180] See Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press 2018).

Table 5, Equal Treatment

	Single Permit Directive	Researchers Directive	Researchers and Students Directive	2009 Blue Card Directive	2021 Blue Card Directive	Seasonal Workers Directive
Working Conditions	✓	✓	✓	✓	✓	✓
Education and Vocational Training	Limitations possible	Limitations possible	Limitations possible	Limitations possible	Limitations possible	Limitations possible
Regonition of professional qualifications	✓	✓	✓	✓	✓	✓
Tax Benefits	Limitations possible	✓	Limitations possible			Limitations possible
Social Security	Limitations possible	✓	Limitations possible	✓	✓	Limitations possible
Access to goods and services	Limitations possible	✓	Limitations possible	Limitations possible	Limitations possible	✓
Freedom of Association	✓		✓	✓	✓	✓
Employment advice Services	✓	✓	✓	✓	✓	✓

First of all, unlimited equal treatment is guaranteed regarding working conditions; however, there is a lack of coherence in the way this is framed in the relevant Directives.[181] Despite the different framing, it is safe to assume that the right applies to all legally resident migrants without differentiation, as it constitutes an expression of Article 13 of the Charter.[182] Equal treatment as regards recognition of professional qualifications is also provided in all the Directives. The Legal Fitness Check suggested extending this right to applicants for permits who have not yet been authorized to enter/reside in the EU, as in some cases the recognition of professional qualifications is necessary for access to certain employment, as is the

[181] Some Directives (Researchers and Students Directive, Blue Card Directive, Single Permit Directive) include health and safety in the workplace, whereas both versions of the Blue Card Directive also include the minimum working age, working hours, leave and holidays in the relevant provisions.

[182] See Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5, Section 2.5.

case for highly skilled workers and researchers.[183] In addition, all the Directives provide equal treatment as regards access to advice services afforded by employment offices.[184] This should not come as a surprise in light of the continuous emphasis in different Commission documents on training the existing workforce to correspond to new needs and on ensuring that labour needs are covered by TCNs already resident and active in the internal market.[185] Finally, all the Directives also provide for freedom of association and affiliation. The Seasonal Workers Directive makes explicit reference to the right to strike and take industrial action, including the right to negotiate and conclude collective agreements. In any case, the relevant right is a specific expression of Article 12 of the Charter, and as a result, it should not be differentiated between different categories of TCNs, as the right is guaranteed to everyone regardless of their nationality.[186]

As to the rest of the areas where equal treatment is required, they appear with different limitations and variations. Some can be explained due to other rights, enjoyed by TCNs (whether they enjoy mobility rights or not, and what is the status under which they entered), while others are firmly based on economic considerations of averting risks from migration. Specifically, in the area of education, limitations appear in all the instruments, allowing Member States to exclude study grants from equal access to migrants.[187] What is more, Member States are given the possibility to set conditions of access to university and higher education.[188] In the Single Permit Directive, the text mentions appropriate language proficiency, payment of fees or specific educational prerequisites as possible conditions, and Member States can also limit access to education, if it is not linked to the specific employment activity of the TCN.[189] A similar possibility on limiting equal treatment regarding access to education or training directly linked to the

[183] ibid Section 1.5.

[184] This was not the case in Researchers Directive and Blue Card Directive 2009, but now they are all recast.

[185] Recently in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Skills Agenda for sustainable competitiveness, social fairness and resilience, COM(2020)274 final.

[186] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5, Section 2.5.

[187] In the Proposal for a Blue Card Directive, COM(2007)0637 final, Explanatory memorandum, Article 15, the Commission stated that the reason for limitation of access to study grants was that the TCN workers would not normally be entitled to them on the basis of their contribution as workers.

[188] Article 14(2) Blue Card Directive 2009, Article 16(2) Blue Card Directive 2021, Article 12 (2) Single Permit Directive. See also Article 11(3) Long-term Residents Directive.

[189] Article 12(2)(a)(iv) Single Permit Directive

employment activity also exists in the Seasonal Workers Directive.[190] Finally, the Single Permit Directive provides for the possibility to limit the application of equal access to education to TCNs who are employed, or are registered as unemployed, and to exclude students.[191] In the area of education, the Fitness Check conducted in 2019 by the Commission that

> While some [restrictions] appear 'logical', such as the restriction in the SPD [Single Permit Directive] that the right can be limited to those who are in employment or are registered as unemployed, the reason why others have been introduced in one or more Directives (but not in others) cannot be easily explained, such as the restrictions related to language proficiency and the fulfilment of specific educational prerequisites.[192]

Arguably, even such limitation is not really justified if we take into account the social aims pursued by the Directives. Apart from aligning migration with the economic objectives of the EU, the relevant instruments seek to secure fair treatment for migrants and to achieve some kind of social progress in the form of rights attributed to migrants. The emphasis put on education as part of the integration policies pursued at EU level to ensure social cohesion necessitates full equal treatment as regards access to education.[193] That is of course since the aim of regulating migration is not only meeting the economic sustainability objectives but also the social ones.

Another area of tension is access to social security, social assistance, and social protection, which are differentiated between the categories of TCNs. The Legal Fitness Check suggested that the limitation of access to social security in employment related Directives is justified, as this is linked to the condition that migrants have sufficient resources to not become a burden.[194] Equal treatment applies to social security as a recognition that workers contribute by their work and tax payments to public finances, and to serve as a safeguard against unfair competition that may result from exploitation.[195] Social assistance, in contrast, was deliberately excluded from the relevant Directives because incoming migrants

[190] Article 23(2)(ii) Seasonal Workers Directive.

[191] Article 12(2)(a)(i) and (ii) Single Permit Directive.

[192] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5.

[193] See in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action plan on Integration and Inclusion 2021-2027, COM(2020)758 final and in the European Skills Agenda for sustainable competitiveness, social fairness and resilience, COM(2020)274 final.

[194] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5

[195] Proposal Seasonal workers Directive, COM(2010)379, Explanatory memorandum Article 15.

should have sufficient resources not to require financial support.[196] Social assistance and social protection is secured only for long-term residents, but even in their case, it can be limited to core benefits. This was not what the Commission aimed for in the original proposals. As regards the Directives that also provide rights to free movement in the EU, limitations can be introduced, and equal treatment can be limited to the Member State where the migrants have their registered place of residence.[197]

It should be noted that all these Directives operate within the context of Article 20 of the Charter, which provides for general non-discrimination rights within the scope of EU law. Unequal treatment is thereby allowed to the extent it can be justified. Relatedly, the Legal Fitness Check suggested that EU migration law, in the way it is formed through the relevant directives, could be described as a 'fine-tuning of legitimate differentiated treatment'.[198] Looking at the way equal treatment is dissected and diluted in the relevant provisions, it is clear that limitations are inserted in order to avoid repercussions of granting rights to public finances. In cases where equal treatment comes with no cost for national economies, there is no reason to discriminate. However, in light of the parallel pursuit of economic and social sustainability as manifested in primary law objectives, the question that remains open is to what extent social cohesion can be guaranteed and when equal treatment is intentionally limited to deprive migrants from EU law protection.[199] This limitation of social rights of TCN migrants does not align well with social sustainability objectives. This is especially because all these TCN migrants come within the scope of EU law because they are admitted as workers, and thereby contribute to the project of growth.

6.3.2.3 Erasure of Equal Treatment and Informalization of the Relation of EU with Third Countries

In parallel to the framework of admission and rights shaped for all legally resident migrants discussed above, in this period we witness the erasure of equal treatment clauses in the Agreements concluded by the EU with third countries, and the further informalization of cooperation with third countries in the area of migration.

The Stabilization and Association Agreements (SAAs) concluded with many Western Balkan countries were the only agreements that set up some minimum rules

[196] See Proposal for a Blue Card Directive COM(2007)0637 final, Explanatory memorandum, Article 15. Proposal for Researchers Directive, COM(2004)178 final, Article 12.

[197] Such limitations appear in the Blue Card Directive 2009 and the Long-term Residents Directive but not in the Blue Card Directive 2021 and the Researchers and Students Directive.

[198] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5, 66.

[199] Cf Martin Ruhs, *The price of rights: regulating international labor migration*, (Princeton University Press 2013).

on equal treatment for workers legally employed in the Member States with regard to working conditions, remuneration or dismissal.[200] These Agreements did not include equal treatment on social security and did not provide for any kind of right to entry or access to the labour market. This is so even though such Agreements were signed as pre-accession instruments. What is more, the wording of the relevant provisions is different from those of the Euro-Mediterranean Agreements, as they stipulate that equal treatment must be granted subject to the conditions and modalities applicable in each Member State. This could be understood as an attempt to limit the direct effect of the relevant provisions. The identical wording was used in Europe Agreements, and was found by the Court to have direct effect.[201] Even though there is no case-law on SAAs, there is no reason to assume that the Court would follow a different approach. In addition, the SAAs grant rights of access to the labour market to the worker's spouse and children who are legally residing with them during the worker's authorized stay of employment.

Aside from these Agreements, which were signed as pre-accession instruments, the approach of the EU to labour migration from third countries has undergone a massive shift. With a general system of admission in place for different categories of TCN workers, development cooperation during this period focused on preventing the entry of all those who attempt to join the EU irregularly. The tensions in the Mediterranean region are perceived as a crisis to be addressed by flexible non-binding arrangements.[202] The objective of cooperation has not changed in so far as its declared focus is still on protection of legal migrants, the development potential

[200] Article 44 Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L 084/13; Article 46 Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and the Republic of Albania, of the other part [2009] OJ L 107/166; Article 49 Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L 108/3; Article 49 Stabilisation and Association Agreement between the European Communities and their Member states of the one part, and the Republic of Serbia, of the other part [2013] OJ L 278/16; Article 47 Stabilisation and Association Agreement between the European Communities and their Member states of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L 164/2. However, see similar Article 86(2) Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2016] OJ L 71/3, which recognizes the rights of Kosovo people under the EU acquis with no differentiation from TCN and no special rights attributed to migrant workers.

[201] Judgment of 29 January 2002, *Pokrzeptowicz-Meyer*, C-162/00, ECLI:EU:C:2002:57, paras 23-25 on EA with Poland, and Judgment of 8 May 2003, *Deutscher Handballbund*, C-438/00, ECLI:EU:C:2003:255 paras 27-29 on EA with Slovakia.

[202] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions A dialogue for migration, mobility and security with the southern Mediterranean countries COM(2011)292 final 3.

of migration for the host state and combatting illegal migration.[203] However, these objectives demand different legal means of cooperation in light of the evolution of EU law. Relatedly, the EU no longer negotiates any binding instrument that can create channels of admission or rights for nationals from specific third countries. Rather, it emphasizes addressing the root causes of migration and creating better living conditions in the region.[204]

During the relevant period, and in parallel to the shaping of an autonomous EU migration framework, the EU was also dealing with the effects of the 2008 economic crisis with diverse repercussions for national economies. In this regard, it would be hardly imaginable for Member States to support binding instruments that created cooperation on admission and rights for workers from third countries. Instead, what they wanted to promote was smart planning that would allow the EU to admit labour migration when needed, while maintaining cooperation with the Mediterranean countries with a view to assisting their development. The means chosen to do this was to informalize cooperation based on a differentiated dialogue with each Mediterranean country.[205] In so doing, Migration Partnerships which are soft law instruments are now preferred so as to guarantee the EU can maintain regular migration channels, so that it can have the manpower it needs, while at the same time maximizing the impact of migration for development.[206] Mobility Partnerships are signed in the form of political declarations that set the goals for migration cooperation between the EU and third countries. The EU has signed Mobility Partnerships with Morocco, Tunisia and Jordan in the Euro-Mediterranean region.[207] These declarations do not affect the obligations of the parties under the Euro-Mediterranean Agreements.

In conclusion, the evolution of the framework of cooperation with third countries on migration has undergone a major shift which is based on changing geopolitical circumstances and labour needs in the EU. The more intense labour needs were, the more rights were attributed to migrant workers under Association Agreements. At

[203] See Council of the European Union, First Euro-Med Ministerial meeting on migration, Algavre 18,19 November 2007, Conclusions 15805/07.

[204] A dialogue for migration, mobility and security with the southern Mediterranean countries COM(2011)292 final 6.

[205] ibid 8.

[206] ibid.

[207] Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member states of 7 June 2-13; Joint declaration establishing a Mobility Partnership between Tunisia and the European Union and its Member states of 3 March 2014; Joint declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member states of 9 October 2014. The EU has signed Mobility Partnerships with Moldova in 2008, Georgia in 2009, Armenia 2011, Azerbaijan 2013, and Belarus 2016.

the same time, we need to remember that, even though in first reading it might look like the rights of such migrants are excluded from EU law, this is not the case. Rather the basis of protection has changed. This means that migrant workers legally resident in the EU and coming from countries in the Euro-Mediterranean no longer enjoy rights on the basis of Association Agreements, but rather on the basis of EU secondary law. Hence, despite the reconfiguration of cooperation, there is a constant understanding on the part of the EU that the rights of migrant workers located in EU territory are non-negotiable due to their active contribution to the EU development project. Rather, what remains negotiable is the regulation of entry or, perhaps, the emphasis on avoiding entry to ensure that no more will come than the EU is able to make use of. The functional role of the migrants, which set the basis for their rights, is now showing its ugly face, by ensuring the exclusion not of those who cannot contribute, but of those whose contribution is no longer needed. Having examined the legislative evolutions of this period, the next section will turn to the consolidation of social rights in the case-law of the Court.

6.3.3 The Consolidation of Social Rights in the Case-law

Contrary to the legislative intention to differentiate social rights between different categories of migrants and to dilute equal treatment by allowing for derogations in order to avoid presumed economic repercussions, the Court has followed a consistent approach, and has guaranteed the rights of migrant by reviewing different national limitations in light of the Charter. Economic considerations are not absent from the case-law of the Court, and it acknowledges how economic fears and objectives have shaped the rights of migrants. Nevertheless, it consistently emphasizes the protection afforded by the Charter to consolidate the rights of TCN migrants.

In the following sections (6.3.3.1-6.3.3.4) I evaluate a broad range case-law related to rights of TCN migrants in social security, family reunification and security of residence under both secondary law and the EEC-Turkey Agreement. The analysis showcases the Court's perception of how social and economic objectives shape the protection of migrants. Subsequently, in section 6.3.4.5, as a conclusion to the analysis, I explain how the approach of the Court not only consolidates the social objectives of the EU project, and relatedly the social pillar of sustainability, but also the constitutional architecture of the EU legal system. The interpretations of the Court follow its meta-teleological technique of adjudication, that is, the interpretation of secondary law as means to fill the normative gaps of the EU constitutional order in the making.[208]

[208] Cf Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2008) 1 European Journal of Legal Studies 137 and Elise Muir, 'The Court of Justice: A Fundamental Rights Institution among Others' in Bruno de Witte, Elise Muir

6.3.3.1 The Judicial Reconstruction of Social Rights of Migrant Workers

Against the incoherent economic obsession with conditioning the rights of migrant workers in secondary law so that they do not pose risks for the economy discussed earlier, the Court has put forward a positive vision related to the rights all migrants should enjoy under EU law. This concerns not only migrants covered under secondary law but also those whose residence status in Member States is irregular.

Specifically, in *Tümer* the Court had to interpret the scope of application of Directive 80/987/EEC on the protection of employees in the event of insolvency of their employer.[209] Tümer, a Turkish national living in the Netherlands, had worked for a company that was declared insolvent. His application for insolvency benefit was rejected on the ground that he was not legally resident in the Netherlands. In that case, the Netherlands argued that since the Directive was based on Article 137 EC, which provided the Union with competence to adopt Directives with a view to achieving social objectives related to the improvement of working conditions, it could not apply to third-country nationals, even legally resident ones.[210] If legally resident aliens were to be protected, the state argued that the concept of employee could be construed under national law to exclude illegally resident TCNs.

AG Bot suggested that excluding TCN workers from protective measures adopted for employees would not be compatible with the purpose of the EU social policy, as it would encourage the recruitment of foreign labour in order to reduce wage costs.[211] Additionally, with reference to *Germany and others v Commission*, he emphasized that the Court had already acknowledged the relation of the Union's social policy to the policy that applied to workers of third countries.[212] The AG proceeded to suggest that the crucial factor triggering obligations under the relevant Directive was the employment relationship of a person to an insolvent employer.[213] Importing a condition of nationality in the scope of the Directive would go against its objective to guarantee all employees in the EU a minimum level of protection.[214] He then went on to examine whether there was discretion on the part of Member States to exclude illegally resident migrants. In this examination, he suggested that

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and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

[209] Judgment of 5 November 2014, *Tümer*, C-311/13, ECLI:EU:C:2014:2337. Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] 283/23.

[210] Opinion Of Advocate General Bot delivered on 12 June 2014 in *Tümer*, C-311/13, ECLI:EU:C:2014:1997 para 34.

[211] ibid para 52.

[212] ibid para 52.

[213] ibid para 54.

[214] ibid para 54.

since the employee status was the crucial status, making it conditional to legal residence would go against non-discrimination.[215] The AG suggested that illegally resident TCNs who had worked and paid contributions were in a comparable situation to other employees, and there was nothing to justify a differentiated treatment.[216]

The Court confirmed the AG's approach and noted that EU social policy was concerned with promoting the living and working conditions of both nationals of the EU Member States and TCNs.[217] It held that Member States could not define the term 'employee' in such a way as to undermine the social objective of the Directive.[218]As a result, the Directive was found to preclude national laws, such as the Dutch one, which strip illegally resident TCNs of protection. As long as somebody is in employment, the social rights they derive therefrom should not be undermined because their residence is not legal. This case is significant in showing the application of EU social policy for all migrants engaged in the EU development project. What is more, it is crucial for understanding how the economic contribution made by migrants' work is at the heart of the protection afforded by EU law.

Next to this case, the Court has also handed down rulings reconstructing equal treatment and limiting the effects of secondary law for the rights of migrants. The line of reasoning that underlies the relevant case-law was set in *Kamberaj*, which concerned discriminatory conditions for access to a housing benefit by a long-term resident. In that case, the Court held that while the provisions of the Long-term Residence Directive provided for equal treatment in access to social security, social assistance and social protection as defined in national law**,** these concepts could not be defined unilaterally by Member States without the risk of undermining the effectiveness of the Directive.[219] The interpretation of what constitutes social security, social assistance and social protection under national law needs to comply with the Charter. Article 34 of the Charter guarantees equal treatment regarding access to specific social benefits in order to guarantee decent living to all those who lack sufficient resources.

In light of this, the Court held that national courts should interpret the relevant concept of social assistance in the Long-term Residents Directive in light of the Charter in order to assess whether benefits of different kinds fell under the categories of benefits where equal treatment should be provided.[220] The Court

[215] ibid para 60

[216] ibid para 89.

[217] *Tümer*, C-311/13 para 32.

[218] ibid paras 42,45.

[219] Judgment of 24 April 2012, *Kamberaj*, C-571/10, ECLI:EU:C:2012:233 para 78.

[220] ibid para 81.

further stated that the derogation allowed under Art 11(4) of the Directive should be interpreted strictly in light of the social purpose of integration.[221] It also clarified that the provision of the Directive which allowed the limitation of equal treatment only to core benefits could not be invoked on a case-by-case basis. Rather, such a derogation needs to be expressed clearly at the time of implementation of the Directive in national law.[222] It further suggested that the meaning and scope of core benefits for the purposes of equal treatment should be construed with reference to the purpose of integration as the objective for long-term residents.[223] It thus held that core benefits are benefits that enable individuals to meet their basic needs such as food, accommodation and health, and should be aligned with the minimum benefits covered by the Charter.[224]

A similar reasoning was followed by the Court in relation to rights under the Single Permit Directive in *Martinez Silva*.[225] In that case a migrant worker was excluded from a grant that was provided to households with at least three minor children and income below a minimum amount. The Single Permit Directive provides for equal treatment not in line with national law, but with reference to social security as defined in Regulation 883/2004 and, more specifically, the family benefits covered under Article 3(1)(j) thereof.[226] The Court found that the benefit at issue fell under Article 3(1)(j) of Regulation No 883/2004, with reference to previous case-law where it had held that family benefits covered all kinds of benefits which are automatically granted to families on the basis of objective criteria without discretionary assessment of personal needs, and which are intended to meet family expenses, as a public contribution to the family's budget to alleviate the burdens involved in the maintenance of children.[227] Once more, the Court pointed to the possibility to derogate from equal treatment provided in the Directive, but it held that such a possibility existed only if the Member State explicitly chose so at the transposition of the Directive.[228]

The line of case-law developed in *Kamberaj* for long-term residents, and applied in *Martinez Silva* under the Single Permit Directive, has been since confirmed

[221] ibid para 86.

[222] ibid para 87.

[223] ibid para 90.

[224] ibid paras 91-92.

[225] Judgment of 21 June 2017, *Martinez Silva*, C-449/16, ECLI:EU:C:2017:485.

[226] Regulation (EC) No 883/2004 on the coordination of social security systems in the EU [2004] OJ L 166/1.

[227] ibid paras 22-23.

[228] ibid para 29.

regarding different types of benefits claimed by TCNs.[229] The Court has followed a clear line of reasoning in promoting fair treatment for this group. When it comes core benefits, to determine if they need to be granted under equal treatment conditions, Member States need to comply with the Charter and particularly Article 34 of the Charter. If a benefit serves the purpose set out in Article 34 of the Charter, then TCNs can in no case be excluded therefrom. The central evaluation then seems to concern the purpose of the benefit: does it aim at making life liveable and ensuring a decent existence for all? If so, it needs to be granted to long-term residents in light of the objective of integration, and to all migrants covered under the Single Permit Directive in light of the objective of ensuring fair treatment. Then as regards non-core benefits, Member States must explicitly exclude migrants therefrom by derogating from equal treatment when they transpose the relevant Directives. It is only in such cases that the Court considers that the relevant discriminatory attribution falls within national law and the relevant measures cannot be reviewed for compliance with the Charter.

In this case-law, we see that the Court puts forward the social objectives served by secondary law (integration of long-term residents and fair treatment) not as a byproduct of the economic contribution of the migrants, but rather under a positive vision of social justice in line with the social sustainability objectives of primary law. In doing so, the Court connects the protection of migrants under EU law with the evolution of the legal order and the incorporation of human rights guarantees under the Charter. By correlating the derogations allowed under secondary law to the provisions of the Charter, it dictates minimum safeguards of fundamental rights protection, thereby limiting the space for derogation by Member States and the EU legislator.[230]

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[229] See Judgment of 25 November 2020, *INPS*, C-302/19, ECLI:EU:C:2020:957 on Italian legislation which excluded the family members of a Single Permit holder who do not reside in Italian territory for the purposes of calculating the entitlement. Similar for holders of Long-term residence permit in Judgment of 25 November 2020, *INPS*, C-303/19 ECLI:EU:C:2020:958; Judgment of 2 September 2021, *INPS*, C-350/20 ECLI:EU:C:2021:659 on childbirth and maternity allowance. Judgment of 28 October 2021, *ASGI and others,* C-462/20, ECLI:EU:C:2021:894 on equal access to goods/services under a family card granting discounts; Judgment of 10 June 2021, *Land Oberösterreich (Aide au logement),* C-94/20, ECLI:EU:C:2021:477 making housing assistance for LTRs dependent on the proof of basic command of language of the Member states

[230] Cf Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final, Explanatory memorandum, Article 12, on the revision of the Single Permit Directive to raise the standards of protection in line with the Court's case-law. For an overview of the proposed changes, see Tesseltje de Lange, 'Recasting the Single Permit Directive: furthering the protection of migrants at work in the EU?' (2022) EU Migration Law Blog, 13 July 2022.

6.3.3.2 Social Rights Compensating for the Lack of a Right to Remain for Turkish Workers

A similar extension of social rights has taken place in relation to social security rights of Turkish workers. In the relevant case-law, it is not the Charter that directed the extensive interpretation of the Court, but rather an understanding of rights as compensatory for the work somebody has carried in the EU, in cases where EU law does not grant a right to remain and enjoy such rights in EU territory.

This was the case in *Akdas,* where the Court found that non-discrimination should lead to exportability of benefits for Turkish workers, where the same does not apply to EU workers.[231] Akdas, a Turkish worker in the Netherlands, became incapacitated to work and obtained a supplementary benefit to ensure a minimum income level. He returned to Turkey, where he retained the benefit under Article 39(4) of the Additional Protocol to the Agreement. Dutch law was eventually amended, leading to a progressive withdrawal and termination of the benefit for all workers who had no residence in the Netherlands. The question addressed to the Court was whether such withdrawal for recipients that resided outside the Member State went against Article 6(1) of Decision 3/80.

The Court acknowledged that the wording of the Decision did not tie residence in the host state to continuation of benefits of such kind.[232] At the same time, EU secondary law on social security for EU migrants had been amended and had introduced an exception to the exportability of benefits like the one in question.[233] This meant that EU migrants who found themselves in circumstances like those of Akdas would have the benefit withdrawn if they moved outside the Netherlands. The Court held that such a difference in treatment would not be incompatible with Article 59 of the Additional Protocol to the Agreement, which required that Turkish workers were not treated more favourably than EU ones.[234] In order to justify this, the Court invoked the limited residence rights of Turkish nationals. It pointed out that Turkish migrants, unlike EU ones, had no right to remain in the host state if they could no longer contribute to the labour force.[235] For them, there is no option

[231] Judgment of 26 May 2011, *Akdas and others*, C-485/07, ECLI:EU:C:2011:346.

[232] ibid paras 80-82.

[233] ibid paras 85-87. Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1992] OJ L 136/1 inserted into Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2 a new Article 10a, which introduced an exception to the requirement of exportability laid down in Article 10(1).

[234] *Akdas and others*, C-485/07 para 88.

[235] ibid para 93-95 with reference to Judgment of 22 December 2010, *Bozkurt*, C-303/08, ECLI:EU:C:2010:800.

to maintain residence and, thereby, the benefit. According to the Court, the fact that they have no right to stay because they can no longer contribute with their labour power should not be construed as a voluntary conduct that leads to loss of their rights.[236]

What happens where the Turkish worker is not forced to leave the territory of the host state? This situation was addressed by the Court in *Demirci,* where a Turkish worker requesting the continuation of exportability of the benefit had acquired Dutch citizenship next to the Turkish one.[237] In this case, AG Wahl explained the purpose of granting such benefits to incapacitated workers to begin with. According to the AG, Article 6 of Decision 1/80 is not intended to assist migrants in the host state, but rather to facilitate their lives upon return to their country of origin.[238] The objective of the provision is to compensate workers for the 'the misfortunes they have suffered in the host Member State', an objective which according to the AG is reasonable precisely due to the contribution the migrant workers has made in the host state.[239] Following the AG, the Court held that such compensation is no longer needed where the worker manages to acquire the nationality of the host state, which represents 'the most accomplished level of integration'.[240] An opposite conclusion would mean that Turkish workers who acquire the nationality of the Member State would be treated more favourably both compared to Turkish workers who no longer belong to the labour force and have no right to reside, and to nationals of Member states, who would have to maintain their residence in the Netherlands to receive the benefit.[241]

The Court has also ruled on cases where the acquisition of nationality of the host state by a worker did not imply the loss of rights derived from the Turkish worker status. This was the case in *Khaveci and Inan*, which concerned family reunification rights for Turkish workers naturalized in the host state.[242] The Court based the differentiation between *Demirci* and *Khaveci and Inan* on the fact that the workers in question had the possibility to enjoy the benefit, if they maintained residence in

[236] *Akdas and others*, C-485/07 para 94. See also Katharina Eisele and Anne Pieter van der Mei, 'Portability of Social Benefits and Reverse Discrimination of EU Citizens Vis-a-Vis Turkish Nationals: Comment on Akdas' (2012) 37 European Law Review 204.

[237] Judgment of 14 January 2015, *Demirci and others*, C-171/13, ECLI:EU:C:2015:8.

[238] Opinion of Advocate General Wahl delivered on 10 July 2014 in *Demirci and others*, C-171/13, ECLI:EU:C:2014:2073 para 54.

[239] ibid para 55.

[240] *Demirci and others*, C-171/13, para 54.

[241] ibid para 59. See also Order of 13 February 2020, *Solak*, C-258/18 ECLI:EU:C:2020:98

[242] Judgment of 29 March 2012, *Kahveci and Inan*, C-7/10 and C-9/10, ECLI:EU:C:2012:180.

the Netherlands, and on the social purpose of Decision 1/80, which created rights for family members and not for the workers themselves.[243]

The Court extended the finding of *Demirci* to Turkish nationals who have acquired long-term resident status under the Long-term Residents Directive, whose purpose is to ensure the integration of third-country nationals who are long-term residents and to approximate their status to EU nationals. In *Çoban*, the Court held that leaving the labour force voluntarily and returning to the country of origin, despite holding a long-term resident status, did not entitle a Turkish migrant to exportability of the benefits in question.[244]

The significance of this case-law and, relatedly, its financial repercussions for Member States, led to a revision of Decision 3/80 in order to limit this extensive protection.[245] Despite the revision, some observations are to be drawn from the consistently extensive application of social security rights in the case-law. There is an implicit understanding by the Court that Turkish workers who can no longer contribute their work and are thus forced to leave the host state, not being able to claim any residence right from EU law, need to be compensated and extensively protected. The basis of such protection is none other than non-discrimination. The extension of social security rights to compensate for a lack of a right to remain should be seen in light of the parallel pursuit of economic and social objectives by EU law. Migrants contribute to economic development by their labour, and are granted rights as a compensation for such labour in a legal order constantly guided by economic and social sustainability.

6.3.3.3 Social Objectives and Economic Risks behind Family Reunification

Another instrument which highlights the intimate connection of the economic and social pillars of sustainability pursued in the regulation of migration is the Family Reunification Directive. The previous chapter outlined the social objectives served by its adoption. However, the Directive does not only regulate the conditions under

[243] *Demirci and others*, C-171/13 paras 67-71.

[244] Judgment of 15 May 2019, *Çoban*, C-677/17, ECLI:EU:C:2019:408 para 32.

[245] Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems 2012/776/ [2012] OJ L 340/19. For a detailed analysis of the relevant case-law, its implication and amendments Paul Minderhoud, 'Decision No 3/80 of the EEC-Turkey Association Council: Significance and Developments' in Daniel Thym and Margarite Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015); Paul Minderhoud, 'Social Security Rights under Decision No 3/80 of the EEC-Turkey Association Council: Developments in the EU and in the Netherlands' (2016) 18 European Journal of Social Security 268. See also Judgment of 18 December 2014, *United Kingdom / Council*, C-81/13, ECLI:EU:C:2014:2449 which contested the legal basis of the adoption of the Decision also examined in the works cited.

which family reunification should take place; more importantly, it creates a right to family reunification for all TCNs who fall within its scope.[246] This was acknowledged by the Court in its case-law during the period under review.

In *Parliament v Council*, the Court held that the Family Reunification Directive goes further than international human rights instruments on the protection of family life for migrants.[247] Specifically, looking at international human rights law, the Court confirmed that, as a rule, there is no right for aliens to be allowed to enter the territory of a Member State for the purpose of family reunification and the corresponding protection of family life. Contrary to these limits to the protection of family life under international human rights law,

> Going beyond those provisions, Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.[248]

This finding has been confirmed in all the cases where the Court has been called to interpret the Directive. Relatedly, the Court has held that any limitations to the rights conferred by the Directive should be interpreted strictly, and has used the Charter provisions as a basis of review of restrictive practices of Member States. In the respective case-law we can see how the Court engages with the balancing of economic and social objectives, conditioning the rights attributed under the Directive.

Specifically, the Family Reunification Directive provides that Member States may require evidence that the sponsor has accommodation regarded as normal for a comparable family, health insurance, and stable and regular resources to maintain themselves and their family, so they do not become a burden to the social assistance system of the Member States.[249] In *Chakroun*, the Court elaborated on how stable and sufficient resources should be perceived, and if this requirement should exclude migrants who may be eligible for certain types of social assistance.[250] Taking the

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[246] See, however, Judgment of 20 November 2019, *Belgische Staat (Régime de décision implicite d'acceptation),* C-706/18, ECLI:EU:C:2019:993 where the Court clarified that Member states are required to establish the existence of family links between the sponsor and the family member. In so far as national law provides that an application can be automatically approved after the lapse of time provided to the national authorities for its examination, then this goes against the effectivness of the Directive.

[247] Judgment of 27 June 2006, *Parliament / Council*, C-540/03, ECLI:EU:C:2006:429.

[248] ibid para 60.

[249] Article 7 Family Reunification Directive.

[250] Judgment of 4 March 2010, *Chakroun*, C-578/08, ECLI:EU:C:2010:117.

right to entry created for family members under the Directive as a starting point, the Court held that family reunification was the general rule. As a result, the conditions provided for it should be interpreted strictly.[251] The Court further pointed out that the margin of appreciation of Member States should not be exercised in such a way as to undermine the objective of the Directive, namely to promote family reunification, and its effectiveness.[252] This strict interpretation in line with the objective of the Directive also needs to be aligned with the protection of fundamental rights, and specifically respect for family life, as protected by the Charter and the ECHR.[253] In this context, the Court interpreted the requirements of Article 7(1)(c) of the Family Reunification Directive as meaning that the concept of social assistance referred to assistance which compensated for lack of stable, regular and sufficient resources and could not cover assistance that enabled exceptional or unforeseen needs to be addressed.[254] This was confirmed by the Court in *O and S*, this time mentioning the need to align the interpretation of the Directive not only with Article 7 of the Charter, but also with Article 24 on the rights of the child.[255]

Subsequently, in *Khachab,* the Court had the opportunity to clarify the meaning of regular and stable resources.[256] Following the line of reasoning established in *Chakroun*, the Court emphasized that this requirement should be interpreted in light of Article 7 of the Charter and with a view to promoting family life.[257] The presence of stable and regular resources implies the existence of a degree of permanence and continuity, allowing the Member State to assess whether the sponsor has the prospect of maintaining the resources for a period after the submission of the application. This prospective assessment was thought to be in line with the system of the Directive, which allows for refusal of renewal where the sufficient resources criterion is no longer satisfied.[258] What is more, this interpretation was aligned by the Court with the objective of Article 7(1) of the Family Reunification Directive– that the sponsor or his family should not become a burden on the social assistance system of the Member States during their stay.[259] The assessment, however, should

[251] ibid paras 41-43 with reference to *Parliament / Council,* C-540/03 para 60.

[252] ibid para 47.

[253] ibid para 44.

[254] ibid para 49

[255] Judgment of 6 December 2012, *O. and S.*, C-356/11 and C-357/11, ECLI:EU:C:2012:776 paras 76-77, the case concerned TCN spouses of TCN sponsors with children.

[256] Judgment of 21 April 2016, *Khachab*, C-558/14, ECLI:EU:C:2016:285.

[257] ibid para 28.

[258] ibid para 37.

[259] ibid para 39.

take place in line with the principle of proportionality, and on a case-by-case basis in accordance with the requirement of Article 17 of the Directive.[260]

In a way similar to the limitations of the rights of EU migrants, the Court acknowledged the limits set by the legislator on the rights of TCN migrants in light of the economic objectives of the EU project. Nevertheless, it firmly grounded the review of such limitations in the changed architecture of the EU legal order, and it emphasised the need to guarantee the rights of individuals under EU law in light of the Charter. The use of the Charter in these cases has a double function. First, it consolidates the constitutional architecture of EU law. Second it appears as a particular manifestation of the social objectives of EU law, and relatedly of how the social pillar of sustainability is pursued by a strong grounding on human rights considerations.

6.3.3.4 Security of Residence Promoting the Social Objectives of the EU

The Court has followed an approach similar to its case-law on family reunification examined above also in relation to interpretation of the provisions of the Long-term Residents Directive. The long-term resident status is attributed to all migrants residing in a Member State for a period of five years under Article 4(1) of the Directive. However, not all types of legal residence count towards the fulfilment of the five-year duration criterion. Specifically, the Directive excludes certain categories of legal residence based on the presumption that the migrant in question has no intention to stay in the Member State for an extended period of time.[261]

The Court has had the opportunity to clarify what is meant by temporary stay, and thus, what type of permits are excluded from the calculation of the residence duration.[262] In light of the purpose of integration served by the Directive, the Court held that the permits excluded are based on the consideration that their holders do not seem to have *prima facie* any intention to settle in the EU for the long term.[263] In other words, their legal status objectively represents an intention to exist in the host Member State for a limited period of time. When it comes to national residence permits that are limited (for example in terms of access to a specific occupation), but do not prevent the long-term residence of the migrant, these cannot be excluded

[260] ibid paras 42-43.

[261] See Article 3(2) Long-term Residents Directive. The directive mentions au pairs, seasonal workers, posted workers, cross-border service providers or holders of formally limited permit as examples. Article 4(2) provides that periods of residence under temporary stay or as a diplomatic staff must not be taken into account for the calculation of the necessary period of legal residence. For TCNs who held a residence permit as students, half of the period of the residence can be calculated towards the fulfilment of the period necessary for acquisition of the status.

[262] Judgment of 18 October 2012, *Singh*, C-502/10, ECLI:EU:C:2012:636 and Judgment of 7 September 2022, *Staatssecretaris van Justitie en Veiligheid*, C-624/20, ECLI:EU:C:2022:639.

[263] *Singh*, C-502/10, para 47.

from the calculation of the period necessary for the long-term resident status.[264] If they were excluded, this would allow much leeway to Member States, in consequence depriving the Directive of its effectiveness. In *Staatssecretaris van Justitie en Veiligheid*, the Court further had the opportunity to elaborate on what should be considered as stay on temporary grounds. In that case the Court provided a definition of residence on 'solely on temporary grounds as follows

> [A]ny residence in the territory of a Member State which is based solely on grounds having the objective characteristic of implying that it is strictly limited in time and is intended to be of short duration, not permitting the long-term residence of the third-country national concerned within the territory of that Member State.[265]

While the duration of residence is the main criterion for access to the status, the Directive also provides for the following conditions.[266] Applicants for long-term residence permit need to prove that they have stable and regular resources, and health insurance, and may also be required to comply with integration conditions. In these requirements we see that the social aim of furnishing security of residence to migrants who have stayed for long in the EU is tied to guarantees that they will not become a burden on the host state.

The Court has also engaged with the criterion of stable and regular resources. In the relevant case-law, it emphasized duration of residence as the central criterion of the Directive, that which shows that the TCN has managed to put down roots in the host state.[267] Consequently, it held that while the concept of resources may be interpreted by analogy to the relevant concept in Directive 2004/38, it should have a different scope.[268] This is because first, the acquisition of the long-term resident status is definitive, so the interpretation of the resources condition should be in line with the purpose of preserving the social assistance system of the Member States.[269] Second, the provision of the Long-term Residents Directive mentions that resources should be stable and regular, compared to Directive 2004/38 which only mentions stable. In addition to these reasons of differentiation, AG Saugmandsgaard Øe added another one, on which the Court stayed silent.[270] That is the paradoxical formulation of the relevant instruments in a way that allows Member States to withdraw the

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[264] ibid para 51.

[265] *Staatssecretaris van Justitie en Veiligheid*, C-624/20 para 34.

[266] Article 5 Long-term Residents Directive.

[267] Judgment of 3 October 2019, *X v Belgische Staat*, C-302/18, ECLI:EU:C:2019:830 para 30.

[268] ibid para 34.

[269] ibid para 35.

[270] Opinion Of Advocate General Saugmandsgaard Øe delivered on 6 June 2019 in *X v Belgische Staat,* C-302/18, ECLI:EU:C:2019:469 para 64.

residence permit of a EU migrant who no longer has sufficient resources if they do not have permanent residence status, if such withdrawal is not foreseen for long-term residents.[271] Expulsion based on economic considerations is also not allowed by the Long-term Residents Directive.[272] In view of the above, the more exacting economic conditions for access to protection are based on the fact that the social protection enjoyed by long-term residents cannot be taken away when they become economically redundant. In this regard, the Court suggested that the relevant requirement meant that a Member State could evaluate the resources on the basis of their nature and regularity, and this would imply an assessment of sufficiency and sustainability of resources, rather than an assessment of their origin.[273]

The Court has also ruled on the conditions of loss of the relevant status. Article 9 of the Long-term Residents Directive provides that the status may be lost due to absence from the EU territory for a period of longer than 12 consecutive months. In *Landeshauptmann von Wien,* a long-term resident was entering the Union territory for a few days over a period of years in order to interrupt the fulfilment of the 12 months condition. The Court held that since the Directive creates a right to a status whose nature is permanent, the rules leading to the loss of such status should be interpreted strictly. [274] Specifically, it held that the physical presence of a migrant in EU territory was sufficient to interrupt their absence from the territory, in line with the objective of the Directive to promote the integration of long-term residents and to grant them rights that bring them closer to EU citizens.[275] Long-term residents should in principle be able to live outside the EU territory without losing their rights, as long as they are not absent for longer than 12 months.[276] This interpretation was also supported by the need to achieve legal certainty for the migrants concerned.[277]

The social purpose of this Directive as a reason for more extensive protection has been confirmed by the Court. In *Commission v Netherlands*, the Commission took action against the Dutch legislature, which imposed excessively high charges for the acquisition of long-term resident status.[278] AG Bot acknowledged that the Directive did not include any provision on charges, which must be left to the Member States

[271] ibid. See also *Commission / United Kingdom*, C-308/14 on that and Article 28(2) Directive 2004/38.

[272] ibid paras 65-66.

[273] *X v Belgische Staat*, C-302/18 paras 40-41.

[274] Judgment of 20 January 2022, *Landeshauptmann von Wien (Perte du statut de résident de longue durée),* C-432/20, ECLI:EU:C:2022:39 para 33.

[275] ibid para 36.

[276] ibid 20 para 37.

[277] ibid para 38.

[278] Judgment of 26 April 2012, *Commission / Netherlands*, C-508/10, ECLI:EU:C:2012:243/

to set. Nevertheless, he considered that the margin of manoeuvre of Member States should be limited by the purpose and effectiveness of the Directive, and by respect for fundamental rights.[279] Regarding the purpose of the Directive, the AG pointed out the double purpose of achieving integration of migrants: to promote social and economic cohesion by granting them rights, and to contribute to the attainment of the internal market by granting them mobility rights.[280] He also held that the fulfilment of the conditions for acquisition of such status created a right for TCNs, and thus any limitation should be interpreted strictly.[281] He suggested that the fees imposed for acquisition of a permit should not have the object or effect of limiting the effectiveness of the Directive.[282] To the AG, the charges at issue constituted an indirect means of limiting the exercise of the rights conferred by the Directive, or of reserving such rights to wealthier migrants.[283] He also emphasized the comparability of long-term residents to EU migrants, and failed to see how such a difference in treatment would be justified on the basis of objective reasons.[284]

As to the limitations to the discretion of Member States with respect to fundamental rights, the AG suggested that the existence of such charges could lead to discrimination against migrants who did not have sufficient financial resources.[285] In light of the arguments put forward by the Netherlands, the AG had the possibility to elaborate on the rights created by primary and secondary law for EU and TCN migrants. Specifically, the Dutch government argued that a residence permit granted under secondary law created rights for the migrants, whereas a residence permit granted to EU migrants was merely declaratory.[286] The AG suggested that such a differentiation could no longer hold in line with the development of EU law.[287] While it is true that for EU migrants a residence permit has declaratory effect, the same is true for TCN migrants, in the sense that secondary law directly confers rights on them, as has been confirmed by the Court.[288] The Court emphasized the purpose of the Directive appearing in recitals 4, 6 and 12, which is to contribute to

[279] Opinion of Advocate General Bot delivered on 19 January 2012 in *Commission v Netherlands*, C-508/10 paras 54, 67.

[280] ibid paras 55-57.

[281] ibid para 61 by analogy to *Chakroun*, C-578/08.

[282] ibid para 62.

[283] ibid para 63.

[284] ibid para 66.

[285] ibid para 69.

[286] ibid para 71.

[287] ibid para 73.

[288] ibid para 74 with reference to case-law on Decision 1/80 of the EEC-Turkey Association Agreement and on the Family Reunification Directive.

the integration of migrants and to the effective attainment of the internal market as an area of free movement of people.[289] In line with the AG, it confirmed that the fulfilment of the conditions of the directive created a right for migrants to obtain the long-term resident status. Member States cannot impose charges which are so high as to have the object or the effect of creating an obstacle for TCNs who are entitled to obtain that status, otherwise the objective and spirit of the Directive would be undermined.[290]

The extensive interpretations of the Court on long-term residents' rights lie behind the recent effort of the Commission to recast the relevant Directive and extend the rights attributed to long-term residents. In 2022, the Commission issued a proposal for revision of the Long-term Residents Directive, which is aligned with the Court interpretation regarding the conditions of acquistion of the long-term resident status.[291] Under the proposal, equal treament is also extended, and the possibility of derogation of Member states to limit equal treatment to core benefits is removed.[292] Overall, the extensive interpretations of the Court on this instrument had two consequences: it ensured the social protection of long-term residents in the Member States, and it shaped the revision of secondary law with closer attention to fundamental rights considerations.

6.3.3.5 Social Rights for Migrant as an Indirect Way of Promoting the Constitutional Elements of EU Law

Primary law on the regulation of migration does not create obligations on the substantive conditions that should inform migrants' rights. The shared competence of the EU on migration is defined in the Treaties by reference to the areas where the EU can adopt legislation. At the same time, the Lisbon Treaty refers to fair treatment and solidarity as principles that should guide the adoption of such legislation. The Court has not referred to the relevant Treaty provisions when reviewing secondary legislation. Rather in the case-law analysed above it was shown that the Court consolidated the rights of TCN migrants by reference to the Charter. Specifically the Court consistently held that secondary law on TCN migration creates EU law rights for migrants, the limitations of which should be interpreted strictly and reviewed for compliance with the Charter.

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[289] ibid para 66.

[290] ibid para 73. See also Judgment of 3 September 2015, *CGIL and INCA,* C-309/14, ECLI:EU:C:2015:523 on fees in Italy which confirmed the same reasoning.

[291] Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) COM(2022)650 final, Explanatory memorandum, Article 5, specifically on resources and integration conditions.

[292] ibid, Explanatory memorandum, Article 12.

At this stage, it should be noted that the Court has dealt with very few cases regarding the right of first admission of a migrant. In such cases it has been reserved. Despite recognizing the creation of a right to entry in accordance with the conditions of the relevant Directive, the Court does not normally push for review of state discretion. However, when it comes to migrants who are already in EU territory and fall under the scope of EU law, the Court acknowledges the importance of fundamental rights protection for all individuals who fall within the scope of EU law. Such rights are extended in light of the Charter, which completed the constitutional architecture of the EU. By reviewing the relevant case-law, it can be argued that it is not only the social objectives of EU law that are promoted by the Court's interpretation and emphasis on the Charter, but also the integration of the EU legal order.

By this, I mean that in the first years of the EU project the Court used primary law with an emphasis on economic freedoms as a means to promote the integration of Member States and to fortify the Community legal order in light of a constitutional end that was absent from the Treaty text.[293] With the political ambition of the EU project under stress, the failed Constitutional Treaty and the reformed architecture of the EU legal system with to the adoption of the Charter, the Court turned to another instrument that could advance integration, namely the Charter. It has consistently made use of the provisions of the Charter to review secondary law on migration and limit state discretion in an area of shared competence. The Court's interpretation on the relevant secondary law is framing the space of fundamental rights policy exercised by the EU legislature. Both the proposed revision of the Single Permit Directive and the Long-term Residents Directive are presented by the Commission with stronger emphasis on fundamental rights protection for migrants in line with the case-law of the Court. [294]

This approach of the Court on TCN migrants stands in stark contrast to the interpretations followed on EU migrants' rights, where it has accepted a consolidation of balancing of economic and social objectives by the EU legislature

[293] See Chapter 4 for the analysis during the first period and Chapter 2 for the presentation of the foundational elements of EU law and the techniques of adjudication. Cf G Federico Mancini, 'The Making of A Constitution For Europe' (1989) 26 Common Market Law Review 595.

[294] See Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final, Explanatory memorandum, Article 12 with reference Judgment of 25 November 2020, *INPS (Prestations familiales pour les titulaires d'un permis unique),* C-302/19, ECLI:EU:C:2020:957. Cf Tesseltje de Lange, 'Recasting the Single Permit Directive: furthering the protection of migrants at work in the EU?' (2022) EU Migration Law Blog, 13 July 2022; Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) COM(2022)650 final, Explanatory memorandum, Article 5, specifically on resources and integration conditions and Article 12.

as expressed in Directive 2004/38. The differentiation could also be connected to the maturity of the legal framework on EU migrants, which has been constantly transforming since the 1960s. Secondary law on migration, on the other hand, is very recent. As shown throughout this historical investigation, it has developed in an 'environment in which national jealousies and priorities are never far from the surface' as Walker has suggested.[295] In cases related to TCN migrants, the Court consistently reviews national law in light of a more positive vision of what individual rights should look like in a legal system whose constitutional architecture is completed by the adoption of the Charter. This differentiated approach however has led to paradoxical interpretations in cases where the Court had to relate the rights of EU and TCN migrants. Maintaining the focus on case-law, the next section showcases the paradoxes that derive from the emphasis on the different status of EU and TCN migrants and the parallel acknowledgment that safeguarding the economy demands the limitation of rights for both categories.

6.4 Migrants, Citizens, Differentiation and Incoherence

Seen together, Sections 6.2 and 6.3 reveal the different approach of the Court in its case-law on EU and TCN migrants during this period. Specifically, it has accepted the balancing of economic and social objectives decided by the EU legislature regarding EU migrants. In contrast to this, it has proceeded in extensive interpretation of the rights of TCN migrants in view of the constitutional architecture of the EU. In parallel, the analysis carried out in the historical chapters of this dissertation has shown that economic and social objectives condition the rights of both categories of migrants. While EU citizenship provisions have shown their teeth when it comes to rights claimed by migrants against their host state, the movement of EU migrants is very much conditioned by economic considerations, and so are the social rights EU migrants can claim. Similarly, the rights TCN migrants draw from secondary law are granted precisely in order to achieve the economic objectives of EU law.

Instead of openly acknowledging the economic limitation behind the rights of EU migrants, the Court emphasizes the fundamental status of Union citizenship before confirming the economic conditioning of their rights under secondary law. This emphasis on the fundamental status of EU citizenship and the different treatment for TCN migrants has created certain paradoxical situations, which are also commented on in the literature. Notably, Iglesias Sánchez has pointed to the incoherence this creates in making sense of the EU fundamental rights protection

[295] Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004).

system.[296] Building on this idea of incoherence, the next section engages with the concept of integration and how it underpins the rights of both EU and TCN migrants in an inconsistent way. Subsequently, Section 6.4.2 engages with a case of the Court which exemplifies the paradoxes of insisting on a differentiation of rights that is not reflected in secondary law, and how this adversely affects the potentials of EU citizenship, while at the same time it implicitly encourages Member States to undermine the rights of third-country nationals.

6.4.1 The Peculiar Case of Integration

The concept of integration appears in many ways in relation to both EU and TCN migrants under EU law.[297] Groenendijk suggested that three conceptions of integration exist in EU migration law.[298] The first is that a strong residence status and equal treatment are instruments for integration. The second is that naturalization or a permanent residence status should be remuneration for a completed integration. The third is that the lack of integration or the unfitness to integrate are grounds for refusal of admission or of extension of a permit. This section examines the differentiated and incoherent ways in which integration appears in secondary law and case-law to uncover the paradoxes behind the way economic and social objectives interrelate with the concept of integration.

First, in relation to EU migrants, in the course of the different chapters we have seen how the legislative and judicial approach promoted the attribution of rights as means for integration. The attribution of rights was based on the economic contribution of migrants to the internal market project. The introduction of the EU citizenship provisions destabilized the link between economic activity and attribution of rights by EU law. However, the complete severance of this link could have economic risks for national welfare states. And while the Court, drawing from the political aspiration of the Treaties, emphasized the need to keep up with the attribution of rights as means to promote integration, regardless of economic activity, the EU legislature opted for a different model. Specifically, Directive 2004/38 provided that the full attribution of social rights to EU migrants could be restricted until they acquired the right of permanent residence. In so doing, Directive 2004/38 came close to the second conception of integration identified by Groenendijk, that is, extra rights as a remuneration for successful integration. In Section 6.2 we also saw that

[296] Sara Iglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

[297] Kostakopoulou, Carrera and Jesse (n 47) refer to competing frames of reference of integration.

[298] Kees Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 European Journal of Migration and Law 111.

after the adoption of Directive 2004/38 the Court accepted the balancing carried out by the legislature and held that equal treatment regarding access to benefits should only be granted to migrants who have lawful residence under EU law.

Förster was a central example in the progressive change of direction of the case-law, because it affirmed permanent residence as a legitimate basis for extensive attribution of rights of EU migrants.[299] *Förster* concerned a German student pursuing education in the Netherlands who was economically inactive and claimed a study finance grant. National law provided that economically inactive migrants must have lawful residence in the Netherlands for five years prior to claiming the grant. Upon examining whether such limitation was legitimate, AG Mazák eloquently suggested that

> Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market and who thus made some contribution to its economy, such financial solidarity is now in principle to be extended to all Union citizens lawfully resident on its territory. Yet it should be noted that certain limits remain. As the Court pointed out in *Grzelczyk* and *Bidar*, Member states are required to show 'a certain degree of financial solidarity' in the organisation and application of their social assistance systems, as opposed, one might add, to unlimited solidarity.[300]

The Court acknowledged that integration in the form of permanent residence, which was also required by the Directive, could be a precondition to the extension of equal treatment rights to EU migrants. Hence, for EU migrants, continuous lawful five-year residence under conditions of self-sufficiency is required to prove their integration and allow them to claim extended social rights.

Thym has suggested that a judicial change of direction in the case of access to social benefits from a 'residence model' as a constitutional foundation of EU citizens' rights to an 'integration model' took place in the case-law.[301] In Thym's analysis the residence model corresponds to the first perception of integration discussed by Groenendijk, whereas the integration mode refers to the second perception of integration.[302] Under the residence model, EU citizenship does not replace national

[299] See also Moritz Jesse, 'The Value of Integration in European Law: Implications of the Forster Case on Legal Assessment of Integration Conditions for Third-Country Nationals' (2011) 17 European Law Journal 172 who relates the case also the concept of integration in instruments related to TCN migrants.

[300] Opinion of Advocate General Mazák delivered on 10 July 2008 in Judgment of 18 November 2008, *Förster*, C-158/07, paras 55-56, references omitted.

[301] Daniel Thym, 'The Evolution of Citizen's Rights in Light of the European Union's Constitutional Development' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

[302] Groenendijk (n 298).

political communities, but rather obliges them to treat EU migrants similarly to nationals. According to Thym, this means that when EU migrants move to another Member State, their territorial presence replaces nationality as the formal link determining insiders and outsiders in solidary communities.[303] This was the prevalent paradigm in the treatment of EU migrants. The integration model, on the other hand, which Thym has identified in the change of direction of the case-law, is based on qualitative factors determining whether a migrant has been sufficiently connected to a political community and to an expectation that migrants will actively pursue their incorporation in societal structures.[304] The success or failure of the migrant thus determines the security of residence and extend of equal treatment rights under EU law.[305]

When it comes to TCN migrants, things get more complicated. Article 79(4) TFEU allows EU action on integration, but excludes its harmonization. At the same time, we find all three perceptions of integration identified by Groenendijk in secondary law. That is first, rights are attributed to migrants as a means to promote integration under the Single permit Directive and the Family Reunification Directive. Second, more extensive rights are attributed to migrants as a remuneration for their successful integration under the Long-term Residents Directive. Third integration appears as a condition for the enjoyment of rights in the case of both the Family Reunification Directive and the Long-term Residents Directive. Groenendijk mentions that this last perception was introduced under the pressure from Germany, Austria, and the Netherlands in order to allow the use of integration conditions as a barrier to the admission of family members and to the access to the long-term resident status.[306] This leads to a paradoxical situation where rights are granted to promote integration, but access to such rights is dependent on the migrant proving integration.

On this matter, Karin de Vries suggests that questions about the boundaries of solidarity and questions about integration, participation and national identity are interconnected.[307] Indeed, as she suggests, this relationship is not new, but has already existed in relation to welfare state, redistribution, social rights, and commitment to a national community. What is noteworthy according to her is that the direction of this relationship is being reversed in the secondary law on TCNs:

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[303] Thym, 'The Evolution of Citizen's Rights in Light of the European Union's Constitutional Development' (n 301) 114–115.

[304] ibid 116.

[305] ibid 116.

[306] Groenendijk (n 298) 125.

[307] Karin de Vries, 'The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in European Union Law?' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

> Whereas in traditional welfare state theory the extension of social rights to all citizens is instrumental to furthering a sense of community, the integration exception instead allows the Member States to withdraw social rights from TCNs who do not comply with normative prescriptions adopted for the purpose of creating an integrated society.[308]

This legislative paradox has been addressed by the Court in an inconsistent way. In the case of family reunification, in *K and A,* the Court examined a requirement imposed by Dutch national legislation that family members should pass a language and culture and society examination as a precondition to their authorization to enter.[309] Article 7(1) of the Family Reunification Directive provides for the conditions of family reunification (accommodation, sickness insurance and stable and regular resources of sponsor), whereas Article 7(2) provides that Member States may require family members to comply with integration measures, unless they are refugees or family members of refugees. Instead of discussing whether integration measures can be a condition for family reunification and, if so, whether the national measure complies with the Directive, the Court repeated its standard line of review. The line of reasoning is that family authorization is the rule, that the conditions thereof need to be interpreted strictly, that the margin of discretion of Member States should not undermine the objective and effectiveness of the Directive, and that Member State discretion should be exercised in line with the principle of proportionality and respect for the Charter.[310]

In the present case, the Court held that in principle such a requirement did not undermine the aims of the Directive.[311] However, it suggested that the principle of proportionality imposed certain conditions as to how such integration measures could appear as a condition of authorization. Specifically, these measures should not be aimed at 'filtering' and systematically precluding family reunification, but rather at facilitating integration in the host state.[312] Individual circumstances of family members that preclude them from taking or passing the exam should be taken into account, and any costs of the process should not have the object or effect of making family reunification impossible or excessively difficult.[313] With this finding the Court tried to limit the effects of integration-related conditions for the attribution of rights to family reunification. Nevertheless, it is very paradoxical to require compliance with integration measures, when under the fourth recital of the Directive

[308] ibid 284.

[309] Judgment of 9 July 2015, *K and A*, C-153/14, ECLI:EU:C:2015:453

[310] ibid para 50.

[311] ibid para 55.

[312] ibid paras 56-57.

[313] ibid para 59, 64.

it is suggested that family reunification rights are granted precisely to create the sociocultural stability necessary to facilitate integration and to promote economic and social cohesion. Thus, in the context of family reunification, we see a peculiar logic of attributing rights to migrants to assist them in integrating in the host state, while at the same time setting integration measures as a precondition for the family members having a right to entry.

A similar paradox has arisen in relation to the Long-term Residents Directive, adopted to attribute extra rights to TCN migrants because they have already contributed to the Member States and have integrated, as attested by their five-year continuous residence. The Directive includes the possibility of requesting the fulfilment of integration conditions as part of the acquisition of the status under Article 5(2) of the Directive, whereas it also allows the imposition of integration measures by a second Member State if the long-term resident applies for residence in another Member State under Article 15(3) of the Directive. The paradox of attributing rights to attest successful integration, while setting integration conditions for the recognition of that status is self-evident. Iglesias Sánchez has commented on how the introduction of these provisions in the Directive has led to a loss of internal coherence of the instrument.[314]

The Court had the opportunity to engage with national integration measures not in the context of attribution of the status, but with regard to the possession of the status. The issue was at stake in *P and S,* where national legislation obliged all foreign nationals to pass an exam on the Dutch language and basic knowledge of society.[315] A failure to fulfil the obligation was punishable by a fine. The question concerned whether such a national law complied with the Long-term Residents Directive. AG Szpunar followed a peculiar logic in his Opinion, suggesting that there is a difference between integration conditions and integration measures.[316] The former are seen as condition for the acquisition of a right, while the latter are measures intended to facilitate integration.[317] The crucial difference is that integration conditions are used as an instrument for selecting migrants or controlling migration. The AG suggested that the imposition of the Dutch integration measures could be in compliance with the Directive if they did not excessively impede the exercise of the rights of long-term residents and complied with the Charter.[318] The AG also

[314] Sara Iglesias Sánchez, 'Free Movement as a Precondition for Integration of Third-Country Nationals in the EU' in Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), *Illiberal liberal states : immigration, citizenship, and integration in the EU* (Ashgate 2009) 213.

[315] Judgment of 4 June 2015*, P and S*, C-579/13, ECLI:EU:C:2015:369.

[316] Opinion of Advocate General Szpunar delivered on 28 January 2015 in *P and S*, C 579/13, ECLI:EU:C:2015:39 para 85.

[317] ibid para 86.

[318] ibid paras 81,86.

made a statement that was as incoherent as the Long-term Residents Directive itself, suggesting that

> I have no doubt that national provisions imposing an integration obligation as a condition for obtaining long-term resident status or for exercising the rights associated with that status would be contrary both to Article 9 of Directive 2003/109, which defines the conditions for withdrawal or loss of that status, and to Article 5(2) of the directive, which permits the imposition of integration 'conditions' solely as a requirement for acquiring that status.[319]

In this statement, the AG suggested that integration obligations as a condition for the acquisition of the long-term resident status would be contrary to the provisions of the Directive, which allowed for the imposition of integration conditions as a requirement of the acquisition of that status. The only way to make sense of such statement is if there was a fundamentally different conception of 'integration obligations' and 'integration conditions,' or if there was a difference between the 'obtaining' the status and 'acquiring' the status. However, he did not elaborate on whether such a difference exists.

In any case, the AG suggested an equally paradoxical resolution to the case, which was followed by the Court. This was that national measures, such as the ones under review, complied with the Directive as long as they did not impede the exercise of the rights associated with the long-term residence status and did not create an obligation to pass a civic integration exam. The Court did not engage in the differentiation between integration measures and integration conditions, but rather focused on the specific national law under review. It found that the obligation to pass a civic integration exam under a pain of fine complied with the Directive, as long as it did not jeopardize the objectives thereof, and it deferred to the national court for an evaluation of the matter.

The case-law of the Court on the integration paradox continued in *C and A,* where the Court had to interpret Article 15 of the Family Reunification Directive in relation to a Dutch law, which required that applicants for an autonomous residence permit as family members were to pass a civic integration test.[320] In that case, AG Mengozzi noted that the autonomous status of the family member under the Directive was a status intended to end dependence on the sponsor.[321] If Article 15 of the Directive was interpreted in a way which would allow Member States to introduce substantive conditions to the exercise of such right, it would undermine the purpose and

[319] ibid para 54.

[320] Judgment of 7 November 2018, *C and A*, C-257/17, ECLI:EU:C:2018:876. The case concerned the right to family reunification of a national who had not used their right to move. Since the Dutch law transposing the Family Reunification Directive extended its provisions to nationals of the state, the Court held that it had jurisdiction to interpret the relevant provisions.

[321] Opinion of Advocate General Mengozzi delivered on 27 June 2018 in *C and A*, C-257/17 para 56.

effectiveness of the measure.[322] In his view, Article 15 of the Directive should be interpreted as meaning that Member States can impose formal administrative conditions on how access to autonomous residence can be exercised, but not substantive ones.[323] For the AG, the EU legislature intended to establish an autonomous status as a consequence of continued residence of the family member to consolidate their legal situation and afford them legal certainty[324] The AG also provided guidance for cases where the Court found that the reference to 'conditions' covered 'substantive conditions'.[325] In such cases, the AG suggested that the conditions related to the civic integration examination would be disproportionate.[326]

The Court held that the phrasing of Article 15 of the Family Reunification Directive covered both substantive and administrative conditions.[327] However, Member States could not go as far as undermining the objective and effectiveness of the article.[328] Including civic integration tests as part of the substantive conditions was found to be line with the objective of the Directive to facilitate the integration of TCNs.[329] At this stage the Court suggested that the effectiveness of the measures adopted by a Member State under Article 7(2) of the Family Reunification Directive (that is, integration measures) could be jeopardized if a migrant's lack of integration at the end of the five year period could not, under any circumstances, prevent the attribution of an autonomous residence permit under Article 15 of the Directive.[330]

In this case the Court drew an analogy with the *P and S* case and further stated that, since the right to be granted autonomous permit arose from a period of five years of residence, the TCN should have been able to acquire some knowledge of the language and society during the relevant period in order to be able to pass such an examination.[331] While in principle accepting the compatibility of the relevant law with the Directive, the Court went on to examine its proportionality. It found the

[322] ibid 57.

[323] ibid 17 para 59.

[324] ibid paras 60-62.

[325] ibid para 66.

[326] ibid paras 69-74. Because the applicants already had to pass a test to get a family reunification permit, due to the financial inaccessibility (very high fees), the potential actual inaccessibility of the exam for some applicants due to their personal circumstances and due to the strict requirements for exemption from the exam even in cases where the applicant would certainly fail it due to their personal circumstances.

[327] *C and A*, C-257/17 para 53.

[328] ibid para 53.

[329] ibid para 55.

[330] ibid para 57.

[331] ibid para 58-59; *P and S*, C 579/13.

measure suitable to ensure integration, but held that it would be proportionate only if it fulfilled certain conditions. These would be that the test was only at a basic level, that the requirement would not lead to rejection where an applicant demonstrated willingness to pass the examination but was unable to do so, that the fees were not excessive, and that due account was taken of the personal circumstances of the applicant. [332]

In these cases, we see that secondary law provides discretion to Member States to set integration conditions for the attribution of the relevant rights. The Court, in a confusing and indirect way, does not acknowledge these as negative conditions behind the acquisition of the right, as it does, for example, in cases on the right to entry.[333] Rather, it sees them as limitations of the rights attributed under the respective Directives, which need to be interpreted strictly and in line with the principle of proportionality and the Charter. While such an approach results in securing certain rights for migrants (as the limitations are reviewed for compliance with proportionality and respect for the Charter), it does not ensure legal certainty nor pronounce on whether integration conditions are indeed conditions for the acquisition of EU law rights.

The complicated reasoning of the Court might be explained by reference to an opinion of AG Mengozzi, which has some potential to restore coherence, even though his line of analysis did not appear in the Court judgements presented above. His reasoning is as follows:

> A systematic interpretation of Article 7 of Directive 2003/86 also militates in favour of that view. Article 7(1) lists a series of conditions relating to the circumstances of the sponsor. The person who has applied for family reunification may be required to provide evidence that those conditions have been met. By contrast, no such evidence is required in respect of measures adopted under Article 7(2). If the legislature's intention had been to make those measures subject to the same rules as those laid down in Article 7(1), it would not have been necessary to insert a new paragraph and a new section could simply have been added to the previous paragraph. In other words, the integration measures referred to in Article 7(2) cannot pursue the aim of *selecting* the persons who may exercise their right of reunification, as such selection is the aim of the criteria and conditions laid down in Article 7(1). On the contrary, the integration measures in Article 7(2) must essentially be intended to *facilitate* integration in the Member states.[334]

[332] ibid para 63. Also confirmed in Judgment of 7 November 2018, *K,* C-484/17, ECLI:EU:C:2018:878

[333] See Judgment of 4 April 2017, *Fahimian*, C-544/15, ECLI:EU:C:2017:255 para 42.

[334] Opinion of Advocate General Mengozzi delivered on 30 April 2014 in *Dogan*, C-138/13, ECLI:EU:C:2014:287, para 53, emphasis in the original.

This explanation restores some coherence in the paradox in the following way. EU law does not see integration as a precondition for the enjoyment of rights. Rather, it creates rights as a means of integration for all those who make an economic contribution to the Member States. At the same time, Member States may have different requirements as to how they perceive integration in their societies.[335] In the tension between the connection of a migrant with the EU and the connection of a migrant with a Member State, the case-law draws the line in the following way. Length of residence as set in secondary law defines the integration of both EU migrants and long-term residents. National requirements can facilitate integration but cannot jeopardise the exercise of the relevant EU law rights. They should be reviewed for respect of proportionality and should not undermine the effectiveness of secondary law. The case of integration is a particularly interesting one, which fundamentally relates to the triangular relationship of the migrant with the community of the host state and with a supranational EU community as regards the attribution of rights, and which exposes the different understanding of integration at national and supranational level.

6.4.2 Differentiated Status under Primary Law Failing to Secure Greater Protection in Secondary Law

The case-law of the Court has developed through the emphasis on the Union citizenship status as the normative foundation of the rights of EU migrants. Even in cases where such status cannot guarantee rights to economically inactive migrants, the Court still emphasizes the primary nature of that status. At the same time the Court implicitly, and its AGs explicitly[336] emphasize that the rights of EU migrants and TCN migrants are different in their nature.

It is true that the rights of EU and TCN migrants are created under different legal bases: EU migrants draw rights directly from primary law while TCNs from secondary law. However, this does not preclude cases where the rights attributed to both groups are of a similar extent and serve the same objectives. This is the case for family reunification rights of EU and TCN migrants, for example. When the Court was called to pronounce on the relevant rights in *X v État belge,* it did not live up to the expectations of the strand of scholarship that identifies a different

[335] Cf Moritz Jesse, 'Integration Measures, Integration Exams, and Immigration Control: *P and S* and *K and A*' (2016) 53 Common Market Law Review 1086.

[336] This was the case by Advocate General Szpunar in *Fahimian*, C-544/15 and in *P and S*., C-579/13, by Advocate General Mengozzi in *Dogan and CA.* Of course these are cases focusing on differentiation. In the context of cases exclusively dealing with EU migrants, many Advocates General have made very grand statements, indicative is the Opinion of Advocate General Jacobs delivered on 9 December 1992 in *Konstantinidis,* C-168/91 ECLI:EU:C:1992:504 and the famous dictum 'civis europeus sum'.

normative foundation behind EU migrants' rights.[337] Instead, it emphasized the difference between the two categories in principle, it did not review secondary law on EU migrants for compliance with the Charter, and it deferred to Member States' discretion on TCN migrants, so that they apply secondary law in a way that is more favourable for EU citizens.

X v État belge concerned the right to an autonomous residence permit for family members of EU citizens, when such family members are victims of domestic violence. In such cases, Article 13 of Directive 2004/38 requires that the family members are either economically active or have sufficient resources and health insurance.[338] Article 15 of the Family Reunification Directive, on the other hand, provides that the conditions for granting such an autonomous residence permit are provided by national law. In this case, a Belgian court asked to what extent the relevant article of Directive 2004/38 should be invalidated as constituting a case of unequal treatment based on nationality. The referring court suggested that the only thing that differentiates the conditions under which an autonomous residence right should be granted to a TCN victim of domestic violence is whether their spouse is an EU migrant or not. The Court examined the case under Article 20 of the Charter, which requires that comparable situations should not be treated differently.[339] It acknowledged that the two provisions established different conditions even though they shared the same objective – protecting family members who are victims of violence.[340] It then went on to examine all the elements of the relevant framework and to evaluate whether the autonomous rights of family members of EU citizens and TCNs could be comparable.

First, the Court suggested that the fields covered by the two Directives are different. Specifically, Directive 2004/38 falls within the Union's objective under Art 3 TEU to establish an internal market.[341] Free movement is a primary law right, and the Directive was adopted to give effect to such right. The rights granted to TCN family members of EU migrants were attributed in order to facilitate the free movement of the latter. In contrast to that, the Family Reunification Directive fell under the

[337] Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique),* C-930/19, ECLI:EU:C:2021:657. See Daniel Thym, '"Citizens" and "Foreigners" in EU Law. Migration Law and Its Cosmopolitan Outlook' (2016) 22 European Law Journal 296; Daniel Thym, 'EU Migration Policy and Its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 Common Market Law Review 709.

[338] Belgian State (Droit de séjour en cas de violence domestique), C-930/19.

[339] ibid paras 50-51, 57. Article 21 was deemed inapplicable since it refers to Article 18 TFEU, which has been interpreted as applicable in cases of discriminatory treatment between nationals of the Member States in Judgment of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, ECLI:EU:C:2009:34.

[340] *Belgian State*, C-930/19, para 70.

[341] ibid para 71.

objective of the EU to create a common migration policy under Article 79 TFEU, and created common rules which were to be transposed into domestic law, but which allowed Member States to derogate therefrom to the extent permitted. Regarding the Court's analysis of the different fields covered by the two Directives, it should be pointed out that the legal nature of the instruments is the same, and as a result they both impose obligations of result and allow for derogations to the extent permitted.

Second, the Court held that the subject-matter of the two Directives was different. Directive 2004/38 concerns free movement and residence by EU citizens and family members and sets the limitations to a right provided under primary law. The Family Reunification Directive has the purpose of determining common criteria for the rights of lawfully resident migrants. In the Family Reunification Directive, the EU legislator intended to ensure the approximation of national laws relating to the conditions of admission and residence of TCNs. To this second reason put forward by the Court, I would add that family reunification for EU citizens is not a right protected under primary law. Rather, it has been always regulated in secondary law. The right that is guaranteed under primary law is the right of EU citizens to move and reside freely in the territory of the Member States.

Third, the objectives of the instruments were considered different. Directive 2004/38 aims to facilitate the exercise of a primary right, and has as a secondary objective the protection of family life and integration, while in Family Reunification Directive the integration and protection of family are the primary objectives. Finally, the Court held that there was a difference in the discretion available to Member States, and that the Family Reunification allowed for broader discretion in its transposition. Besides the preceding observation that both instruments are Directives, it is also interesting to look closely at the analysis of the Court, where it held that the discretion of Member States was limited under Directive 2004/38 as such, whereas the discretion as regards the Family Reunification Directive was broad specifically as regards Article 15(3) which makes reference to national law.[342] In this specific finding the Court went to great lengths to emphasize that Member States enjoyed discretion to apply the Family Reunification Directive in a way that is more restrictive for the relevant rights of TCN migrants than the respective rights of EU migrants under Directive 2004/38.[343]

What we can take away from this case, then, is that, even though the provisions in both the instruments have the same objective according to the Court, they exist in Directives that relate to different fields, principles, subject-matters and objectives.[344] The Court suggested that beneficiaries of rights under Directive 2004/38 'enjoy a

[342] ibid paras 84-85.

[343] ibid para 88, within the limits of effectiveness and proportionality.

[344] ibid.

different status and rights of a different kind'.[345] By stating that the rights of EU migrants are of a different kind, the Court does not explain why these rights should be applied to the disadvantage of their family members. In both cases the rights of family members enter the picture as derivative from the status or function of the principal. How can we accept that a family member of a principal with arguably different status who sits at the centre of EU legal order should be subject to more limitations regarding access to a secure residence status compared to the family member of a principal with a lesser status? According to the Court, this paradoxical outcome is not the result of EU law. Rather, the differentiation is instituted by the Belgian law, which did not impose equally strict conditions for family members of TCN migrants, even though it had the discretion to.[346]

This case is exemplary of the analysis of the Court in that it highlights the tensions inherent in EU law and case-law and the way it qualifies the rights of migrants. First, Directive 2004/38 does not go as far as creating an autonomous right of residence for victims of domestic violence who are not at least self-sufficient. The fundamental nature of the rights this Directive should protect are always conditioned to avoid harm to the economy of the Member States. At the same time, the legislature adopts measures on TCN migrants, knowing they cannot be a burden for the national economies, as their residence and rights are in all cases conditioned by their economic activity. There are, of course, limitations to ensure that such migrants will never become a burden, but, in any case, Member States can always limit residence and social rights for migrants who do not contribute economically.[347]

How does the Court address the differences instituted in secondary law? Instead of reviewing Directive 2004/38 for compliance with the Charter, it accepts the economic balancing that results in limitation of the rights of EU migrants and their family members. At the same time, it defers to national law to lower the standard of protection for TCN migrants to ensure that EU migrants are not treated unfavourably. And overall, it puts forward the Charter as a basis of review of national law on TCN migrants, as was shown in Section 6.3.3, when it consistently fails to invoke the Charter in relation to EU migrants.[348] Indeed, as Nic Shuibhne suggested in a different context, the Court's case-law is characterised by a

[345] ibid para 89

[346] ibid para 88.

[347] Economically inactive migrants do not enjoy residence rights under EU law. Sufficiency of resources can always be reviewed as a ground for renewal of family reunification permits, and access to long-term residence status presupposes sufficiency of resources with more discretion to evaluate the sustainability of such resources, in view of the fact that long-term residents cannot be expelled for economic reasons.

[348] Cf Niamh Nic Shuibhne, 'Integrating Union Citizenship and the Charter of Fundamental Rights' in Daniel Thym (ed), *Questioning EU citizenship: judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

'hegemonic attribution of supremacy to secondary law, which fails to engage the constitutional protocols epitomising the Union legal order more generally'.[349] In the specific case analysed in this section we see the Court accepting as legitimate the standards of Directive 2004/38 without further examination of the relevance of the economic conditioning for victims of domestic violence, and suggesting that these lower standards should apply to TCN migrants as well. The minimum standards of protection are ultimately the ones dictated by the economic and social balance as it has taken place for EU migrants.[350]

6.5 Realization and Paradoxes at the Coming of Age of EU Law

The legislative and judicial developments from the failed Constitutional Treaty to the Lisbon Treaty and beyond were examined in this chapter with the aim of investigating how the economic and social objectives of EU law, and related economic and social sustainability considerations, affected migrants' rights. The EU legal order continued to undergo transformations, but after the Lisbon Treaty the primary law framework stands firmly in place. During this period, it became clear that despite the hope for an ever-closer Union between the peoples of Europe, such a Union could not have a traditionally understood constitutional structure, as the peoples of Europe decided otherwise. At the same time, the incorporation of the less developed economies of the CEECs and the economic crisis showed the reluctance of Member States to extend rights to all citizens of this *sui generis* supranational community, despite the relevant declaration of primary law.

Section 6.1 showed how economic fears conditioned the attribution of rights of citizens from the acceding Member States. What is most important in the differentiation instituted in this final enlargement process is that the review of restrictive measures to the movement of migrants from the acceding states was left at the will of each individual Member State and did not take place under the control of the EU institutions, as was the case in previous enlargements. At the same time social considerations also made their appearance in this enlargement processes, as the EU framework had evolved and attributed significance not only to the maintenance of growth, but also to the social standards developed in the old Member States.

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[349] Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 891.

[350] See also Vladislava Stoyanova, 'On the Bride's Side? Victims of Domestic Violence and Their Residence Rights under EU and Council of Europe Law' (2019) 37 Netherlands Quarterly of Human Rights 311.

Similar economic fears conditioned the limitation of the rights of EU migrants after the revision of secondary law investigated in Section 6.2. The relevant analysis demonstrated the consolidation of the balancing between economic and social objectives behind the rights of EU migrants in secondary law, and in the case-law of the Court, which confirmed the choice of the legislature. It is precisely this balancing which frames the free movement framework as a sustainable migration framework. The analysis further showed that there is a tendency of the Court for more extensive interpretations towards Union children in light of the vulnerability owed to their underage status. However, when it comes to rights of Union children against a host state (and not their state of origin), the Court has also accepted the possibility to limit the rights of their migrant parents if they do not have sufficient resources to support their family, and hence if they can be a burden to the host state.

Steering the investigation of economic and social considerations towards the regulation of migration from third countries, Section 6.3 examined what the Parliament calls an 'asymmetric patchwork' providing rights for TCN migrants.[351] There, the failure of the current system of admission to meet the economic objectives of the EU was emphasized. This failure is attributable to the economic fears and antagonisms of Member States. The differentiation that characterizes the rights of TCN migrants in the relevant framework was also revealed. The framework is characterized by the attribution of rights not to those engaged in the project of growth, but rather to those who are urgently needed to keep the project running. In that section I also evaluated the case-law of the Court on social rights of migrant workers. There, the Court consistently used the Charter as means of review of national law to advance the objectives of the relevant Directives, thereby significantly extending the protection of the rights of TCN nationals.

After a thorough examination of the economic and social considerations behind different facets of EU migration law, the analysis concluded with Section 6.4 , which revealed the paradoxes embedded in the current legal framework. Looking at cases related to integration and the rights of EU and TCN migrants, I identified problematic elements in the Court's justification that complicate the way secondary law is applied and interpreted in relation to primary law. The Court's emphasis on the fundamental status of EU citizens and the different nature of rights for TCN migrants only furthers the incoherence of the current legal framework which will be further discussed in the concluding chapter.

Essentially, in this period the dust settled. The EU project had been continuously on the road to transformation, as ingrained in the language of the Treaties, but it had also come a long way. Different actors came to different realizations, which affected

[351] European Parliament resolution of 20 May 2021 on new avenues for legal labour migration (2020/2010(INI)) [2022] OJ C 15/196; European Parliament resolution of 25 November 2021 with recommendations to the Commission on legal migration policy and law (2020/2255(INL)) [2022] OJ C 224/69.

legislation and case-law on migrants' rights in the following way.[352] The Council realized that it could no longer block admission and rights of TCN migrants because EU growth would be impossible to maintain without their labour. The Commission realized that the Council could not go as far as accepting the shaping of a supranational community whereby EU citizens and TCNs alike would enjoy rights directly from the EU legal order. The Court also realized that integration could not only be promoted via law but also needed to find support in democratic processes, and for this reason deferred to the political balancing behind different instruments as legitimate balancing for the purposes of EU law. This does not mean that any effort for integration through law was blocked. During this period the Court proceeded in review of national legislation in light of the Charter in the same way that it employed economic freedoms provisions during the first period reviewed in Chapter 4. With the coming of age of the EU legal order, fundamental rights provisions become a powerful integration technique.[353] This chapter thus concludes the historical overview of EU migration law from the establishment of the European Coal and Steel Community to the present. The persistence of the economic and social pillar of sustainability in the regulation of migration, as they were manifested in the language of economic and social objectives of EU primary law has been revealed throughout the historical investigation. The task of the remaining chapter, therefore, is to draw on the findings of this historical investigation, so as to link the balancing of economic and social objectives behind the regulation of EU migration to the contemporary demand of sustainable migration, and to conclude the dissertation by discussing the potentials and limitations of an EU sustainable migration.

[352] The use of the term 'realization' should be understood metaphorically and does not imply a certain will/intention on the institutions as unitary actors. The way different concessions were formed in secondary law can only have a limited response in the premises of a legal study. Hence, this is a simplistic way of presenting the way different institutions acted during this period in the context of legal and juridical decision-making.

[353] Cf Muir, 'The Court of Justice: A Fundamental Rights Institution among Others' (n 208) 92. See analysis in Chapter 7, Section 7.2.2.

Chapter 7. Lessons from the Past and Suggestions for the Future of an EU Sustainable Migration

Having identified the indeterminate nature of sustainable migration as an objective to be addressed for the future of EU migration law, this project set out to investigate how the economic and social pillars of sustainability, as expressed in the primary law objectives of economic growth and social progress, have shaped migrants' rights. The short answer to the question is that migrants' rights formed as means to achieve these objectives manifest in an incoherent way. All the instruments creating rights for migrants (both EU and TCN) are adopted with the primary aim of serving the economic objectives of the EU (either by promoting growth, or by mitigating the negative impacts of entry/residence to the economy). In this regard, they all guarantee a set of rights which is differentiated depending on the potential effects of such rights on economic growth. Thus, the logic behind the attribution of rights to migrants under EU law with due regard to the economic and social objectives of primary law is somewhat circular: instruments that are adopted to promote economic objectives create rights only to the extent that they do not cause detriment to those economic objectives.

While this circular logic has found perfect application in the rights of EU migrants, which were first developed in the years of post-war growth, the same cannot be said for the rights of TCNs. The impossibility to ever achieve the rates of economic development existing during the years of post-war growth, the enlargement of the EU to include Member States with diverse economies and labour demands, and more recently the politicization of migration, have all led to an unsustainable system of regulation. The many revisions of instruments, as well as the constant effort of the EU institutions to recreate an agenda for EU migration law, point to the failure to align this legal area to the economic and social objectives of EU law, and relatedly to the economic and social pillars of sustainability.[1]

[1] On the economic side this derives from the constant attempts of the Commission to shape a regular migration policy that can address the economic needs of the EU, most recently in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Attracting skills and talent to the EU COM(2022)657 final. On the social side this derives both from the need to bring the EU closer to

This concluding chapter will first, in Section 7.1, provide a longer and more detailed answer to the research questions that guided the historical investigation. This section summarizes the findings of the historical investigation and suggests that the problem behind the new objective of sustainable migration lies not so much in the effort to align migration with economic and social demands. This has after all been a constant feature of EU law as distilled from Chapters 4, 5 and 6. Rather the problem lies in the way the economic and social objectives of the EU are perceived by different actors and, most importantly, by Member States. Section 7.2. analyses the limitations that exist in the way EU law has historically aligned migrants' rights to the economic and social objectives of primary law and reflects on what an EU sustainable migration can and cannot mean for the rights of migrants. Essentially this section highlights that structural features of the EU legal order set very clear limits in attempts to envision an EU sustainable migration law. Section 7.3 presents a vision of what an EU sustainable migration law could mean if the way economic and social objectives are considered was redirected and grounded on the current *acquis*. Finally, Section 7.4. concludes this dissertation by exploring further avenues for research that can be triggered by this work.

7.1 Economic and Social Sustainability in the Past of EU Migration Law

The project asked how the economic and social pillars of sustainability, as they have been historically conveyed in the primary EU law objectives of economic growth and social progress, shaped the rights of migrants under EU law. The task of looking back at the history of EU law in search for answers is a challenging one. As Walker suggested,

> Given the remorseless pace of development of the *acquis comunautaire*, there has been no subsequent natural point of doctrinal consolidation to follow the foundational innovations. Rather, as the proliferation of legal textbooks, journals, and commentaries indicates, doctrinal analysis has strained to keep up with the flow of

the citizen by addressing the democratic deficit, most recently addressed by efforts like the Conference for the Future of Europe, and by the emphasis on integration, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action plan on Integration and Inclusion 2021-2027, COM(2020)758 final. See also Sylvie Sarolea, 'Legal migration in the "New Pact": modesty or unease in the Berlaymont?' (2021) EU Migration Law Blog, 11 February 2021.

> new law, and has continued to take priority over more broad-ranging theoretical reflection.[2]

Positioning the time of doctrinal consolidation in the present, more than a decade after the adoption of the Treaty of Lisbon and with no Treaty revision in sight, I recall the findings of Chapters 4, 5 and 6 before looking more specifically at the way economic and social considerations appear in law-making (Section 7.1.1) and the Court's case-law (Section 7.1.2).

Already in the first period of Community law, reviewed in Chapter 4, the economic pillar of sustainability was emphasized in the attribution of rights to migrants, as it was specifically manifested in the language of economic objectives served by migration. This period was characterized by the reconstruction of Western economies and post-war growth. Free movement of factors of production was necessary to spearhead the post-war growth of the founding Member States. Among other factors, labour power was necessary for the unhindered growth pursued in the 1950s and 1960s. Next to Community migrants, third-country nationals (guest workers and workers from former colonies) supported the growth of Western economies until the oil crisis of the 1970s. At the time, Community workers and TCNs employed in European industries were attributed extensive rights pursuant to a clear acknowledgement that they were all equally contributing and participating in this project of growth. Equal treatment and raising the standard of living for all people who pursued a life in the EU – and who contributed with their work towards the achievement of social progress – was a non-issue.

The changing economic circumstances after the 1970s, the repeated enlargements of the EU and its continuous legal evolutions through Treaty amendments, nuanced the way economic considerations served as the basis of rights and promotion of social standards. Member States became more diverse: they were differently affected by the oil crisis, and they had different economic development levels and labour needs. In these circumstances, faced with the need to seal themselves off from the effects of transnational markets and with national unemployment on the rise, they attempted to close their borders and limit the rights of migrants, so as to become unattractive destinations. The plan of the Commission, as expressed in legislative proposals published at the time, continued unhindered. The Commission set more items on migrants' rights in the legislative agenda with the hope that the effects of the crisis would be eventually overcome and that a framework would be put in place to ensure the continuation of growth. During this period, positive action to promote the social objectives of the legal order was not really considered. The reason for this was a perception that economic growth would raise living standards for the population of Member States automatically. The attribution of social rights

[2] Neil Walker, 'Legal and Constitutional Theory of the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 91, reference omitted.

was considered in a superficial way, being mostly focused on equal working conditions to counter the economic effects of social dumping. Overall, during this first period, the economic objectives served by migration dictated the aligned treatment of all migrants due to a demand for equal treatment for all those who contributed to the development of the Community.

In the second period, reviewed in Chapter 5, when the EU underwent many transformations, the appearance of economic and social objectives was more ambiguous. While the economic and social pillar of sustainability continued to determine the rights attributed to migrants, elements of differentiation between EU and TCN migrants were put in place in line with the ambition to create a political community. During that time, the promise of EU growth and the changing political landscape after the fall of the Berlin Wall created the impetus for closer integration and more consistent protection of the individual behind the factor of production. The aspiration of reuniting Europe put emphasis on turning the project of growth into a project of prosperity for the people of Europe. At the same time, economic worries of Member States blocked any attempt by the Commission to shape a framework that could regulate the rights of migrants in light of long-term economic needs and fluctuations. Member States via the Council deflected the issue of third-country nationals' rights, so as to maintain a semblance of control in case of fluctuations in national economies.

Regarding EU migrants, the political aspirations of the time led to the establishment of EU citizenship in primary law. However, economic concerns precluded the creation of a framework that would shape residence rights for EU migrants based on their importance for the EU polity in the making. This political aspiration was, nevertheless, taken into account by the Court. By insisting on the new fundamental status established in primary law, the Court significantly restricted the limitations set by secondary law regarding the rights of EU migrants. Taking the objectives of the EU project at face value, the Court also consolidated the protection of migrant workers regardless of their nationality, thereby promoting the social objectives of the EU. To do so, it maintained the approach developed in the case-law on Community migrants and extended it to TCN migrants as well, suggesting that equal contribution to the EU project required equal rights. This protective case-law was a cause of concern for Member States, who feared repercussions for their national economies. For this reason, their economic concerns appeared behind the limitation of migrants' rights in the Association Agreements, concluded or revised at the time.

Next to the political aspirations for EU citizenship, the transformation of the EU project also demanded a closer pursuit of social progress, and relatedly more emphasis on the social pillar of sustainability. Even though legislation could not be adopted to extend the rights of EU migrants in light of their citizen status, legislation attributing rights to TCN migrants resident in EU succeeded. The results of this legislation were not as far reaching as the Commission had hoped. Despite this, it managed to convince Member States of the need to attribute at least a minimum set

of rights to those who would not pose risks to EU growth, and to the extent that they would not pose such risks. This was the case with the Students Directive, the Family Reunification Directive, and the Long-Term Residents Directive adopted at that time, which created EU law rights for migrants, even if such rights could be significantly limited by considerations related to economic reasons.

Finally, in the third period, reviewed in Chapter 6, the transformation of the EU project was completed and the way in which the economic and social pillars of sustainability appear behind the regulation of migration was consolidated. From a small Community club of states, based on largely similar and interdependent economies, the EU developed into a political and economic Union comprised of Member States with different systems of social protection and different levels of economic performance. The enlargement of the EU in the new millennium consolidated a diverse mix of economic needs and ideals of social progress. In parallel, the labour needs of industries began to revive, and these were matched by demographic predictions of an ageing EU population that could not sustain growth.

The failure to adopt the Constitutional Treaty put an end to aspirations of making something more of the movement of individuals, and the economic crisis of 2008 consolidated the need to always balance the rights of EU migrants against potential economic risks, even if such migrants were now called EU citizens. During this period sustainable migration became perfected in the rights enjoyed by EU migrants. Specifically, the balancing of economic and social considerations behind the rights of EU migrants meant that they could not enjoy unlimited residence rights by virtue of their status. Rather, when they migrate, their rights should be limited based on economic considerations. If they do not contribute to the EU project, they should at least not negatively affect the economies of host states. This consideration was consolidated in Directive 2004/38, and the balancing of individual rights against economic considerations was confirmed by the Court.

At the same time, economic demands and demographic projections created the need for labour migration. Despite the Member States' reluctance to harmonize migration law, in the new millennium it became clear that human labour was necessary not to spearhead growth, but rather to maintain it. As the Member States were very unequally affected by migration and not equally in need of migrant workers, a system of entry was created for those workers who were most needed: highly skilled workers (including researchers) and low-skilled workers. In this framework, social considerations demanded the incorporation of labour law standards in the employment of such migrants, and these are more extensive when it comes to migrants considered more vulnerable to exploitation. The problem of this framework, however, lies in the fact that more rights are granted to migrants who are most urgently needed. Instead of equal treatment for all the migrants who contribute to growth (meaning all migrant workers in the EU), economic considerations have shaped a system of utter fragmentation and differentiation. Fair treatment for third-country nationals translated into differentiated treatment to

attract the migrants the EU project most needs, notably researchers and highly skilled workers. At the same time, the rights include very strict safeguards to avoid settlement migration for those that are only temporarily needed. What we witness in this period is also the emphasis of the Court on social rights for migrants in light of the Charter. While in the case of EU migrants, the Court has accepted the balancing of economic and social objectives carried by the EU legislature and does not invoke primary law or Charter rights as a basis for review, this is not the case for TCN migrants. In the relevant case-law, the Court has consistently invoked the Charter to extend the protection of the rights of migrants against attempts by Member States to curtail them.

The analysis above shows how economic and social objectives shaped migrants' rights under EU law. Specifically, EU migration law is characterised by the attribution of rights to migrants because of their contribution to growth, the limitation of rights due to perceived risks to growth, an emphasis on work-related rights as means to social progress without a broader conception of the individual behind the economic actor, and the incorporation of clauses to guarantee that there is always a safety valve to stop migration in case of threats to the economy. In addition to these characteristics of EU migration law, the investigation identified the constant pursuit of the economic and social pillars of sustainability via the regulation of migration. The language of sustainability was not part of EU migration law until very recently. However, the core economic and social pillars of sustainability along with its demand of balancing different considerations in policy making in view of preserving the desirable characteristics of a framework have always found expression in the EU attempts of shaping an autonomous migration law. A more detailed explanation of how economic and social considerations manifested themselves in law-making and adjudication in the next sections will further reveal the centrality of sustainability in the development and interpretation of EU migration law.

7.1.1 Economic and Social Considerations in EU Law-making

As regards the way economic and social considerations appear in the process of adoption and negotiation of legal instruments on migration, the following could be said. A preliminary point discussed already in Chapter 2 is that EU law does not channel 'a prior general political authority and its integrated sense of the public good'.[3] Rather it is a means to stabilize the commitments of Member States to achieve 'various complex public goods under a new transnational political

[3] Neil Walker, 'The Theoretical Foundations of EU Law' in Claire Kilpatrick and Joanne Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 38.

authority'.[4] For this reason, the way economic and social considerations are taken into account and are channelled into laws varies for different institutional actors.

The Commission is the only actor insistent on achieving long-term economic and social development for the EU. It has consistently shown a proactive stance on the attribution of rights to migrants with the aim of shaping EU instruments that can align migration with the objectives of growth and progress, thus implicitly promoting an EU sustainable migration during all the years of its legislative activity. In the regulation of entry for TCN migrants, the Commission has emphasized the need to guarantee the more efficient allocation of resources and the proper functioning of the EU economy. Each proposal the Commission issued included safeguards that could guarantee the functioning of such system, including in cases of recession. In addition, the attribution of social rights to migrants has also been constantly suggested by the Commission. While originally this attribution of rights was based on the contribution of the migrant to the economy and had the purpose of minimizing unfair competition in the labour market, after the 1990s the Commission has focused on the necessity of attribution of rights to promote social cohesion across EU territory and to thus allow for more socially sustainable societies. In parallel, the Commission put a lot of emphasis on long-term approach to the regulation of migration. Despite this, in the final period examined the Commission has become more realistic, in the sense that it suggests proposals which can secure some minimum support of the Council, rather than proposals that are actually geared towards achieving economic and social sustainability by the regulation of migration. This was the case with the regulation of admission, where even though the Commission consistently acknowledged the horizontal regulation of admission as the ideal system, it continued to pursue sectoral regulation of the matter, as it became clear that it cannot gather support for horizontal measures.[5]

In contrast to the Commission's approach, the Council takes into account economic considerations related to the specific circumstances at national level. In doing so, it does not differentiate between EU and TCN migrants, but rather relates migration as such to the economy of the Member States. Relating migrant rights to the achievements of economic objectives was emphasized only during the years prior to the oil crisis. Thereafter the Member States have repeatedly acknowledged the need to commit to the common project of growth in political declarations, but when it comes to the negotiation of specific legal instruments, the focus turns to ensuring economic and social growth in the short-term and within each national setting. To a large extent, this explains the struggle behind the adoption of a framework regulating migration from third countries. In a sense, the above dissonance between the Council and the Commission also points to the limits of solidarity between

[4] ibid.

[5] See Attracting skills and talent to the EU COM(2022)657 final and Fitness Check on EU Legislation on legal migration SWD(2019)1055.

Member States when the EU project does not deliver unhindered growth for all the members of the club.

The problem is aggravated by the fact that economic considerations in the Council are shaped by the immediate economic circumstances on the ground, with no thought to how to align migration with future needs of national economies. In contrast to the long-term planning demanded by sustainability, the Council has been particularly short-sighted when addressing migration. Furthermore, even though the Council is supposed to reflect the collective political interests of Member States in the common EU project, national considerations predominate. Especially regarding TCN migrants, when Member States are up against national unemployment or recession, it is impossible for them to agree on any migration-related measure that could lead to the attribution rights. This is, of course, also connected to the shared competence on migration and the fact that even if Member States can foresee the demand for workers, they know that they can fulfil this demand through national migration law measures. In this context, the creation of EU rights for migrants can only cause tension in national politics. In addition to the issue of shared competence, the approach of the Council, as attested in the analysis, is tied to what Neyer has identified as institutional deficiencies of the European political order.[6] The European Council is composed of heads of state or government of the Member States. These officials are accountable to national electorates and, as a result, 'all political discourse is centred on catering to the domestic interests of Member States and lacks the necessary identification with the integration process'.[7]

Hence, even though there has been no evidence to support the negative effects of the different Commission proposals on national economies (as was the case in the context of enlargement, in the case of social rights of EU workers in the new millennium, and in the case of mobility rights for TCNs), the Council cannot reach an agreement. As to the social objectives, once again, the focus is rather on the national level. It is at the national level that the Council considers how to promote social cohesion or how to fight national unemployment, covering labour demands with little to no concern as to how to align national approaches with the transnational aspirations of collective economic growth and social progress.

Finally, the Parliament, especially in the second period, but also throughout the examination, has put forward a rights-based approach as a means to promote the social conditions across EU territory. It also seeks to advance political ideals of including all residents in the Member States in the project of peace and prosperity. This does not seem to deliver much when it comes to the legislative proposals,

[6] Jürgen Neyer, 'Saving Liberal Europe: Lessons from History' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019) 24.

[7] ibid.

which are all eventually restricted by the Council. Having seen how economic and social considerations are expressed by different EU actors and channelled into EU law-making, the next section turns to how these considerations are reflected in the case-law and revelas the particular use of economic and social objectives by the Court as a means to progress integration. Looking at these two sections together identifies the centrality of economic and social considerations for all institutional actors and shows the pursuit of sustainable migration as an objective even before the explicit appearance of the term in EU policy discourse.

7.1.2 Economic and Social Considerations in the Case-law

The second sub-question guiding the investigation asked how social and economic considerations appear in the case-law of the Court. The short answer is that it depends on how integration can proceed. The analysis carried out in this project fits well with earlier scholarly examination of the Court as a political actor and claims related to judicial activism. Such claims rest on two contrasting positions described by Dawson.[8] There is a liberal position, which suggests that the role of the Court in promoting EU integration is politically empowering for the individual.[9] By empowering individuals to enforce their rights under EU law, the Court is providing individuals with access to the law, and thereby opens new political pathways.[10] At the same time, there is a second, republican view on the social role of the law.[11] This view entails that courts should express and carry forward the views of a political community as mediated in the legislation, rather than protect and empower individuals. As Dawson suggests, what is considered the proper judicial function in the liberal position, becomes an 'usurpation of power' in the republican position, where individual rights and legal entitlements are utilised to overturn the settled preferences of a political community.[12] It is under this reading that the Court can be understood as a political actor, and it is in this context that the Court has been seen

[8] Mark Dawson, 'The Political Face of Judicial Activism: Europe' s Law-Politics Imbalance' in Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

[9] ibid 11 with reference to G Federico Mancini and David T Keeling, 'Democracy and the European Court of Justice' (1994) 57 The Modern Law Review 175.

[10] Dawson (n 8) 11.

[11] ibid with reference to Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); Fritz W Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 European Political Science Review 173; Bruce A Ackerman and James S Fishkin, *Deliberation Day* (Yale University Press 2004).

[12] Dawson (n 8) 12.

as 'activist' in judicially settling questions that should be balanced and decided in political arenas.[13]

The liberal position on the role of the Court has been supported by members of the Court. Former Judge and Advocate General Mancini has proudly suggested that the case-law of the Court in the early years of Community law coincides with the making of a constitution for Europe.[14] Acknowledging that the Treaty framework could not be seen as a constitutive act, Mancini described the endeavour of the Court to constitutionalise the Treaty as being 'to fashion a constitutional framework for a federal-type structure in Europe'.[15] Mancini himself admits a degree of activism on behalf of the Court in using law to foster the integration of Europe.[16] This acknowledgement fits squarely with the scholarly analysis of the central role of the Court for the construction of the EU legal order as an integrated constitutional order.[17]

Looking at the role of the Court in the process of legal integration, Burley and Mattli suggested in the 1990s that its action fits a neofunctionalist model of integration.[18] In line with neofunctionalism, this suggested that

> [I]ntegration is most likely to occur within a domain shielded from the interplay of direct political interests … in the legal context, judges who would advance a pro-integration "political" agenda are likely to be maximally effective only to the extent that they remain within the apparent bounds of the law.[19]

By political agenda, Burley and Mattli meant a pro-European agenda, and they argued that the Court had promoted the role of individuals by giving them a stake in the implementation of Community law only in such ways as would promote Community goals.[20] In their work, they tie the political and activist stance of the

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[13] ibid.

[14] G Federico Mancini, 'The Making of A Constitution For Europe' (1989) 26 Common Market Law Review 595, 595.

[15] ibid 596.

[16] ibid 612.

[17] Neil Walker, 'Opening or Closure? The Constitutional Intimations of the ECJ' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 41.

[18] Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41, 44.

[19] ibid 57.

[20] ibid 60. The authors discuss the extensive construction of the scope of EU law in preliminary references, comparing it to the restrictive criteria for individual standing in actions for annulment; Fabien Terpan and Sabine Saurugger, 'The Politics of the Court of Justice of the European

Court to promoting the visibility, effectiveness and scope of EU law, as well as the power of the Court, while at the same time 'presenting itself as the champion of individual rights and the protector of the prerogatives of lower national courts'.[21] This analysis, as well as the literature examining the Court as a political actor, fits well with the findings of the present investigation and reveals that the Court has used economic and social objectives at different points in time as a means to progress integration.

Specifically, in the early years of the Community project, economic objectives dominated the reasoning of the Court. The extensive creation of rights for Community and TCN migrants was based on the contribution of the individual to the project of growth, as shown in Chapter 4. Even in cases where such contribution was minor, the Court emphasized how the economic objectives of the project can be served by the attribution or extension of rights of migrants. The political aspirations of the EU affected the case-law during the second period, as demonstrated in Chapter 5. At the time, there was an emphasis on the 'ever-closer Union of peoples' goal in order to extend rights beyond the economic function of EU migrants under their new citizens status.

During the third period examined in Chapter 6, there is a consistent reliance on the Charter in cases concerning TCN migrants, not driven by an economic logic, but with the aim of promoting social objectives in a legal system that recognizes the need to attribute rights to all individuals who come within its scope. At the same time, the political aspirations for a Union of peoples appear in a confusing way. While the Court acknowledges the limitation of rights of EU migrants in light of the balancing of economic and social objectives undertaken by the legislator in Directive 2004/38, it has used the political aspirations to establish a differentiation between EU and TCNs on a discourse level. Even in cases where Directive 2004/38 sets less favourable conditions for the rights of EU migrants compared to the rights of TCN migrants on family reunification, the Court emphasized the political goals of the EU for its nationals, and did not examine whether secondary law can stand review under the Charter.[22] It also emphasized the rights of EU migrants *qua* citizens, but it no longer invokes primary law to extend their access to social rights. As was shown in Chapter 6 and as scholarly literature has pointed out, the Court defers to the balancing carried out by the legislature, and does not try to trump the

Union' in Paul James Cardwell and Marie-Pierre Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar Publishing 2020) 33 who refer to 'biased' Court.

[21] Burley and Mattli (n 18) 64.

[22] Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique),* C-930/19, ECLI:EU:C:2021:657 analyzed in Chapter 6, Section 6.4.2.

limitations of Directive 2004/38 with a broader interpretation of either primary provisions on citizenship or the Charter.[23]

Looking at the evolution of the case-law, we need to bear in mind that the more progressive rulings of the Court presented in Chapter 5 took place at a time when Treaty provisions demanded non-economic free movement rights for EU citizens, while secondary law giving effect thereto was adopted prior to the relevant Treaty amendments. Directive 2004/38 came into effect after the Treaty provisions established such rights, and hence expressed the clear will of the legislature to set limits on the social rights of EU migrants *qua* citizens. This limitation by the legislature, which has led to what Muir called a deconstitutionalisation process, brings to mind another comment made by scholars emphasizing the political role of the Court.[24]

According to Burley and Mattli, to enhance and preserve the power of the Court 'they [judges] must preserve and earn anew the presumed legitimacy of law by remaining roughly faithful to its canons'.[25] This means that the Court needs to stay within the boundaries of existing law. Mancini similarly suggested that as democracy advanced and politics (meaning EU politics) asserted its claims, judges should take a step back, otherwise they risked becoming 'so embroiled in the passions' that they could harm their independence.[26] Related to this, Terpan and Saurugger have suggested that since the 1990s, the Court has been exercising self-restraint in its adjudication, also hinting that in the relevant period there was no longer a permissive consensus on the part of the Member States.[27] Keeping this in mind, what should we make of the much more consistent approach of the Court on using the Charter as the benchmark of review in cases concerning TCN migrants? In these cases, I argue that we can see the Court being political by using the cases on TCN migration to promote the power and strength of the Charter and, thereby,

[23] Moritz Jesse and Daniel William Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress, Social Justice, Brexit and Other Challenges*, vol 16 (Brill Nijhoff 2020); Niamh Nic Shuibhne, 'What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano' (2016) 23 Maastricht Journal of European and Comparative Law 908.

[24] Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit' (2019) 2018 European Papers - A Journal on Law and Integration 1353.

[25] Burley and Mattli (n 18) 73.

[26] Mancini (n 14) 613.

[27] Terpan and Saurugger (n 20) 34.

to constitutionally perfect an integrated legal order. As Mancini has suggested, self-restraint does not mean strict constructionism in the interpretation of EU law.[28]

In this intricate mix of self-restraint and striving to achieve further integration, we see that just as the Court is deconstitutionalising the rights of EU migrants *qua* citizens, it is constitutionalising the rights of TCN migrants. When it comes to TCN migrants (either as family members of EU migrants or as individuals coming within the scope of EU law), the Court never misses a chance to use the Charter as a means to strengthen the protection afforded by the secondary legislation in place and, relatedly, to consolidate the position of the Charter in the constitutional architecture of the EU law. As Muir has suggested, the review of compliance of legislation with fundamental rights appears as a powerful integration technique.[29] This is because, as she argues 'by merging the content of legislation and autonomous concepts having primary law value, the Court circumscribes the possibility for EU political institutions to define the format and limits of EU fundamental rights policy through legislation.'[30] Muir's point was made in relation to other areas of EU law, but finds equal application in the case-law regarding rights of TCN migrants examined in Chapter 6, where the interpretation of the Court with an emphasis on the Charter is now channelled in proposals for revision of secondary legislation.[31]

Overall, the analysis carried out in this dissertation has shown how in the first period of aligned paths, economic aspirations drove legislative openness on migrants' rights. In the second period of political aspirations, the slow resurgence of growth matched with an anticipated enlargement of the EU (and the addition of working population) pointed to legislative closure and differentiation between EU and TCN migrants. In the third period of realisation, failed political aspirations marked the economic conditioning of the rights of EU migrants and the setup of an incoherent framework on the rights of TCN migrants. Throughout all these periods, the Commission has been proactive, while the Council has been reactive, or even destructive. This is so especially if we consider the way in which it has downgraded protection in all relevant secondary law on the rights of both EU and TCN migrants,

[28] ibid.

[29] Elise Muir, 'The Court of Justice: A Fundamental Rights Institution among Others' in Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 92.

[30] ibid 92-93.

[31] Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final, Explanatory memorandum, Article 12 with reference to Judgment of 25 November 2020, *INPS (Prestations familiales pour les titulaires d'un permis unique),* C-302/19, ECLI:EU:C:2020:957. See also Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) COM(2022)650 final.

and renegotiated International Agreements to limit the effects of EU law as construed by the Court. The Court, on the other hand, has been consistently reconstructing the rights of migrants. This reconstruction of migrants' rights takes place not in light of what the EU should become, but rather in light of what it currently is under the Treaty framework, complemented with a binding Charter, which provides sufficient basis to consolidate the constitutional architecture of EU law. The approach of all these institutions, as it derives from the past 70 years of EU migration law, is not without gaps and paradoxes. Potential ways of addressing these and framing an EU sustainable migration law are discussed in Section 7.3. Before going into that, the next section engages with the limitations that appear in the current system. Specifically, the analysis showed that the economic and social pillars of sustainability have historically affected the development of EU migration law as they were historically conveyed in the economic and social objectives of EU primary law. The pursuit of an EU sustainable migration also goes together with inherent limitations which are due to structural features of EU law and which are reflected also in the regulation of migration.

7.2 The inherent limits of an EU Sustainable Migration

The critical historical study conducted in this project shows that EU migration law was never meant to be inclusive, in the sense of linking migrants to a transnational legal order and creating a civic post-national membership.[32] Many authors have argued that EU migration law has been shaped on the exclusion of different people for different reasons.[33] This project contributes to the relevant literature by suggesting that another reason for exclusion is the economic function of the migrant for the EU development project. The EU legal order is shaped around the constant pursuit of growth and progress. In this regard, an EU sustainable migration is doomed to have little room for those who cannot contribute to the project of growth.

[32] Cf Yasemin Nuhoğlu Soysal, Limits of Citizenship: Migrants and Postnational Membership in Europe (University of Chicago 1994).

[33] Although different authors have pointed to different reasons. See Étienne Balibar, *Nous, citoyens d'Europe ?* (La Découverte 2001); Peo Hansen, 'Making Sense of a Neoliberal Fortress? : EU Migration Policy in the Nexus of Economy, Security and Rights' (Nordisk Samarbejdsråd for Kriminologi 2011); Steve Peers, 'Building Fortress Europe: The Development of EU Migration Law' (1998) 35 Common Market Law Review; Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) 31 Journal of Refugee Studies 216; Daniel Carter, 'Inclusion and Exclusion of Migrant Workers in the EU' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020); Moritz Jesse and Daniel Carter, 'The "Market Insider": Market-Citizenship and Economic Exclusion in the EU' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020).

The historical investigation conducted in the dissertation has made clear the effect of the primary law social and economic objectives on the attribution and/or limitation of rights of migrants and the embeddedness of the economic and social pillars of sustainability in EU migration law. To go further than demonstrating the embeddedness of these pillars in EU law, which is also reflected in Article 3(3) TEU, and to apply the system-theoretical understanding of sustainability discussed in Chapter 3 would entail three requirements that are at present absent. First, that migration law should respect the function of the EU legal system in delivering the promised objectives of growth and social progress. Second, that migration law should be shaped with a view to long-term considerations (both in relation to the fluctuations of the economy and to the position of migrants in a society) to be able to address external stress caused to the system. And finally, that migration law should be able to respect the structure of the legal system in terms of horizontal and vertical division of competences.

Connected to the system-theoretical understanding of sustainability, a substantive question arises related to the place of justice as part of sustainability. Chapter 3 suggested that the minimum core features of sustainability are its economic, social and environmental pillars, a long-term approach and inter- and intra-generational justice demands. Questions on justice and its relation to the EU have been picked up by scholarship and this contribution does not aim to examine them in depth.[34] Various scholars have engaged with the possibilities and limitations of imagining distributive justice in a transnational setting.[35] Among them, Williams has suggested that, while the EU discourse includes occasional references to solidarity, economic cohesion and social justice, there no political or constitutional obligation for the EU to coordinate any process of redistribution of resources within or outside its borders.[36] Leaving aside the issue of long-term approaches to law-making which will be discussed later, and drawing on different theoretical contributions, this section shows how questions of justice and social and economic objectives appear

[34] See the contributions in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[35] Daniel Augenstein, 'We the People: EU Justice as Politics' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) with reference to Damian Chalmers, 'Damian Chalmers: Kinship, Markets, and Justice in Europe' in Grainne De Burca, Dimitry Kochenov and Andrew Trevor Williams (eds), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair* (2013); Richard Bellamy, 'Political Justice for an Ever Closer Union of European Peoples' in Grainne De Burca, Dimitry Kochenov and Andrew Trevor Williams (eds), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair* (2013); John Rawls, *Political Liberalism* (Columbia University Press 1993); Philip Pettit, 'A Republican Law of Peoples' (2010) 9 European Journal of Political Theory 70.

[36] Andrew T Williams, 'The Problem(s) of Justice in the European Union' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 39.

in the current form of EU migration law. Section 7.2.1 next presents the limitations that relate to the EU's pursuit of growth. Following this, Section 7.2.2 outlines the limits that arise from the way EU law attributes rights to migrants. Finally, Section 7.2.3 emphasises the limits that exist from the position of migration law in the EU legal architecture.

7.2.1 Politics of growth

The investigation carried out in Chapters 4 to 6 highlighted the close connection between the extent to which rights have been attributed to migrants by the EU and the existence of growth. Even though subtly changed in the course of the Treaty revisions, the major emphasis of the EU legal order is on achieving growth, and hence on the economic pillar of sustainability. This emphasis of the EU on growth has been identified by Somek as having the implication of shifting the discussion away from the political control of the economy.[37] The claim to inclusion through rights, he argues, does not extend to political concerns over the basic distributive structures, it rather takes them for granted.[38]

Similarly to Somek, Wilkinson has transposed Streek's dilemma between market justice (in the form of inclusion via equal opportunities) and social justice (in the form of redistribution) to the EU, suggesting that

> This ideological and institutional neutering of democratic and market logics was complemented by a 'golden age' of sustained economic growth, which facilitated the (temporary) satisfaction of the demands of both capital and labour, dramatically reducing levels of socio-economic inequality. The precise contribution made by European integration to the peace and prosperity of the 'Trente Glorieuses' is contested. What is not contested is that from the mid-1970s, coinciding with an end to easy economic growth, the 'long downturn', equilibrium between capitalism and democracy has become more difficult to maintain.[39]

To connect Wilkinson's comment to my analysis, we have seen how the only years in which the Commission could, in one way or another, make the case for a harmonized migration system that would provide for equal treatment of EU and

[37] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 European Law Journal 711, 720.

[38] Alexander Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 308.

[39] Michael A Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 121, reference omitted; Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Patrick Camiller and David Fernbach trs, 2nd edn, Verso 2017).

TCN migrants was before the 1970s oil crisis. The economic circumstances from the oil crisis to this day, and the extension of the EU to cover very diverse economies, make the slightest consideration of ever returning to the post-war growth years impossible. Wilkinson's suggestion was put forward to support the contention that questions of justice in the EU should be resolved by adding political justice to the debate; this would allow democratic space to question the preference for market justice embedded in the EU system.[40] In addition to his suggestion, which is supported by other scholars, I would also add that we should reconsider whether the EU project can deliver growth to begin with.[41]

The limited potential of considering the attribution of rights to migrants at times when there is no growth, and the limited potential of reconsidering growth as the ultimate EU law objective, point to the inherent limitations of EU migration law.[42] With the current emphasis on growth, it is hardly imaginable that EU migration law has any potential to change. In principle, there seems to be no problem in how the Commission, the Parliament and the Court understand the necessity of granting rights to migrants as a form of promoting the social objectives of the project and perfecting the constitutional structure of the EU legal order. However, as the analysis showed, the attribution of rights stops when growth is threatened (not by migrant workers, but by broader failures of the economic system like the oil crisis in the 1970s and the financial crisis of 2008), with implications for both EU and TCN migrants.[43]

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[40] Wilkinson (n 39) 133–136.

[41] See Augenstein (n 35); Agustín José Menéndez, 'Whose Justice? Which Europe?.' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015); Floris de Witte, 'Emancipation Through Law?' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law : Rights, Roles, Identities* (Hart Publishing 2016). The emphasis on growth is an inherent part of sustainable development. Cf Julian Reid, 'Interrogating the Neoliberal Biopolitics of the Sustainable Development-Resilience Nexus' (2013) 7 International Political Sociology 353; For critique and alternative conceptions of sustainability see Ashish Kothari and others (eds), *Pluriverse: A Post-Development Dictionary* (Tulika Books 2019).

[42] Gareth Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 259 discusses how the very choice is 'constitutionally denied'.

[43] See Daniel Thym, 'When Union Citizens Turn into Illegal Migrants: The Dano Case' (2015) 40 European Law Review 249; Karin de Vries, 'The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in European Union Law?' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017); analysis in Chapter 6.

7.2.2 Rights as Equal Opportunities

The second limitation of EU migration law relates to the conception of individual rights under EU law.[44] The analysis conducted in this historical study proves that, under EU law, there is an intimate link behind the attribution of rights to migrants and the effects of such rights on growth. Linking rights to broader questions of justice, Somek has suggested that in a transnational market setting, the distribution of resources becomes irrelevant, and the relative treatment of individuals and equal opportunities are afforded central place.[45] According to Somek, in the EU, the only distributive mechanism of relevance is the market, and it has a justice-disabling effect.[46] Looking at the market to correct inequalities, the concern is not on redistribution, but rather on equal access to opportunities.[47] In the EU context, questions of justice become questions of rights, with an emphasis specifically on non-discrimination.[48] In such a set-up, human rights do not need to be followed by strong legislative measures and can be promoted judicially by courts. The debate shifts from questions of justice to questions of inclusion in the form of 'the elimination of arbitrary factors that prevent voluntary access by those who meet non-arbitrary conditions'.[49]

The emphasis on inclusion in the form of rights attribution, as suggested by Somek, is apparent in the development of EU migration law. This development has been based on the attribution of mobility and equal treatment rights to people as a means to achieve social progress. Given this, the maximum level of inclusion of migrants under EU law can be achieved by attributing rights to those who do not negatively impact growth (by being self-sufficient and not having recourse to the social assistance system of Member States), but making the case, legal or political, for demanding inclusion (in the form of residence rights and corresponding social rights) for TCN migrants would be challenging.

As Somek suggested, migrant workers' geographic movement attests 'the inclusive growth of capitalism'.[50] At the same time, people who would like to move to be part of this inclusive growth are faced with what Somek calls the most elementary

[44] See also Augenstein (n 35) 164.

[45] Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion' (n 37) 724.

[46] ibid 711, 716.

[47] ibid.

[48] See also Williams (n 36) 33 who suggests that reliance on human rights cannot resolve substantive justice issues; Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion' (n 37) 720; Also Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' (n 38) 297.

[49] Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion' (n 37) 718.

[50] ibid 725.

obstacle, namely lack of access to a society to begin with.[51] In the current form of EU migration law, it would be extremely challenging to make the case for a right to entry or residence of economically inactive TCN migrants. Such a case could only be made in relation to migrants who have already contributed to the project of growth (like long-term residents and former workers). The difficulty to argue for rights of economically inactive TCN migrants derives from the related failure of EU law to create such rights for nationals of states that are already part of the EU project of growth. No residence rights are attributed to those who become a burden, as is clear both from the text of Directive 2004/38 and from the case-law examined in Chapter 6. EU migrants who cannot or have not contributed to the EU project of growth do not come within the scope of EU law. It is important to understand that whatever EU migration law will look like, it will always exclude those who cannot contribute – that is, unless the core parts of this legal system are amended.

7.2.3 EU Institutional Structure and Conferral

A final limitation of an EU sustainable migration comes from the institutional structure of the EU and the conferral of powers in this legal order. The analysis showed that only during the first period, examined in Chapter 4, did economic and social objectives drive a positive development of the EU legal system. The similar development levels of the Member States and their common need for migration led to a common approach on how to best achieve economic and social objectives. After that period, unequal development levels and repeated economic challenges have turned Member States to considering how to best achieve economic and social objectives in closed national communities. The issue here is not (or is not mainly) the balancing of economic and social objectives, but rather the Member States' understanding of how their national objectives relate to the EU ones.[52]

On a similar note, Craig attributed the issue of institutional failure during the migration crisis not to EU institutional inaction, but rather on the impossibility to get Member States to agree on the different reform proposals issued by the Commission.[53] Institutional failure, he argued, could be traced to the inability of Member States to perceive the question of refugee protection as a collective action problem that should be addressed by the EU.[54] The same holds true in the area of regular migration, as the fundamental problem behind achieving an EU sustainable

[51] ibid 722.

[52] See Niamh Nic Shuibhne, 'Editorial: Is It Time to Worry Yet?' (2009) 34 European Law Review 521 who had mentioned already in 2009 that 'political and economic concerns seem increasingly disconnected from the framework and momentum of legal integration'.

[53] Paul Craig, 'Institutions, Power, and Institutional Balance' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 85.

[54] ibid.

migration lies not so much in the efforts for reform, as in the inability of Member States to perceive migration as an area of collective concern. The Commission has time and again brought consistent proposals on the negotiation table that would allow the regulation of migration to serve the economic and social objectives of the EU legal order in view of long-term needs of national economies.[55] The inability to garner support for such proposals is connected both to the shared competence of the EU in the area of migration and to the lack of social legitimacy of the EU in the eyes of national electorates.[56]

The shared competence of the EU on migration means that Member States can eventually admit the labour they need to keep their economies running via national migration schemes. This allows them to individually cover labour demands and to achieve the needed growth without regard to growth on the collective level. The existence of such national frameworks, which do not guarantee sufficient rights to migrants, creates barriers to the development at EU level. This is because migrants who are already resident in Member States cannot move without restrictions and fill labour demands but are rather subject to administrative barriers. Where a position could be filled internally by the movement of a person from one Member State to another, this is now subject to barriers and delays that make it no different from entering the EU for the first time. At the same time, the pursuit of growth at state level is not always matched with considerations of promoting the social rights of migrants under national laws.

Regarding social legitimacy, the balancing of economic growth and social objectives has led to a situation where EU migrants have no claim to residence or social protection if they do not contribute to the EU economy. In addition to this, EU nationals who have not left their Member State can be subject to reverse discrimination and they are excluded from the scope of EU law. These situations are the outcome of a very specific balancing of economic and social objectives that lie behind the pursuit of sustainable migration applicable in the free movement framework. If this free movement framework was indeed discussed and understood as a sustainable migration framework, it would not lead to lack of social legitimacy. However, this framework is linked to and part of a completely different institutional discourse and aspiration of creating a political Union for the people of Europe.

Somek has suggested that the European support of freedom of choice (in the form of economic rights) was accompanied by 'a vague Durkheimian hope' that it would

[55] Cf Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member states, COM(1997)387 final; Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001)0386 final [2001] OJ C 332E/248.

[56] For an examination of the institutional issues linked to the EU's social legitimacy and law-making see Davies (n 42).

create solidarity on the basis of market transactions.[57] The lived experience of those excluded from EU law has revealed the failure to create such transnational solidarity; it has fractured the social legitimacy of the EU and shaped space for Eurosceptic tendencies.[58] Like Somek, Neyer has also pointed out that the legal and institutional set-up of the EU is made for supporting liberalisation rather than social integration.[59] This set-up, paired with the fragmentation of political authority of the EU and the disempowerment of political competence at national level, means, according to Neyer, that EU politics are usually driven by national concerns of Member States, rather than addressing pan-European problems.[60]

In sum, we see the specific limits to how migration law could be sustainable for the EU. These limits stem from the emphasis on growth as the driving force of rights (and the limitation of rights when they can no longer be instrumental to sustaining growth), the emphasis on rights geared towards achieving growth (versus broader concerns with social justice), and the structure of the EU legal and political system. Nor are these limits are peculiar to migration: they relate to the political, economic, and institutional set-up of the EU. The question that naturally arises is whether there is a possibility to overcome some of these limitations – at least partially – by considering how the rights of TCN migrants might develop to fit the frame of sustainable migration introduced in Chapter 2 and implicitly applicable in the case of EU migrants.

7.3 The Realistic Potential of an EU Sustainable Migration

A change in the Treaty Framework is nowhere on the horizon. The conferral of powers and the legal bases for regulating migration in the EU are clear. The previous section discussed three specific limitations of EU migration law and of the broader EU architecture. Despite these limitations, there is still some room for evolution both in secondary law, and in the Court's interpretation to shape migration law in a

[57] Alexander Somek, 'Alienation, Despair and Social Freedom' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law : Rights, Roles, Identities* (Hart Publishing 2016) 53.

[58] See Niamh Nic Shuibhne, 'Editorial: What Is "Europe" and Who Is It For?' (2012) 37 European Law Review 673; Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937 suggesting that the national distortions of EU law turn back and distort EU law; See also Davies (n 42) who attributes this to the characteristics of technical law-making which pre-empts contestation.

[59] Neyer (n 6) 26.

[60] ibid 31.

way that is sustainable for the EU legal order. In the previous section I discussed how sustainability would demand a migration law that promotes the function of the EU system by delivering growth and social progress, that is shaped by long-term considerations (both in relation the fluctuations of the economy and the position of migrants in a society) to be able to address external stress caused to the system, and that respects the structure of the legal system in terms of division of competences.

I will not make any suggestions on issues related to the division of competences, as this division is constitutionally settled and not subject to change. I will rather offer some practical suggestions on law-making and interpretation that could promote the economic and social objectives of the EU under long-term considerations and imbue the current system with certain elements of justice, drawing on Douglas-Scott.

Douglas-Scott, like other scholars, has acknowledged the many challenges the EU presents for justice.[61] She did not argue for a particular understanding of justice in the EU, rather she held that – at the time of writing – it was unrealistic to expect the EU to offer and apply an overarching substantive theory of justice.[62] However, she suggested that there is a consensus for the realization of a 'thin' notion of justice in the EU, which she called Critical Legal Justice, and which should be applied next to the protection of human rights.[63] Critical Legal justice does not require actual, substantive laws but rather structural components which involve justification, attention to the detail of law-making and transparency.[64] This form of justice is similar to Neyer's account of procedural justice in supranational systems and should apply to both law-making and courts' interpretation.[65] Pairing human rights with Critical Legal Justice, Douglas-Scott has suggested that these should be seen more as a legal toolbox that can offer mechanisms to avoid injustice, rather than an ideal, transcendental theory of justice.[66] At the same time, there is sufficient consensus in legal theory that these are elements crucial to the development of the EU legal order.[67] Against this backdrop, the following section will consider how the current legal system could develop in such a way as to make migration law more sustainable

[61] Sionaidh Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 51.

[62] ibid 57.

[63] ibid 59.

[64] ibid.

[65] Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press 2012).

[66] Douglas-Scott (n 61) 60 connecting her approach to Amartya Sen, *The Idea of Justice* (Penguin 2010).

[67] Douglas-Scott (n 61); Williams (n 36); Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' (n 38).

for the EU legal system, while Section 7.3.2 will offer suggestions on the interpretative approach of the Court.

7.3.1 Practical Suggestions on Law-making

Despite the inherent limitations of an EU sustainable migration for the reasons suggested earlier, there is still room for changes that could extend and consolidate the rights of TCN migrants in a way that is better aligned to the economic and social pillars of sustainability. The first necessary action would be to amend secondary law so that it can better serve both economic and social objectives in relation to long-term considerations. Account should be taken of the long-term economic fluctuations in the Member States and, relatedly, the fluctuations in labour demand that need to be effectively addressed by migration, as well as the place of migrants in future EU societies.

The most far-reaching change to align migration with the policy objectives of the legal order would be the horizontal regulation of admission for all categories of migrants. That would entail a single instrument to regulate the conditions of entry and stay for all migrants and the recasting of the sectoral regulation currently in place. The Commission unsuccessfully made the case for such a regulation of migration twice in the past.[68] Any resurrection of an attempt to horizontally regulate migration would be unlikely, as attested by the more recent legislative initiatives of the Commission.[69]

Removing this first proposal for change from the table, other more limited changes could have far-reaching results. One of these would be to demand the abolition of parallel national schemes regarding long-term residents and highly skilled workers, as well as more favourable conditions for mobility of these categories of migrants. Parallel national schemes allow Member States to use national law to cover their domestic labour needs, while at the same time nationals who draw rights from these schemes cannot enjoy EU law rights. Most importantly, they cannot enjoy cross-border mobility under favourable conditions, and, in the case of highly skilled workers, they cannot enjoy a permanent residence status under such more favourable conditions. The Commission has been arguing for mobility of legally resident migrants as a means to cover fluctuations in national labour markets for the

[68] Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member states, COM(1997)387 final; Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001)0386 final [2001] OJ C 332E/248.

[69] See Attracting skills and talent to the EU COM(2022)657 final and Fitness Check on EU Legislation on legal migration SWD(2019)1055 and Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final

longest time. It makes no sense to simultaneously allow parallel schemes which do not provide for mobility, and to submit mobility to the strict requirements still in place even after the revision of the Blue Card Directive.[70]

In general, mobility rights for all legally resident migrants make sense in terms of aligning migration to the economic objectives of the EU, and such an amendment would not go further than primary law provisions.[71] It is aligned with the provision of Article 79(1) TFEU as it would lead to more efficient management of flows. Migrants who are already resident in one Member State would be able to move and establish residence in another Member State. In doing so, labour demands could be covered at a European level, and there would be no need to resort to new recruitment of migrants when there is labour force available in the Member States. Such mobility rights would also give substance to Article 45(2) of the Charter, which provides that the EU can adopt measures to regulate free movement for TCNs. One can only hope that the suggested revision of the Long-term Residents Directive would be a first step.[72]

Mobility of all legally resident migrants would also be aligned with solidarity demanded under Article 80 TFEU. In 1961, when the first framework of free movement was introduced, with significant clauses limiting the rights of EU migrants, Lionello Levi Sandri suggested that the rights attributed to EU migrants derived from the 'new spirit of European solidarity'.[73] It was presented as a concession made by the Member States with a view to creating a labour market which would ensure the best use of the Community's human potential.[74] It is easy to see how true and effective mobility rights for TCN migrants resident in the EU

[70] Cf Tesseltje de Lange and Zvezda Vankova, 'The Recast EU Blue Card Directive: Towards a Level Playing Field to Attract Highly Qualified Migrant Talent to Work in the EU?' (2022) 24 European Journal of Migration and Law 489.

[71] Cf Moritz Jesse, 'The "Integration" of Economic Immigrants: Lessons to Be Learnt from Free Movement of Persons on the EU's Internal Market, Journal of Immigration, Asylum and Nationality Law' (2023) 37 Journal of Immigration, Asylum and National Law 31. See, however, Jean-Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 22 European Journal of Migration and Law 198, who argues against common admission criteria and the abolition of parallel schemes, and instead suggests enhanced social rights and particularly mobility rights for third-country nationals.

[72] Proposal for revision of Long-term residents Directive COM(2022)650 final 4, Explanatory memorandum Articles 16-18. See also Council Document, Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) - Presidency compromise text, ST 10528/1/23 REV 1, Brussels 21 June 2023 already limiting some elements of the Commission proposal.

[73] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1961) 66.

[74] ibid.

could fit with interstate solidarity based on the promotion of the economic objectives of this legal order. This time the EU's human potential would extend to cover not only EU migrants but also TCN migrants resident in the Member States.

The framework of protection of rights of TCNs and the differentiation it introduces based on how much a migrant is needed should also be revisited. It can hardly be imagined that fair treatment to TCNs, as demanded by Article 79(1) TFEU, implies differentiated attribution of rights based on how crucial a migrant is for the EU economy. Even though, as stated earlier, the EU legal system is grounded on the contribution of the individual as the basis of rights, this contribution is based on the work performed by the individual, and not on how urgently such work is needed by the EU economy. The model on which EU law furnishes rights to migrants is based on inclusion in the form of absence of discrimination on grounds that cannot be justified. The attribution of more rights to migrants who are more needed is both arbitrary and out of line with a long-term planning around migration law. We might know what type of migrants the EU economy needs today, but we cannot predict what type of migrants will be most needed in the future. In this context, the proposed revision of the Single Permit Directive is welcome, but more work needs to be done to reach the extensive scope of equal treatment and family reunification rights already enjoyed by highly skilled workers and researchers.[75]

Arguing for the extension of social rights of TCNs, however, is more challenging. If we look at EU migrants, the Court has acknowledged that financial solidarity among Member States dictates the attribution of social rights to them.[76] By engaging in a common project of growth, Member States have accepted that they may have to incur the costs for an EU migrant because of the economic benefits they collectively derive from the EU project. After all, a host state's citizens can migrate to another Member State, too, and will enjoy benefits there. This case for financial solidarity, no matter how strong, has not gone very far since the enlargement of the EU. If anything, the diverse nature of Member States' economies set the basis for limiting social rights of EU migrants to ensure that the strong welfare states of the

[75] Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final; See however Council Document, Proposal for a Directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) - General approach, Document ST 10464 2023 INIT, Brussels, 13 June 2023. Tesseltje de Lange, 'Recasting the Single Permit Directive: furthering the protection of migrants at work in the EU?' (2022) EU Migration Law Blog, 13 July 2022.

[76] It was exemplified in the extensive attribution of rights in Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458 but I would say that such a conception behind the attribution of rights existed already in Judgment of 15 October 1969, *Württembergische Milchverwertung Südmilch AG v Ugliola*, 15/69, ECLI:EU:C:1969:46.

West and North would not have to carry the burden for the migrants from the South and East. Regardless of whether this claim had any factual basis, this narrative redefined the degree to which EU states are ready to recognize a full extension of social rights even to the nationals of Member States that are already part of the collective project of growth.[77] It is in this limitation of social rights due to economic considerations that we can see a model of sustainable migration perfected in the free movement framework through Directive 2004/38.

The attribution of social rights to TCN migrants can be based on their contribution to the project of growth. However, an extension of social rights in a way comparable to those of EU migrants is definitely harder to justify. That is because the states of origin of TCN migrants are not directly involved in the EU project of growth. In Chapter 4, I analysed the extension of social rights to migrants originating from states associated with the EU and engaged in trade or economic cooperation. The interdependence of their economies created the basis for attribution of rights. However, after the setting in place of an autonomous EU migration policy that attributes rights to TCNs based on their residence, such clauses have disappeared. One might also say that they are no longer needed. How would such an inclusion be justified? In this case, it could only take place by a commitment to advancing the social objectives of the EU project in line with the approach followed by the Court, and with a stronger emphasis on human rights as a tool not only for progress, but also for integration of the migrant in the national community under a long-term view of the place migrants will occupy in future EU societies.

7.3.2 Practical Suggestions on Judicial Interpretation

The suggestion made earlier to follow the road paved by the Court should be qualified. Throughout this historical study we have seen how secondary law has been adopted as means to achieve the economic objectives of the EU. At the same time, the Court's case-law has consistently promoted a constitutional structure for the EU. This led to the attribution of rights to individuals by placing them at the centre of this legal order.[78] In more recent years, this has led to an attribution or

[77] Daniel Thym (ed), *Questioning EU Citizenship : Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017); Stamatia Devetzi, 'EU Citizens, Residence Rights and Solidarity in the Post-Dano/Alimanovic Era in Germany' (2019) 21 European Journal of Migration and Law 338; Elspeth Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in Elspeth Guild, Cristina Gortázar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014); Paul Minderhoud, 'Back to the Roots? No Access to Social Assistance for Union Citizens Who Are Economically Inactive' in Daniel Thym (ed), *Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017); Sandra Mantu and Paul Minderhoud, 'Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens' (2019) 21 European Journal of Migration and Law 313.

[78] See Chapter 2 for closer analysis.

extension of rights to TCN migrants through a continued emphasis on the Charter as a means of judicial review of national law. While the use of the Charter as a means of review of national law is a positive outcome, the Court's approach has not been coherent as to how it uses the Charter in cases related to EU and TCN migrants.

In the case of Directive 2004/38, the Court has acknowledged the protection of public finances as one of the objectives of the Directive, and as the objective of more specific provisions of this Directive.[79] Even though it has explicitly done so, it has also mentioned this economic objective as a legitimate interest of Member States that should be interpreted strictly and in line with the principle of proportionality. The Court has followed the same approach in relation to the provision referring to stable/sufficient resources as a condition for family reunification or acquisition of the long-term resident status. In all the relevant cases, it acknowledged that provisions of secondary law served an economic objective. Then it referred to the national laws transposing the relevant provisions as protecting the legitimate interests of Member States to safeguard their national economies, and demanding a strict interpretation, because they depart from an EU law right.

A similar and even more confusing approach has been followed by the Court in relation to social objectives. It has acknowledged that the Family Reunification Directive and the Long-term Residents Directive promote social objectives like social cohesion and integration. In parallel, these Directives include provisions that allow Member States to set integration conditions for the attribution of the respective rights. In such cases, the Court refers to the legitimate interests of Member States to promote integration in their national communities, and it suggests that the relevant national law should be interpreted strictly in order not to jeopardise the EU law rights created by the Directives. This incoherence can be explained in two ways, presented below. The Court should be clear on which of the two interpretative lines it follows in order to restore coherence and legal clarity in its interpretation.

A first option would be to acknowledge that secondary law (on EU migrants) is inconsistent and fails to meet the intended objectives (or fails to balance between the different objectives), and to conduct a review in light of the Charter. The Court has consistently failed to assess the compliance of Directive 2004/38 with the Charter even when paradoxical interpretations are the result of such failure.[80] Reviewing the choice of the EU legislature for compliance with the Charter would align with scholarly claims on the construction of EU law in a federal-like manner, making Charter rights an integral part of the EU citizenship.[81] It would also restore

[79] See Chapter 6, Section 6.2.2.

[80] The paradox is explained in detail in Chapter 6, Section 6.4.2.

[81] See Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 945; Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); JHH Weiler, 'Federalism Without

the inconsistencies identified in the literature on the position of fundamental rights in the EU constitutional architecture and their relation to EU citizens' rights.[82] At the same time, it would clarify that a citizen-foreigner divide exists not only in discourse, but also in the treatment EU law reserves for EU citizens.[83] From then onwards, the logic of the Court behind the application of the Charter would become more coherent, albeit not necessarily more protective for TCN migrants.

An alternative solution would be to assume, even though the Court does not say so, that there is a difference between the collective objective served at EU level (protection of collective EU economy, promotion of integration in a supranational European space), and the more specific legitimate interests of Member States to pursue their national economic and social objectives.[84] By referring to a distinct European objective the Court could capture all the different forces shaping EU law and put forward a specific approach to migration. Such an approach would be based on a uniform understanding of the position of migrants in EU law and on their relation to the EU and national legal orders. Moreover, it would be based on understanding the EU as a 'functionally oriented transnational polity'.[85] This approach would also fit with the argument put forward by Groussot and Zemskova on the resilience of fundamental rights as a tool for EU integration connected to the

Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press); Cristoph Schönberger, 'European Citizenship as Federal Citizenship - Some Citizenship Lessons of Comparative Federalism' (2007) 19 European Public Law Organization's - EPLO Publications. See however Koen Lenaerts and José A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 770-775, who argue that such an approach would upset the constitutional balance set out in the Treaties.

[82] Sara Iglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in Daniel Thym (ed), *Questioning EU citizenship: judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

[83] Thus, confirming the relevant critiques on racialized or other types of exclusion Balibar (n 33); Spijkerboer (n 33).

[84] Cf Niamh Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 34 European Law Review 230, 232.

[85] Kaarlo Tuori, 'EU and Member State Constitutionalism: Complementing and Conflicting' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019) 278. Although Tuori's position on sectoral constitutions – economic, social and security – cannot find a clear-cut application into the case of migration, see Karlo Tuori, *European Constitutionalism* (Cambridge University Press 2015).

effectiveness EU law, and the objective of achieving an ever-closer Union in unity and diversity.[86]

Closer to the functional constitutional theory suggested by Isiksel,[87] the Court could clarify how it positions the migrant (both EU and TCN) in the orientation of this legal order towards the pursuit of growth. Looking at EU citizenship and migration law from the perspective of functional constitutionalism, Isiksel has suggested that 'While supranational free movement law mitigates the exclusionary framing of national political communities, it has helped to fashion a new, equally bounded legal space by excluding third-country nationals from its scope.'[88] Contrary to her suggestion, the analysis carried out in this work has demonstrated that the supranational framework is inclusive of third-country nationals. However, the framework is geared towards the inclusion of those who contribute to growth, while excluding from its scope those EU nationals who are not contributing to this objective. The extensive protection of TCN migrants and the limited protection of EU migrants who do not fulfil at the very least self-sufficiency requirements could align with a functional constitutionalist understanding and the furnishing of a bounded legal order that excludes those who cannot promote its objectives.

In any case, shaping migration law that is sustainable for the EU legal system is bound to meet resistance, due the different development levels of the Member States, their different needs in migrant labour for economic gains, and the different ideological approaches to migration highlighted by populist trends in the past decade. In this context, the problem-solving capacity of positive integration at EU level could be stymied by non-negotiable conflicts between national and supranational actors.[89] The Court has the potential to reconstruct and consolidate the rights of migrants. The direction of its rulings during the period reviewed in Chapter 6 point to this conclusion. My only addition would be that more clarity and coherence would be required when doing so, to also advance legal certainty and to thereby promote justice as suggested by Douglas-Scott.[90] This reconstruction would continue on the path of rights as equal opportunities presented earlier with the corresponding limitations for broader social justice demands. It might not be the

[86] Xavier Groussot and Anna Zemskova, 'The Resilience of Rights and European Integration' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019).

[87] Turkuler Isiksel, Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State (Oxford University Press 2016).

[88] ibid 159.

[89] By analogy with Scharpf's analysis in economic policy, Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 11–13.

[90] Legal certainty has been restored in the case of EU migrants' social rights as shown by Jesse and Carter (n 23).

ideal option, but it is the only realistic one, considering how the EU legal system is shaped.

7.4 Future Research Avenues

The project set out to investigate how the economic and social pillars of sustainability, as historically conveyed in the economic and social objectives of the EU legal order, have shaped migrant's rights in EU law. Starting from the inconclusive appearance of sustainable migration as a new objective for EU migration law and by conducting a critical legal historical study, I have demonstrated how the economic and social pillars of sustainability are embedded in the establishment and evolution of EU migration law. In addition my analysis showed the inherent limitations and potentials of the pursuit of an EU sustainable migration for migrants' rights under EU law. The investigation conducted in this project suggests directions for more extensive research in the concept of sustainability and EU migration law.

For example, theorization is needed on how environmental considerations could relate to EU migration law. After all, Articles 11 and 37 of the Charter demand the incorporation of environmental considerations in all EU policies. There is nothing to exclude the incorporation of environmental considerations in EU migration law. Research on this matter, that is the incorporation of environmental considerations has taken place in relation to EU competition law, as discussed in Chapter 3. Theoretical contributions have already engaged with the relation between justice, the environment and EU law.[91] Legal scholars have also examined climate-induced migration and its interplay with refugee law.[92] There is value in closer examination of how these different research tracks could merge and affect EU migration law.

In addition, this research did not examine the areas of asylum law, border controls and the relation of migration to external action in the new millennium. On asylum law, researchers could turn to questions of sustainability, interrogate its value and investigate how this fuzzy concept interacts with international human rights obligations.[93] Regarding border controls, migration law that is sustainable for the

[91] Jane Holder, 'An Idea of Ecological Justice in the EU' in Dimitry Kochenov, Andrew T Williams and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015); Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999).

[92] Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020); Simon Behrman and Avidan Kent (eds), *Climate Refugees: Global, Local and Critical Approaches* (Cambridge University Press 2022).

[93] A starting point could be to look at Guild and assess to what extent her claims could relate by analogy to refugee law, Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular

EU can hardly legitimize the conditions of extreme border violence, pushbacks and lack of accountability which is the current form of this system.[94] Research is needed, however, to conceptualize what type of legal demands the concept of sustainable migration places on the area of border management.

Finally, it would be interesting to dig deeper into the EU external action framework and its relation to sustainability. By now there is an internal dimension of EU migration law, whereby the EU grants rights to migrants resident in the Member States under secondary law, and an external dimension where the EU continues its cooperation on migration with third countries primarily based on soft law. This takes place against the backdrop of a discourse oscillating between the development of the third countries and their function as buffers to ensure that migrants are contained in states of origin and transit and do not reach the EU. In this respect, research would be valuable in exposing how the sustainable development obligations of the EU towards third countries relate to the rights of migrants who have not reached the EU.

Overall, I hope that the investigation concluded in this dissertation will inspire a closer interrogation of the concept of sustainability and its interplay with different EU legal norms. Instead of unquestionably following EU institutional discourse and integrating new policy concepts into legal writing, there is value in focusing intellectual inquiries on the extant legal framework and questioning whether there is anything new under the sun. At the same time the close examination of the economic and social pillars of sustainability and their relation to migration can prove crucial for the extension of migrants' rights. Maintaining the focus on migration for economic growth can only get us so far. It is particularly important to extend the social and mobility rights of TCN migrants if we are to achieve socially sustainable societies.

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[94] See Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); also Violeta Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law' in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research handbook on EU migration and asylum law.* (Edward Elgar Publishing 2022).

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Sustainability and EU Migration Law

Sustainable migration is the new objective of EU migration law, a term whose meaning and legal implications are unclear. Through a critical historical study of different areas of EU migration law, this book explores whether and how the past can guide the way for a contemporary understanding of sustainable migration, and it reveals the potentials and limits of this novel objective.

Alezini Loxa is a PhD candidate at Lund University and a Greek lawyer holding an LL.B. and an LL.M from the National and Kapodistrian University of Athens. To conclude this doctoral dissertation, which reconstructs the history of EU migration law, Alezini examined diverse legal sources from 1951 to this day and investigated archival material at the Historical Archives of the EU.

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