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**European Citizenship and EU Immigration:  
A Democratic Bridge between the Third Country Nationals' Right to Belong and the  
Member States' Power to Exclude\***

**Forthcoming, European Law Journal, vol. 22, Issue 4 (2016)**

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**Abstract**

European citizenship entails, for EU nationals, a right to belong across borders. This article questions the implications of this latter right for the status of third country nationals in the EU. It contributes to address a gap between the literature on European citizenship and the literature on the admission and civic integration of third country nationals. The article begins by tracing a disconnect in the rules and narratives on admission and naturalisation of third country nationals in the EU. This is a disconnect between logics of individual rights protection, which European citizenship infiltrates, and logics of state sovereignty and governmental discretion, which otherwise dominate relevant rules and narratives. The article relies on the political science *literature on mutual recognition and democracy to reinterpret European citizenship's norm* of belonging across borders so as to reconcile the disconnect. Ultimately, the theoretical bridge that the article draws between citizenship narratives and immigration narratives offers a novel perspective on the tension between liberal values and integration discourses in Europe. It also sets out a possible frame to begin rethinking rules of engagement and cooperation in the context of the EU common immigration policy.

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\* All websites referred in the paper were last checked on May 25th, 2016.

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## I Introduction

In January 2015, Lassana Bathily saved a number of people in a French supermarket from death at the hands of ruthless terrorists. As a reward, in March 2015 he was awarded French citizenship.<sup>1</sup> Rani Pushpa, an Indian woman, failed to learn Italian in 10 years of Italian residence. As a sanction, in March 2015, she was prevented from taking the oath of Italian citizenship.<sup>2</sup> In June 2015, the beaches around Ventimiglia on the border between Italy and France portrayed a disheartening scenario: bathing European citizens looking for a tan, and homeless third country asylum seekers, hoping to cross into France despite the French police pushbacks, and meanwhile looking for shelter.<sup>3</sup>

These disparate stories point in a common direction. Inclusion of a third country national (TCN) as a citizen, resident, or just temporary visitor in a EU Member State depends in good part on governmental discretion in deciding on inclusion and exclusion. Yet belonging in a EU Member State at its fullest entails a supranational citizenship, which limits governmental discretion in a number of ways.

This article focuses precisely on how European citizenship affects, in this sense, the rules of the immigration game. It questions how European citizenship rules matter for the status and rights of TCNs in the EU, and how European citizenship's underlying rationales may contribute to rethink rules of engagement and of cooperation in the context of a common European immigration policy.

The quest may seem ill-defined, at a time when European citizenship's relevance to Europe and to the project of integration is under threat from several perspectives. First, the right of free movement in which European citizenship finds most concrete expression is in practice relevant to few, but has drawn the attention of many in Euro-skeptical political agendas, and has ultimately become exposed to judicial backlash.<sup>4</sup> Second, European citizenship's political irrelevance becomes egregious at a time when Europe is confronted with harsh expressions of national voice and tangible threats of exit. Finally, European citizenship's rights-protection legacy appears nullified by the dehumanizing experience of several TCNs at Europe's frontiers.

It is precisely the danger of rushed demise, under the influence of these perspectives, of one of the richest conceptual achievements of European integration that makes this article's investigation pressing. The article argues that European citizenship harbors an important theoretical *acquis* that is worth exploring further. It endeavors to spell out part of this *acquis*, by focusing on its relevance for the EU immigration regime. It begins by tracing a disconnect throughout rules, narratives, and rationales resulting, respectively, of European citizenship's engagement with TCNs, and of the EU common immigration policy and the Member States' immigration and nationality regimes. This is a disconnect between logics of individual rights protection, which European citizenship infiltrates into the domain of immigration and nationality, and logics of state interest and discretion which otherwise prevail in the latter

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<sup>1</sup> See <<http://mobile.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Lassana-Bathily-est-devenu-francais>>..

<sup>2</sup> See <[http://www.huffingtonpost.it/2015/03/01/sindaco-nega-cittadinanza\\_n\\_6778770.html](http://www.huffingtonpost.it/2015/03/01/sindaco-nega-cittadinanza_n_6778770.html)>. The decision was later reverted. See *infra* para 0.

<sup>3</sup> See <http://www.theguardian.com/world/2015/jun/17/this-isnt-human-migrants-in-limbo-on-italian-french-border?CMP=share>.

<sup>4</sup> See e.g. Case C-333/13, *Dano*, EU:C:2014:2358.

domain, informing the recognized state's power to decide on admission and exclusion of aliens.<sup>5</sup> The article ultimately draws a conceptual model of European citizenship linking its internal (i.e. free movement of EU nationals) and external (i.e. inclusion of TCNs) functions through notions of mutual recognition and democracy.<sup>6</sup> Central to this model is the argument that democratic ideas of trust and no othering, whose traces can be evidenced in the architecture of European citizens' free movement, may also help interpret the distinctive narratives that European citizenship weaves in the field of immigration and nationality. This conceptual model inspires a possible new vision for Member States' engagement and supranational cooperation in immigration matters, mediating between legitimate claims to belong and unquestioned powers to exclude, while offering a novel angle on notions of collective good which justify, in part, the latter powers.

While the question of the relation between European citizenship and TCNs has been asked before in more and less direct ways,<sup>7</sup> this article takes a novel methodological approach to it. First, it develops a granular analysis of how European citizenship logics intersect immigration ones by exploring not only the hard legal rules but also the narratives, legislative, judicial and political, surrounding them. Focusing on the narratives allows treating admission to residence and naturalisation, usually at the heart of separate debates on, respectively, immigration and nationality, as two prongs of a same working notion of inclusion.<sup>8</sup> This is defined, for purposes

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<sup>5</sup> See e.g. ECtHR, *Sen v. Netherlands*, Appl. No. 31465/96, judgment of 21 December 2001, par. 36 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.

<sup>6</sup> On mutual recognition see K. Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 *Journal of European Public Policy* 682-698; K. Nicolaïdis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 *Law and Contemporary Problems* 267-322; K. Nicolaïdis, 'Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition' in M. P. Maduro (ed.), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2007); on democracy, K. Nicolaïdis, 'The Idea of European Democracy' in J. Dickinson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012), 247; K. Nicolaïdis, 'European Democracy and its Crisis' (2013) 51 *Journal of Common Market Studies* 351-369; F. Cheneval and F. Schimmelfennig, 'The Case for Democracy in the European Union' (2013) 51 *Journal of Common Market Studies* 334-350; R. Bellamy 'An Ever Closer Union among the Peoples of Europe: Republican Intergovernmentalism and Democratic Representation within the EU' (2013) 35 *Journal of European Integration* 499-516.

<sup>7</sup> See e.g. D. Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 *Common Market Law Review* 709-736; R. Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' 8 *Theoretical Inquiries in Law* (2007) 453-488, at 471-74 and 485-86; N. Cambien, 'Union Citizenship and Immigration: Rethinking the Classics?' (2012) 5 *European Journal of Legal Studies* 10-37; M. Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third Country Nationals', (2004) 7 *Yale Human Rights & Development Law Journal* 132-183. Other studies have taken more specific perspectives. See e.g. Y. Solanke, 'Using the Citizen to Bring the Refugee in: *Gerardo Ruiz Zambrano v Office National de l'Emploi (ONEM)*' (2012) *Modern Law Review* 101-111; G. Davies, 'The Family Rights of European Children: Expulsion of non-European Parents', *EUI Working Papers* 2012/04, <[http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS\\_2012\\_04.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_04.pdf?sequence=1)>.

<sup>8</sup> For a study that engages European citizenship from the residence and immigration perspective, see D. Acosta Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Postnational Form of Membership' (2015) 21 *European Law Journal* 200-219; for the naturalisation and nationality perspective, see D. Kochenov, 'Rounding Up the Circle: The Mutation of Member States' Nationalities under Pressure from European citizenship' *EUI Working Papers* 2010/23, <[http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS\\_2010\\_23.corr.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS_2010_23.corr.pdf?sequence=3)>.

of the article's quest, as the process that brings TCNs from legal otherness to partial or full legal membership. The fact that legal inclusion is a process, and not the immediate result of a TCN passing the border, depends precisely on the state's sovereign power to exclude aliens, by controlling borders and deciding on entry and residence. A second methodological novelty is in the interdisciplinary perspective that the article adopts. It applies concepts from theories of democracy and mutual recognition to link back the contrasts it identifies in the rules and narratives on citizenship and immigration to broader conundrums on rights and power.

In this latter perspective, the article contributes, first, to the literature on mutual recognition.<sup>9</sup> Its European citizenship lens magnifies connections between notions of mutual recognition in political theory and international relations,<sup>10</sup> and technical legal ones in the area of freedom, security and justice (AFSJ).<sup>11</sup> It also adds to the literature on European citizenship, stretching transnational understandings of the same in a new direction.<sup>12</sup> Finally, the arguments developed in the article also offer hints to ongoing debates on interstate cooperation and sharing of responsibilities in the EU common immigration policy,<sup>13</sup> and on civic integration and liberal nationalism.<sup>14</sup>

Part II charts the rules on the status of TCNs developed, respectively, in the penumbra of European citizenship, and as part of the EU common immigration policy and the Member States'

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<sup>9</sup> Nicolaïdis, 'Trusting the Poles?', above, n. 6; Nicolaïdis and Shaffer, above, n. 4; Nicolaïdis, 'Kir Forever?' above, n. 4; Nicolaïdis, 'Trusting the poles? : Mark 2 - towards a regulatory peace theory in a world of mutual recognition' in I. Lianos and I. Blanc (eds.), *Regulating Trade in Services in the EU and the WTO : Trust, Distrust and Economic Integration* (Cambridge University Press, 2012), 263-298; F. K. Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave MacMillan, 2005); C. Janssens, *The Principle of Mutual Recognition in EU Law*, (Oxford University Press, 2013); S. Schmidt (ed.), *Mutual Recognition as a New Mode of Governance* (Routledge 2008); K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The Fourth Annual Sir Jeremy Lever Lecture, University of Oxford, 30 January 2015, available at [https://www.law.ox.ac.uk/sites/files/oxlaw/the\\_principle\\_of\\_mutual\\_recognition\\_in\\_the\\_area\\_of\\_freedom\\_judge\\_leenaerts.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_leenaerts.pdf) (last visited 24 May 2016); M. Möstl, 'Preconditions and Limits of Mutual Recognition', (2010) 47 *Common Market Law Review*, 405-436.

<sup>10</sup> See e.g. Nicolaïdis, 'Trusting the Poles?', above, n. 6.

<sup>11</sup> See e.g. Möstl, above, n. 9.

<sup>12</sup> See e.g. D. Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 *European Law Journal* 623-646; R. Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 *Citizenship Studies* 597-611; Bauböck, above, n. 7; R. Bauböck, *Transnational Citizenship*, (Edward Elgar, 1994); J. Weiler, 'Bread and Circus: the State of European Union' (1998) 4 *Columbia Journal of European Law* 223-248; N. Nic Shuibne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597-1628.

<sup>13</sup> See e.g. V. Mitsilegas, 'Solidarity and Trust in the Common European Asylum System', (2014) 2 *Comparative Migration Studies* 181-202; D. Caruso, 'Lost at Sea' (2014) 15 *German Law Journal*, 1197-1208 (for a compelling parallel between EU migration policy and Economic and Monetary Union); S. Trevisanut, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management' in L. Azoulay and K. de Vries (eds.) *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press, 2014), 106-148.

<sup>14</sup> See e.g. D. Kostakopoulou, 'The Anatomy of Civic Integration' (2010) 73 *Modern Law Review* 933-958; S. Wallace Goodman, 'Controlling Immigration through Language and Country Knowledge Requirements' (2011) 34 *West European Politics* 235-255; R. van Oers, E. Ersbøll and D. Kostakopoulou (eds.), *A Re-definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff, 2010); C. Joppke, 'The Inevitable Lightning of Citizenship' (2010) 51 *European Journal of Sociology* 9-32; L. Orgad, 'Illiberal Liberalism-Cultural Restrictions on Migration and Access to Citizenship in Europe', (2010) 58 *American Journal of Comparative Law*, 53-106; J. Hampshire, 'Liberalism and Citizenship Acquisition: How Easy Should Naturalization Be?' (2011) 37 *Journal of Ethnic and Migration Studies* 953-971.

immigration and nationality policies. It illustrates and compares the frames and purposes of relevant rules (II.A); it considers and contrasts a rights narrative and a discretion narrative developed through the interpretation and application of each set of rules (II.B); and ultimately it reflects on the disconnect that these rules and narratives portray and on the broader tensions between rights and sovereignty that this disconnect reveals (II.C). Part III questions European citizenship's capacity to support the rules and narratives that it fosters with appropriate rationales. It considers how European citizenship's relentless challenge to national boundaries relies on a norm of mutual recognition of belonging (III.A); building on the implications of this norm of mutual recognition it develops a democratic reading of European citizenship (III.B); and it applies the democratic argument to attempt a reconciliation of the disconnect in the rules, narratives and rationales (III.C). This yields an answer to the question of how European citizenship matters for TCNs and for rules of engagement and cooperation in immigration, as well as broader reflections on the conceptual potential of European citizenship, which are taken up in the conclusion.

## **II The Status of TCNs in the EU: Competing Rules and Narratives**

### **A Rule Frames and Purposes**

#### **European Citizenship**

European citizenship has at first sight little bearing on the admission, status and rights of TCNs. It is an addition to national citizenship, which it follows automatically,<sup>15</sup> and it is not an independent category in the context of either EU, or Member States' immigration laws. However, it has grounded a set of judicial and legislative rules on the admission and on the rights of TCN family members of European citizens who exercise their Treaty rights. It has also grounded some novel principles on the interpretation of Member States' nationality laws. In this sense, European citizenship has brought about some novel rules affecting the condition of TCNs even beyond the rules of EU immigration law that are specifically addressed to TCNs.

First of all, TCNs who are family members of migrant European citizens under article 2 of Directive 2004/38 enjoy a number of derivative rights. Rights of entry and residence,<sup>16</sup> equal treatment, labor market access, and long-term integration<sup>17</sup> are recognized to the TCN family member in order to ensure the exercise of the European citizen's right to free movement under 'objective conditions of freedom and dignity'.<sup>18</sup> Relevant TCNs' rights are retained even if death or separation come to sever the family relationship on which they are based.<sup>19</sup> ECJ case law has interpreted and stretched the boundaries of relevant rights. It has clarified for instance the conditions for the entry and residence in a host State of spouses of migrant European citizens;<sup>20</sup> the conditions under which TCN family members may obtain a right of permanent residence;<sup>21</sup>

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<sup>15</sup> TFEU, art. 20.

<sup>16</sup> Art. 5-7, 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, OJ L 158, 30.04.2004, pp. 77-123.

<sup>17</sup> *Id.*, art. 24, 23 and 16(2).

<sup>18</sup> *Id.*, whereas 5.

<sup>19</sup> *Id.*, art. 12-13.

<sup>20</sup> Case C-109/01, *Akrich* EU:C:2003:491; then revisited by Case C-127/08, *Metock* EU:C:2008:449.

<sup>21</sup> Case C-162/09, *Lassal* EU:C:2010:592; Case C-244/13, *Ogieriakhi* EU:C:2014:2068.

the limits to documentary burdens that can be imposed on the TCN family member in the Member State of nationality of the sponsor European citizen.<sup>22</sup>

Case law has brought European citizenship to bear even on TCN family members whose situations do not fall within the scope of the Citizenship Directive. The ECJ has interpreted Treaty provisions on European citizenship to require that the TCN parent caretaker of a minor European citizen be entitled to reside with her in a host Member State in order to make the minor's right to free movement effective.<sup>23</sup> As a further protection of the effectiveness of free movement, the CJEU has affirmed the right of a TCN family member to reside in the Member State of origin of the sponsor European citizen, so as to allow European citizens to continue the family life they may have built or developed during the exercise of free movement.<sup>24</sup> Even in the absence of free movement or other cross-border links, the claim for a right to reside and work of a minor European citizen's TCN parent caretaker has to be accommodated, if a contrary determination would lead to interference with the genuine substance of the European citizen's rights.<sup>25</sup>

As a result the rules surrounding European citizenship accord protected status to a number of classes of TCNs: spouses of migrant citizens, partners of returning migrant citizens, parent caretakers of migrant minor citizens, or of non-migrant but threatened ones.<sup>26</sup> These European citizenship-dependent statuses are to some extent parallel to the statuses of TCN family members of migrant EU workers. The latter also enjoy a privileged status under EU law.<sup>27</sup> European citizenship has however gone a step further, bringing the legacy of citizenship to bear on the condition of relevant TCNs. While the recognition of rights to TCN family members of migrant workers fits clearly within the context of a market project, the condition of TCN family members of European citizens depends on the scope of transnational membership in the EU.<sup>28</sup> It has to do with how European citizenship transforms the meaning and boundaries of national citizenship.<sup>29</sup>

This transformation depends not only on the statuses that European citizenship entails for TCNs but also on the limits that European citizenship brings to the Member States' power to grant and withdraw national citizenship. While nationality remains an exclusive competence of the

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<sup>22</sup> Case C-202/13, Sean Ambrose McCarthy EU:C:2014:2450.

<sup>23</sup> Case C-200/02, Zhu and Chen EU:C:2004:639.

<sup>24</sup> Case C-456/12, O. and B. EU:C:2014:135; also see Case C-370/90, Surinder Singh EU:C:1992:296 (construing a similar right for family members of migrant workers).

<sup>25</sup> Case C-34/09, Ruiz Zambrano EU:C:2011:124. Subsequent cases have qualified the Ruiz Zambrano judgment. See *infra* note 78.

<sup>26</sup> For a restatement of relevant rules see Case C-40/11, Iida EU:C:2012:691.

<sup>27</sup> Family members of migrant workers derive rights from Art. 10 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. These have been extensively interpreted in case law, OJ L 141, 27.5.2011, pp. 1-12. See Case C-413/99, Baumbast, EU:C:2002:493; Case C-529/11, Alarape EU:C:2013:290; Case C-480/08, Teixeira EU:C:2010:83; Case 310/08, Ibrahim EU:C:2010:80. For a more restrictive application, see Case C-45/12, Hadj Ahmed EU:C:2013:390.

<sup>28</sup> The distinction tracks the one between free movement as a right for workers and as a right for citizens. For a recent discussion see F. De Cecco, 'Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law' (2014) 15 German Law Journal 383-406, at 386-88.

<sup>29</sup> See R. Wagner, 'European Citizenship of Last Resort: Migrant Strategies and Civic Practices in the Danish Family Unification Dispute', paper prepared for the 19<sup>th</sup> International Conference of Europeanist, Boston Massachusetts, 22-24 March, 2012, on file with the author, at 25 (European citizenship family reunification rules as 'citizenship of last resort' for Danish families including a TCN).



Member States,<sup>30</sup> European citizenship case law clarifies that relevant powers must be exercised in compliance with EU law and taking into account, in particular, the rights and status of European citizens.<sup>31</sup> Member States cannot impose additional conditions before treating as full-fledged European citizens the nationals of other Member States;<sup>32</sup> and they cannot denaturalize a citizen without considering, in a proportionality perspective, the consequences in terms of loss of European citizenship.<sup>33</sup> One further status appears thus to be imbued with European citizenship considerations: the one of TCNs aspiring to naturalisation.

Ultimately, European citizenship affects the condition of TCNs in a piecemeal fashion and with an alternation between daring and pulling back.<sup>34</sup> It does design in the penumbra of citizenship, in any case, a number of status-protective rights.

### **EU Common Immigration Policy and National Rules**

These European citizenship-based statuses for TCNs co-exist with a multitude of other ones, determined in accordance with the Member States' immigration and nationality laws, and the EU common immigration policy. The coexistence of the latter two levels of law and policy makes for a complex regulatory frame.

Under the Treaties, the EU is competent to develop a common policy on asylum, immigration and external borders control.<sup>35</sup> The common policy on asylum finds implementation in a recently recast package of directives and regulations comprising the 'common European asylum system'.<sup>36</sup> The common immigration policy encompasses, among others, 'the conditions for entry and residence, and the standards on the issue by the Member States of long-term visa and residence permits'<sup>37</sup> and 'the definition of the rights of third country nationals residing legally in a Member State'.<sup>38</sup>

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<sup>30</sup> See Declaration n. 2 annexed to the Treaty of Maastricht on Nationality of a Member State.

<sup>31</sup> Case C-369/90, *Micheletti* EU:C:1992:295; Case C-135/08, *Rottmann* EU:C:2010:104.

<sup>32</sup> *Micheletti* above, n. 31.

<sup>33</sup> *Rottmann* above, n. 31.

<sup>34</sup> The definition of family members for these purposes is limited. See Directive 2004/38, above n. 16, art. 2; the CJEU has recently clarified new conditions for the retention of rights in case of separation and divorce. Case C-218/14, *Kuldip Singh* EU:C:2015:476.

<sup>35</sup> Art. 67 TFEU.

<sup>36</sup> Art. 78 TFEU. Also see Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 OJ L 180, 29.6.2013, p. 31–59; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337, 20.12.2011, p. 9–26; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29.6.2013, p. 60–95; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.6.2013, p. 96–116.

<sup>37</sup> Art. 79 par. 2 a) TFEU.

<sup>38</sup> Art. 79 par. 2 b) TFEU.

Under the umbrella of these Treaty provisions, the EU has adopted comprehensive policy programs,<sup>39</sup> regulations,<sup>40</sup> and a range of directives addressing specific categories of TCNs aspiring to entry<sup>41</sup> and specific entitlements of admitted TCNs.<sup>42</sup> EU level provisions remain in any case complementary to Member State level immigration law, which although residual in character, is still predominant in scope:<sup>43</sup> in fact EU legislation often only sets shared standards but leaves the Member States free to legislate on the details, to adopt more favorable provisions or to retain pre-existing categories alongside the European ones;<sup>44</sup> also, the Member States retain control on the volumes of TCNs' admissions.<sup>45</sup>

The result is a multitude of statuses for TCNs in Europe. Member States' domestic law governs the residence rights of several classes of TCNs seeking work, family reunification, or humanitarian protection. However EU law has carved out, within each class, broader or narrower subclasses whose residence rights are EU law driven: for instance, among workers, the highly skilled, and among asylum seekers, those who are given either refugee status or subsidiary protection under relevant EU law rules.<sup>46</sup>

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<sup>39</sup> See e.g. Conclusions of the 1999 European Council in Tampere <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)>; also see the Stockholm Programme – An open and secure Europe serving and protecting the citizens, Council of the European Union, 2 December 2009, [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the\\_stockholm\\_programme\\_-\\_an\\_open\\_and\\_secure\\_europe\\_en\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf).

<sup>40</sup> See e.g. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.04.2006, pp. 1-32; Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27.6.2014, p. 93–107.

<sup>41</sup> E.g. 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, OJ L 155, 18.6.2009, p. 17–29; 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 OJ L 375, 23.12.2004, p. 12–18; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3.11.2005, p. 15–22 (the latter two directive have recently been merged into a newly adopted directive and not yet effective directive on the entry of students and researchers); 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, OJ L 157, 27.5.2014, p. 1–22.

<sup>42</sup> E.g. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16, 23.1.2004, p. 44–53; 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 OJ L 343, 23.12.2011, p. 1–9.

<sup>43</sup> In the area of freedom, security and justice, comprising the common immigration policy, competence is shared between the EU and the Member States, art. 4(2)(j) TFEU.

<sup>44</sup> This is particularly true in the field of economic migration. See 'Communication from the Commission to the European Parliament and the Council on the Implementation of Directive 2009/50', COM(2014) 287 final, of 22.05.2014, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-287-EN-F1-1.Pdf>.

<sup>45</sup> Art. 79(5) TFEU.

<sup>46</sup> See Directive 2011/95, above n 36. Although the new TFEU provisions aim for a uniform EU status of asylum and subsidiary protection (TFEU art. 78), the Member States retain other distinct humanitarian migration statuses. See e.g. Legislative Decree 286/1998, *Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e*

This fragmentation of statuses reflects in part an uneasy division of competence between the EU and the Member States beyond the Treaty rules, and an uncertain terrain for supranational cooperation. The design of the EU immigration policy bears indeed the legacy of its inter-governmental origins.<sup>47</sup> Conflicting priorities depending on geographic position and histories of migration, a puzzle of opt-in and opt-outs, and dualism between mutual trust and mutual suspicion express this inter-governmental legacy and the difficulties of supranational cooperation in this field.<sup>48</sup> Cooperation has resulted, for instance, in clear, albeit highly problematic rules on asylum seekers' reception,<sup>49</sup> and in swift mechanisms of recognition of enforcement decisions against illegal migrants.<sup>50</sup> On the other hand, the harmonization of statuses for legal migrants has incurred much resistance, yielding the above mentioned plethora of statuses for TCNs, as well as 'softer' Member States obligations.<sup>51</sup>

In the context of these supranational rules of different sign, fundamental rights and individual rights do have a place. EU law instruments explicitly refer to fundamental rights protection and the European courts test governmental conduct with regards to immigration against relevant standards.<sup>52</sup> However protection of relevant rights represents an outer limit to the coordinated exercise of state power, rather than an objective of supranational coordination.<sup>53</sup>

Supranational cooperation in the context of the EU common immigration policy thus expresses a sort of anomalous federalism: despite commitment to fair sharing of responsibilities among equal participants in a supranational system,<sup>54</sup> and despite commitment to fundamental rights, the supranational cooperation frame works primarily to upgrade and reinforce states' interests

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norme sulla condizione dello straniero (Italian Immigration Act), GU n. 191, 18.08.1998, Suppl. Ord. N. 139, art. 18.

<sup>47</sup> Only with the Treaty of Amsterdam, the transfer of rules on immigration from the third to the first pillar marked the beginning of a shift from inter-governmentalism to supranationalism in this field.

<sup>48</sup> For an overview of the opt-out regime, see S. Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law* (Martinus Nijhoff, 2012), at 26-28. On the delicate relation between trust and suspicion, see Case ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, judgment of 21 January 2011, available at [hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103050](http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103050). Also see H. Toner, 'The Lisbon Treaty and the Future of European Immigration and Asylum Law' in Azoulay and de Vries, above, n. 11, pp. 14-40, at 33-34.

<sup>49</sup> Regulation 604/2013, above n. 36. The Dublin's regulation first country of entry criterion has attracted much criticism, while the ongoing migration crisis has proven the inadequacy of the regulation frame in both constitutional and operational terms. See S. Peers, 'The Dublin Regulation: is the End Nigh? Where Should Unaccompanied Children Apply for Asylum?' <http://eulawanalysis.blogspot.co.uk/2016/01/the-dublin-regulation-is-end-nigh-where.html>.

<sup>50</sup> See Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2.6.2001, p. 34-36.

<sup>51</sup> The Blue Card directive (Directive 2009/50, above, n. 41) exemplifies these softer obligations. See e.g. art. 18. But see Case C-491/13, *Ben Alaya* EU:C:2014:2187 (Member States must admit TCN students who meet requirements under Directive 2004/114).

<sup>52</sup> See e.g. art. 3(2) Regulation 604/2013, above, n. 36; Art. 4 Regulation 656/2014, above, n. 40. Also see *M.S.S.*, above, n. 48; joint Cases C-411/10 and C-493/10, *N. S.*, EU:C:2011:865. Also see Thym, above, n. 5, at 719-721 (EU migration policy refutes the idea of alienage without legal protection).

<sup>53</sup> See V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-state Cooperation to the Slow Emergence of the Individual', (2012) 31 *Yearbook of European Law* 319-72 (on the balance between state interests and individual rights in the AFSJ).

<sup>54</sup> Art. 80 TFEU. Also see Stockholm Programme, above, n. 39.

already clearly set through national level immigration laws;<sup>55</sup> inter-state loyalty is selective and contingent;<sup>56</sup> and while formally protected through the fundamental rights frame the interests of individual denizens are ultimately entrusted to a puzzle of overlapping statuses.

While there is no supranational frame of cooperation for access to nationality, the coexistence of 28 different nationality laws adds to the puzzle of TCNs' statuses. For instance, the TCN highly skilled workers, or the TCN students, whose statuses are harmonised under EU law, further divide into TCN highly skilled workers in Belgium, Spain, Poland or else; and into TCN students in the Netherlands, Germany or Italy or else. Their paths to citizenship differ, and their respective spaces of action are not as borderless as the ones of birth-right citizens.<sup>57</sup>

Despite a common name, thus, TCNs' statuses are multiple in the EU. Both European citizenship and its rules on the one hand, and the Member States and EU rules on immigration and nationality on the other one, contribute to generate this multitude. There is a difference in focus and purpose between the European citizenship rules, and the immigration and nationality ones. Albeit with limits and conditions that take into account Member States' preferences, the former tend to be right-enhancing for TCNs: they open up facilitated routes for their inclusion, based on consideration of TCNs' and European citizens' individual interests. The latter are rather centered on allocating independent and coordinated state interests: they preserve a system of selective inclusion and enforceable exclusion, where the TCNs' individual interests work as a limit to governance rather than as a purpose for its exercise.

This contrast that blinks through the rules becomes prominent in the narratives that develop through their interpretation and application on the part of courts, administrators, policy makers. These narratives illustrate further the character of the process of TCNs' inclusion in Europe; that is, the process through which TCNs acquire a status of partial or full legal membership through either residence or nationality.

## **B The Narratives**

### **The Rights Narrative**

A first narrative unravels through the reasoning and the dicta in ECJ judgments interpreting European citizenship-dependent rules on the status of TCNs. This first narrative emphasizes that the Member States, albeit competent to decide on nationality matters, retain limited discretion in this field, in light of European citizenship; that, in some instances inclusion descends from European citizenship as a right and Member States' discretion in granting or denying rights of residence to TCNs is accordingly limited also in this respect; and finally that European citizenship has a substance of its own, which may trigger relevant rights to inclusion.

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<sup>55</sup> See Mitsilegas, above, n. 51, at 320-22.

<sup>56</sup> As shown by contemporary debates on resettlement and relocation plans for refugees. For an overview see <http://eulawanalysis.blogspot.co.uk/2015/05/the-new-eu-migration-agenda-takes-shape.html> (last visited 27 Jul. 2015); also see Communication from the Commission: Third Report on Relocation and Resettlement, 18 May 2016, COM(2016) 360, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160518/communication\\_third\\_report\\_on\\_relocation\\_and\\_resettlement\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160518/communication_third_report_on_relocation_and_resettlement_en.pdf) (last visited 24 May 2016).

<sup>57</sup> See F. Strumia, *Supranational Citizenship and the Challenge of Diversity – Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff, 2013), at 258-266.

## Limited Governmental Discretion in Nationality Matters

According to the rights narrative, European citizenship limits governmental discretion in making determinations on nationality. In the context of these latter decisions, indeed, the rights of European citizens cannot be disregarded. The idea that EU law represented a limit to Member States' decisions on the grant and withdrawal of nationality has echoed throughout ECJ case law ever since the *Micheletti* case.<sup>58</sup> The *Rottmann* judgment,<sup>59</sup> concerning the denaturalisation proceedings in Germany of an Austrian national who had acquired German nationality through fraud, clarifies the extent to which European citizens' rights limit Member States' powers in this field. *Rottmann* had lost Austrian nationality in acquiring the German one and would thus have remained stateless following his denaturalisation in Germany. The referring German court asked the ECJ whether EU law required a Member State to refrain from denaturalizing a national if denaturalisation would have caused loss of European citizenship and statelessness.<sup>60</sup> The ECJ replied that EU law requires, on the part of national authorities, an assessment of proportionality of the relevant decision in light of the consequences of denaturalisation for the citizen's, and his family's, status and rights under EU law.<sup>61</sup> European citizens have, in other words, a right to inclusion that decisions on grant and withdrawal of nationality must take into account.

In the words of Advocate General Maduro, writing the opinion for the case,

“if the situation comes within the scope of Community law, the exercise by the Member States of their retained powers cannot be discretionary. It is subject to the obligation to comply with Community rules”.<sup>62</sup>

In the words of the Court, “the Member States have the power to lay down the conditions for the acquisition and loss of nationality, [...] the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union [...] is amenable to judicial review carried out in the light of European Union law.”<sup>63</sup>

## Inclusion through Residence as a Right

Conferral and withdrawal of nationality is not the only power that the Member States can no longer exercise in a discretionary fashion in light of European citizenship. The case law interpreting TCN family members' rights under the Citizenship Directive and under the Treaty provisions on European citizenship tends to treat recognition of a residence status to relevant TCNs as a right they can claim, rather than as a concession they may receive at the discretion of the authorities of the relevant Member State.<sup>64</sup>

Breach of relevant rights on the part of a Member State may give rise to state liability. In December 2014, the Irish High Court condemned the Irish State to pay damages to Mr.

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<sup>58</sup> *Micheletti*, above, n. 31, para 10.

<sup>59</sup> *Rottmann*, above, n. 31.

<sup>60</sup> *Id.* para 35.

<sup>61</sup> *Id.* para 54-56.

<sup>62</sup> *Rottmann*, above, n. 31, (Opinion of A.G. Poiras Maduro) EU:C:2009:588, para 20.

<sup>63</sup> *Micheletti*, above, n. 29, para 48.

<sup>64</sup> See e.g. *O and B*, above, n. 24, para 56; *Sean Ambrose McCarthy*, above, n. 22, para 33; *Ruiz Zambrano*, above, n. 23, para 45.

Ogieriakhi, a Nigerian national, for having wrongfully denied his right to permanent residence in Ireland under the Citizenship Directive, as the spouse of a EU national.<sup>65</sup> Mr. Ogieriakhi had lost his job as a result and sued the Irish State for damages.<sup>66</sup> The Irish Court of Appeals subsequently reverted the High Court's judgment on the ground that the High Court had not properly applied the test for state liability.<sup>67</sup> However, the narrative weaved in the High Court's judgment, and in the CJEU's response to the questions that the High Court referred to it in the course of the first instance proceeding, cast light on the nature of TCNs' rights to inclusion.

In referring to the CJEU, the Irish High Court aimed at clarifying whether residence in a host Member State while separated from the sponsor European citizen spouse counted towards achievement of the right to permanent residence under the Citizenship Directive.<sup>68</sup> In responding in the affirmative, the ECJ highlighted the rights' nature of Mr. Ogieriakhi's claim to permanent residence under the directive: he had to be regarded, in the words of the court, 'as having acquired a right to permanent residence' under the relevant provisions.<sup>69</sup> The Irish High Court referred to this very passage of the ECJ judgment to support its own determination that Mr. Ogieriakhi 'had become entitled to permanent residence in Ireland'.<sup>70</sup>

Entitlement of the TCN equals limited discretion for the host Member State: the Irish High Court noted that under the relevant provisions of the Citizenship Directive, no discretion whatsoever was left to Ireland.<sup>71</sup> Having disregarded the limits of its own discretion contributed, in the view of the High Court, to make the Irish government liable to Mr. Ogieriakhi.<sup>72</sup> While the Court of Appeals dismissed the High Court's reasoning on discretion and the the High Court's rule in this respect thus did not survive,<sup>73</sup> the underpinning narrative on a right to inclusion does.

Even if it is in principle just an addition to nationality, European citizenship triggers a range of inclusion rights: rights to remain included for European citizens; and rights to become included for TCNs. European citizenship reveals thus a substance of its own, which constrains Member States' power and discretion in administering admission and naturalisation.

#### The Substance of European Citizenship as a Trigger for the Right to Inclusion

The very substance of European citizenship may become, at times, the source of rights of inclusion. This was the case in the 2010 Ruiz Zambrano judgment.<sup>74</sup> The ECJ resorted to the substance of European citizenship to ground the entitlement of a TCN to reside and work in Belgium as the father care-taker of two Belgian-born and Belgian national children.

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<sup>65</sup> High Court of Ireland, *Ogieriakhi -v- Minister for Justice and Equality & ors (No.2)*, [2014] IEHC 582, judgment of 22 December 2014, available at <http://www.bailii.org/ie/cases/IEHC/2013/H133.html>.

<sup>66</sup> *Id.* para 25, and 1-2 (*Ogieriakhi* brought the action after naturalizing in Ireland).

<sup>67</sup> Irish Court of Appeals, *Ogieriakhi -v- Minister for Justice and Equality & ors*, [2016] IECA 46, judgment of 26 February 2016, available at <http://www.bailii.org/ie/cases/IECA/2016/CA46.html>.

<sup>68</sup> *Ogieriakhi* (ECJ), above, n. 19, para 25.

<sup>69</sup> *Id.* para 47.

<sup>70</sup> *Ogieriakhi* (High Court of Ireland), above, n. 57, para 12.

<sup>71</sup> *Id.* para 48.

<sup>72</sup> Excess of discretion is one factor in determining a serious infringement of law for purposes of state liability. *Id.* para 47-48. Also see *Case C-46/93, Brasserie du Pêcheur* EU:C:1996:79 para 55-58.

<sup>73</sup> *Ogieriakhi* (Irish Court of Appeals), above, n. 67, para 19.

<sup>74</sup> *Ruiz Zambrano*, above, n. 25.

‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, [...] has such an effect’<sup>75</sup>

Protection of the substance of the children’s European citizenship, which would have been harmed had they been compelled to leave the European Union with their father, triggered their father’s right to inclusion.<sup>76</sup> Hailed as revolutionary for its dispensing with cross-border elements in applying European citizenship,<sup>77</sup> the innovative potential of the decision has actually been tamed in subsequent cases: the Court has been reluctant to accommodate any of the TCNs’ claims subsequently brought in reliance on Ruiz Zambrano, and has qualified the doctrine from various perspectives.<sup>78</sup>

In this sense Ruiz Zambrano may appear as the last indulgence before the Court adopted a more sober and cautious approach to the rights of European citizenship.<sup>79</sup> The substance doctrine, however, yields an important and potentially enduring legacy for the rights narrative of inclusion: it suggests that there is a substantive core to the rights of European citizenship, which may dictate the overruling of regular admission requirements and procedures for a TCN, and yield an independent right to inclusion.<sup>80</sup> Despite the vagueness of the relevant rule, the doctrine strengthens and confirms a commitment to individual rights in the inclusion narrative developed around European citizenship.<sup>81</sup> This challenges some of the main tenets of a competing narrative on immigration and naturalisation that rather focuses on discretion.

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<sup>75</sup> Id., para 42-43.

<sup>76</sup> Id., para 42-45.

<sup>77</sup> See D. Kochenov, ‘A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe’, (2011) 18 *Columbia Journal of European Law* 55-109, at 58-59; also see Ruiz Zambrano, above, n. 25, Opinion of AG Sharpston EU:C:2010:560; K. Lenaerts, ‘Civis Europeus Sum: from the Cross-Border Link to the Status of Citizen of the Union’ (2011) 3 *FMW-Online Journal on Free Movement of Workers within the European Union* 6-17, at 7-8.

<sup>78</sup> The court has indicated that the doctrine is exceptional in character. See Case C-256/2011, Dereci EU:C:2011:734; Case C-434/09, Shirley McCarthy EU:C:2011:277; it does not cover lesser interferences such as with the mere desire to keep a family together in a given Member State. See Joint Cases 356/11 and 357/11, O, S EU:C:2012:776, para 52; Case C-87/12, Ymeraga EU:C:2013:291, para 38. Also see Case C-86/12, Alokpa EU:C:2013:645.

<sup>79</sup> See Case C-333/13, Dano EU:C:2014:2358; Case C-67/14, Alimanovic EU:C:2015:597. Also see D. Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’, (2015) 52 *Common Market Law Review* 17-50.

<sup>80</sup> For further analysis of this case see F. Strumia, ‘Ruiz Zambrano’s Quiet Revolution: 468 Days that Made the Immigration Case of One Deprived Worker into the Constitutional Case of Two Precarious Citizens’ in F. Nicola and B. Davies (eds.), *EU Law Stories: Comparative and Contextual Histories of European Jurisprudence* (Cambridge University Press, forthcoming).

<sup>81</sup> On the role of European citizenship for individual rights protection see D. Kochenov, ‘The Citizenship Paradigm’ (2012-13) 15 *Cambridge Yearbook of European Legal Studies* 196-225; but see E. Spaventa, ‘Earned Citizenship – Understanding Union Citizenship through its Scope’ in D. Kochenov (ed.), *Citizenship and Federalism in Europe: the Role of Rights* (Cambridge University Press, forthcoming) (for a point of view on how European citizenship may be seen as impoverishing rather than enriching its beneficiaries).

## The Discretion Narrative

The interpretation and application of EU and national rules on immigration and of national rules on naturalisation on the part of courts, administrators and policy makers yields a second narrative on the inclusion of TCNs in the EU. This second narrative is Member States' focused, even though EU laws and policies developed within the frame of supranational cooperation in the context of the EU common immigration policy also feed into it, as do the CJEU judgments interpreting EU immigration law.<sup>82</sup>

This narrative emphasizes state discretion rather than individual rights. Discretion of national authorities in making decisions on inclusion of TCNs, whether as residents or as nationals, is a first theme in this narrative. A further theme is integration: inclusion of a TCN, as a resident or as a national, requires a measure of integration into the social and cultural community of a specific Member State. Both themes are ultimately a reminder of the sovereign prerogatives of states, which retain the power to guard their borders and administer inclusion and exclusion.

### Discretionary Inclusion

Discretion informs several determinations on inclusion and exclusion at Member States' level. It is built into criteria for the grant of visas and residence permits under both national and EU law, and transpires from the language in which relevant requirements are expressed. The UK Immigration Rules,<sup>83</sup> for instance, clarify that

'A person who is neither a British citizen nor a Commonwealth citizen with the right of abode nor a person who is entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations requires leave to enter the United Kingdom'.<sup>84</sup>

The concept of 'leave to enter' reminds that entry is a granted concession of the authorities, even when relevant requirements are met. Terminology used in the guidance on the Tier 1 (Entrepreneur) visa confirms this idea of concession.<sup>85</sup> In clarifying the conditions for obtaining the relevant visa, the guidance refers in fact repeatedly to notions of 'leave to enter', 'leave to remain', 'grant of leave', 'permission to stay'.<sup>86</sup> Similarly, the Italian Immigration Act lists the conditions according to which a foreigner 'may be allowed to stay'.<sup>87</sup>

The Belgian Cour Constitutionnelle has made the point clear in a judgment interpreting the Belgian law on the residence of foreigners: grant of a residence permit under relevant provisions "constitue une faveur et non un droit".<sup>88</sup>

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<sup>82</sup> See e.g. Ben Alaya, above, n. 51, para 51; Case C-502/2010, Mangat Singh EU:C:2012:636; Case C-571/10, Kamberaj EU:C:2012:233.

<sup>83</sup> Home Office, Visas and Immigration Operational Guidance Collection, Immigration Rules, available at <<https://www.gov.uk/government/collections/immigration-rules>>.

<sup>84</sup> Id. para 7.

<sup>85</sup> Guidance on Tier 1 (Entrepreneur) visa, available at <<https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-entrepreneur>>.

<sup>86</sup> Id.

<sup>87</sup> Italian Immigration Act, above, n. 46, art. 4.

<sup>88</sup> Cour Constitutionnelle (Belgian Constitutional Court), judgment of 26 September 2013, n.123, available at <http://www.const-court.be/public/f/2013/2013-123f.pdf>, at 7.



Even beyond admission to residence, discretion is an important element in the context of naturalisation processes.<sup>89</sup> Under the nationality law of several Member States, competent authorities retain a margin of discretion in deciding on the opportunity of the grant of citizenship, even when legal requirements are satisfied. The naturalisation stories of Lassana Bathily in France and of Rani Pushpa in Italy provide a telling example. Lassana's inclusion story took a sudden turn following the dramatic events in Paris in which he had distinguished himself. The French Ministry of the Interior at this point exercised its discretion to accelerate Lassana's application for French citizenship, which had been pending since 2011.<sup>90</sup> In the case of Rani Pushpa, discretion cut the other way: an Italian mayor decided that poor Italian skills had to prevent Rani from taking an oath on the Italian constitution, even if she had complied with all legal requirements for naturalisation.<sup>91</sup> The competent *prefetto* (representative of the Ministry of the Interior), in overruling the mayor's determination, pointed out that the latter had entailed a misuse of discretion.<sup>92</sup>

Case law on the review of naturalisation decisions both confirms and justifies governmental discretion as an element of the inclusion process. The Italian Consiglio di Stato (Council of State), for instance, has repeatedly held that the grant of nationality is the result of a highly discretionary evaluation on the part of the administrative authorities.<sup>93</sup> The scope of this discretion is clarified in a 2007 memorandum of the Ministry of the Interior on the interpretation of Italian citizenship law:

“Administrative discretion in the grant of Italian citizenship encompasses the assessment of the foreigner's family and social life [...] as well as the authenticity of his aspiration to become an Italian citizen. [...]”<sup>94</sup>

The discretion tale suggests that the Member States' may legitimately guard the boundaries of their national communities. A second theme corroborates this impression: inclusion requires integration.

### Integration in a National Community

Social and economic integration have become, over the course of the last decade, a preliminary requirement in several Member States for a TCN to obtain or maintain a residence permit. France, Italy, Austria and Luxembourg, for instance, require that entrants sign an integration

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<sup>89</sup> See e.g. Nuove Norme sulla Cittadinanza, Law no. 91 of 1992, Gazzetta Ufficiale n. 38, 15.02.1992, art. 9. Also see Ministry of the Interior of the Czech Republic, 'Granting Nationality of the Czech Republic', available at <<http://www.mvcr.cz/mvcren/article/granting-nationality-of-the-czech-republic.aspx>>.

<sup>90</sup> See <http://mobile.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Lassana-Bathily-est-devenu-francais>.

<sup>91</sup> See [http://www.huffingtonpost.it/2015/03/01/sindaco-nega-cittadinanza\\_n\\_6778770.html](http://www.huffingtonpost.it/2015/03/01/sindaco-nega-cittadinanza_n_6778770.html). Also see Italian Citizenship Act, above, n. 89. Language knowledge is not a legal requirement for Italian citizenship, although it is an element taken into account in the authorities' discretionary evaluation.

<sup>92</sup> See <http://www.stranieriinitalia.it/attualita-alla-fine-ha-vinto-rani-pushpa-cittadina-italiana-anche-se-non-sa-l-italiano-19834.html>.

<sup>93</sup> See Consiglio di Stato (Italian Council of State), Judgment no. 3006/2011, of 20 May 2011, available at <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=EYYV6ADYI07GVOXTUZXOQSEVWI&q=>.

<sup>94</sup> Italian Ministry of the Interior, 'Memorandum K.60.1 of 5 January 2007', available at [http://www.meltingpot.org/IMG/pdf/circolare\\_ministero\\_interno\\_cittadinanza\\_-\\_linee\\_interpretative.pdf](http://www.meltingpot.org/IMG/pdf/circolare_ministero_interno_cittadinanza_-_linee_interpretative.pdf).

agreement with the State, under whose terms they undertake to attend integration courses and activities, and commit to the achievement of set integration objectives.<sup>95</sup>

In the wording of relevant agreements, integration requirements are a preparation of the foreigner to live in the host community and respect its values. According to the preamble to the Italian integration agreement, for instance:

“Integration, meaning a process designed to promote the coexistence of Italian citizens and foreign nationals legally residing in the country, is based on mutual commitment to participate in the economic, social and cultural life, under the values enshrined in the Italian Constitution. [...] in order to be integrated, foreign nationals are required to [...] respect share and promote the democratic values of freedom, equality and solidarity that are at the basis of the Italian Republic.”<sup>96</sup>

Other Member States have gone a step further and introduced requirements that applicants for a residence permit begin a process of integration even before admission into the host State. This is the case in the Netherlands, under the terms of the Civic Integration Act implemented in 2007.<sup>97</sup> Several categories of TCNs applying for a residence permit in the Netherlands have to pass a civic integration test at the competent Dutch Embassy prior to obtaining the permit.<sup>98</sup>

If a measure of integration must be proven, in many Member States, already to qualify for first admission, integration requirements play an even more pervasive role in the context of TCNs’ naturalisation as nationals of a Member State.<sup>99</sup> The latest reforms of EU nationality laws witness to their increasing diffusion. Similar requirements have been introduced in the Luxembourg nationality law with a 2007 reform;<sup>100</sup> in the new Czech nationality law, effective

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<sup>95</sup> For France see *Code de l’entrée et du séjour des étrangers et du droit d’asile*, available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158&dateTexte=20160525>, art. 311-19 ; for Italy, Italian Immigration Act, above, n. 46, art. 4-bis; for Austria, Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz - NAG), para 14, available at <<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004242>>; also see Integration Agreement, available at <<http://www.migration.gv.at/en/living-and-working-in-austria/integration-and-citizenship/integration-agreement.html#c2563>>. For Luxembourg, *Loi du 16 décembre 2008 concernant l’accueil et l’intégration des étrangers au Grand-Duché de Luxembourg*, available at <<http://eli.legilux.public.lu/eli/etat/leg/loi/2008/12/16/n5>>; Règlement grand-ducal du 2 septembre 2011 fixant les conditions d’application et modalités d’exécution relatives au contrat d’accueil et d’intégration, available at <<http://eli.legilux.public.lu/eli/etat/leg/rgd/2011/09/02/n5>>.

<sup>96</sup> See template Italian integration agreement, available at [http://www.libertaciviliimmigrazione.interno.it/dipim/export/sites/default/it/assets/accordi\\_integrazione/0185\\_Accordo\\_di\\_Integrazione\\_Inglese.pdf](http://www.libertaciviliimmigrazione.interno.it/dipim/export/sites/default/it/assets/accordi_integrazione/0185_Accordo_di_Integrazione_Inglese.pdf).

<sup>97</sup> See Wet Inburgering Buitenland, 15 March 2006, available at <http://wetten.overheid.nl/BWBR0020611/2014-03-29>.

<sup>98</sup> See Dutch Immigration and Naturalisation Service, Civic Integration, <<https://ind.nl/EN/individuals/residence-wizard/other-information/civic-integration>> (last visited 28 Jul. 2015); also see Kostakopoulou, above, n. 14, at 933-934; Orgad, above, n. 14, at 63.

<sup>99</sup> For an overview, see Strumia, *Supranational Citizenship*, above, n. 57, at 64-79.

<sup>100</sup> *Loi du 23 octobre 2008 sur la nationalité luxembourgeoise*, Memorial n. 158 of 27 October 2008, available at <http://eli.legilux.public.lu/eli/etat/leg/loi/2008/10/23/n1>.

as of January 2014;<sup>101</sup> and in the Belgian Code of Nationality, reformed in 2012.<sup>102</sup> Parliamentary debates surrounding the latter reform shed light on the narrative underpinning such requirements of integration. According to one of the members of the Belgian Parliament, the aspiration to become citizen of a nation implies the desire “to share the values of the nation one wants to belong to, to integrate in its identity, and to make such desire known to everybody”. As a result, nationality policy requires

“an in-depth, sincere reflection on the necessary link between the acquisition of nationality in a country, and the national community which is at the basis of such country”. It requires “taking into account the concerned person’s intention to integrate in the country of residence, and granting nationality upon successful completion of this integration”.<sup>103</sup>

Integration requirements in European nationality laws encompass language knowledge, civic and social integration, acquaintance with history and constitutional values, or even assimilation. The French *Conseil d’État* relied precisely on lack of assimilation, in a landmark 2008 judgment, to uphold rejection of the naturalisation application of the Moroccan wife of a French national, who habitually wore a niqab:<sup>104</sup>

“[Mme A] has engaged in a radical practice of her religion, incompatible with the essential values of the French community [...]; as a result she does not comply with the assimilation requirement in art. 21.4 of the civil code;”<sup>105</sup>

Even when integration is not a named requirement under applicable nationality laws, it is often part of the concrete assessment of administrative authorities. So much explains the Italian Consiglio di Stato, in whose words, relevant authorities must ascertain “whether the foreigner has been successfully integrated in Italy, so that he can be said to belong to the national community”.<sup>106</sup>

The national rush towards integration requirements also has a EU level counterpart. TCNs’ integration has been a EU priority ever since the European Council in Tampere,<sup>107</sup> re-emphasized, most recently, in the 2015 European Agenda on Migration, which makes ‘effective integration’ one of the priorities for a new policy on legal migration.<sup>108</sup> Recognition to the EU,

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<sup>101</sup> Act 186/2013 on Citizenship of the Czech Republic, Collection of Acts No. 77/2013, 1774, para 14-15 (English summary available at < [http://eudo-citizenship.eu/docs/bibliographyFiles/CZR\\_English%20summary%20of%20Act%20186\\_2013\\_Consulate%20General.pdf](http://eudo-citizenship.eu/docs/bibliographyFiles/CZR_English%20summary%20of%20Act%20186_2013_Consulate%20General.pdf)>.

<sup>102</sup> *Loi modifiant le Code de la nationalité belge afin de rendre l’acquisition de la nationalité belge neutre du point de vue de l’immigration*, 4 December 2012, Moniteur Belge 393 of 14 December 2012, 79998-80008, available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2012120404](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2012120404).

<sup>103</sup> See Galant, in Full report of the plenary seating of the Chamber of Representatives of 24 October 2012, para 05.09, available at < <http://www.lachambre.be/doc/PCRI/PDF/53/ip108.pdf>>.

<sup>104</sup> See *Conseil d’État* (French Council of State), Faiza M judgment n. 286798 of 2008, of 27 June 2008, available at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000019081211>.

<sup>105</sup> Id.

<sup>106</sup> Italian Council of State, judgment 3006/2011, above, n. 93.

<sup>107</sup> Conclusions of the Tampere European Council, above, n. 11.

<sup>108</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration’, COM(2015) 240 final,

with the Treaty of Lisbon, of a precise competence in matters of TCNs' integration has opened up further options for EU intervention in this field.<sup>109</sup> Several policy initiatives have contributed in the last decade to a EU integration policy: the Council's 2004 Common Basic Principles for Immigrant Integration;<sup>110</sup> the Commission's 2005 Common Agenda for Integration;<sup>111</sup> the EU website on integration and the Integration Fund;<sup>112</sup> and the 2011 Common Agenda for the integration of Third Country Nationals.<sup>113</sup>

If the focus of these policy programmes is promoting genuine participation of migrants at the economic and social level,<sup>114</sup> EU legislation adopted as part of the common immigration policy, as well as its interpretation on the part of the CJEU, rather reflect the Member States' adoption of integration requirements as tools of immigration control. Both the EU Long Term Residence Directive<sup>115</sup> and the EU Family Reunification Directive<sup>116</sup> make room for the application of integration requirements on the part of the Member States.<sup>117</sup> In particular, in interpreting the latter, the CJEU has taken to some extent a middle way between rights' narrative and discretion narrative. For instance, in interpreting the Family Reunification directive, the Court has clarified that the directive imposes precise obligations on the Member States with regard to family reunification, which mirror into individual rights for TCNs.<sup>118</sup> However, the Court has then readily upheld provisions of the directive having the effect of reinstating a margin of appreciation for the Member States so as to allow them to apply integration requirements, in certain circumstances, before granting family reunification.<sup>119</sup> The Court has recognized, in this respect, the legitimate interest of the Member States in considering their competing interests before granting entry and residence rights to a TCN family member.<sup>120</sup> The stance of EU

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of 13.05.2015, available at

[http://ec.europa.eu/lietuva/documents/power\\_pointai/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](http://ec.europa.eu/lietuva/documents/power_pointai/communication_on_the_european_agenda_on_migration_en.pdf), at III.4.

<sup>109</sup> Art. 79(4) TFEU.

<sup>110</sup> European Council, 'Common Basic Principles on Immigrants Integration Policy', November 2004, available at <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/82745.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/82745.pdf)>.

<sup>111</sup> 'Common Agenda for Integration

Framework for the Integration of Third-Country Nationals in the European Union', COM(2005) 389 final, 1 September, 2005; available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0389>.

<sup>112</sup> Cf. <<http://ec.europa.eu/ewsi/en/>>. The European Integration Fund (EIF) had a budget of EUR 825m for the period 2007-2013. For 2014-2020 it has been replaced by the Asylum, Immigration and Integration Fund (AMIF) with a budget of ca EUR 3.1 million.

<sup>113</sup> 'European Agenda for the Integration of Third-Country Nationals', COM(2011) 455 final, of 20 July 2011, available at [http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1\\_en\\_act\\_part1\\_v10.pdf](http://ec.europa.eu/dgs/home-affairs/news/intro/docs/110720/1_en_act_part1_v10.pdf).

<sup>114</sup> Id.

<sup>115</sup> Directive 2003/109, above, n. 42.

<sup>116</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003, p. 12–18.

<sup>117</sup> E.g. Directive 2003/109, above, n. 42, art. 5(2); directive 2003/86, above, n. 117 art. 7(2). Also see Wallace Goodman, above, n. 12.

<sup>118</sup> Case C-540/03, Parliament v Council, EU:C:2006:429, par. 60; Case C-578/08, Chakroun EU:C:2010:117, par 41.

<sup>119</sup> Parliament v Council, above, n. (118), par. 61-62; Case C-153/14, K. & A., EU:C:2015:453.

<sup>120</sup> Parliament v Council, above, n. (118), par. 62 and 68. But see K. & A., n. 119, par. 52-54, where the Court in deciding on the admissibility of integration requirements for spouses in the context of family reunification, has emphasized that relevant integration requirements must be genuinely aimed at facilitating the establishment of connections in the host Member State on the part of the sponsor's family member.

immigration law, as well as the CJEU's approach to its interpretation, reconfirm thus that beyond the sphere of EU citizenship, a narrative of legitimate national closure, and of discretionary inclusion, prevails both at the national and at the supranational level.

### **C From Competing Narratives to Contrasting Rationales**

The contrast between individual rights protection and accommodation of state priorities, which surfaced in the rules on European citizenship and on immigration and nationality respectively, ripens into a full-fledged disconnect throughout the competing narratives. According to the discretion narrative, inclusion of a TCN, whether as a resident or as a citizen, ultimately depends on the choice of national authorities and is not a right. While the rights' narrative revolving around European citizenship emphasizes that inclusion through residence, in a number of situations linked to European citizenship, is a right; and that decisions on inclusion through nationality have to respect EU law and the rights of European citizens. This limits the discretion of national authorities as well as, potentially, the bite of integration requirements that constellate the discretion narrative. Further, if inclusion in the discretion narrative depends on the good fit of the entrant in the social and cultural fabric of the host Member State, in the rights narrative respect for the substance of European citizenship provides an alternative driver for inclusion independent of integration.

Disconnected narratives label similar situations in different ways. For instance, a rejected asylum seeker according to the discretion narrative may be the admissible parent caretaker of a European citizen according to the rights one; a national legitimately denaturalised for fraud according to the discretion narrative may be a wrongfully disentitled European citizen according to the rights one. Awkward practical results may follow. What for instance if Mr. Zambrano had been in Italy rather than in Belgium and he had failed to comply with the terms of his integration agreement? Would protection of the substance of his subsequently born European citizen child have saved him from expulsion?<sup>121</sup>

It could be counter-argued that the European citizenship's rules and narrative, rather than challenging the national ones, simply extend exceptions to the discretion frame that already exist in the immigration frame. Family considerations – the argument could go – warrant deviations from general immigration rules,<sup>122</sup> and European citizenship does no more than applying relevant considerations to TCN family members of migrant (and exceptionally also static) European citizens. However first, family considerations only go so far in immigration law and policy.<sup>123</sup> Second, European citizenship tends to emancipate the position of the TCNs it affects from family

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<sup>121</sup> Under the Italian Immigration Act, TCNs who hold a residence permit for family purposes or are family members of European citizens are not subject to the requirement to sign an integration agreement. See Italian Immigration Act, above, n. 46, art. 4-bis. However, it is not clear that a person in Mr. Zambrano's situation would have qualified for one of these residence permits.

<sup>122</sup> Family reunification is an autonomous ground for admission under most immigration laws. Further the right to family life under art. 8 of the ECHR, and art. 7 of the Charter of Fundamental Rights potentially work as a limit to state priorities in immigration matters.

<sup>123</sup> See Wallace Goodman, above, n. 14 (integration programmes have turned into migration control instruments precisely for family reunification migrants).

considerations, rather embedding it into a frame of rights meant to bestow autonomous statuses upon their holders.<sup>124</sup>

Ultimately, the rules and narratives of European citizenship protect a right to belong in a domain where national rules and narratives, as well as the rules under the EU common immigration policy, rather point towards the state's power to exclude. In this sense, the disconnect between these rules and narratives transposes into the European context a tension between individual rights and state sovereignty that is at the very heart of legal and philosophical conundrums on the regulation of cross-border movement.<sup>125</sup>

Under international law, states have a right to manage their borders and to decide in their discretion on the admission and exclusion of aliens.<sup>126</sup> The states' legal power to exclude finds justifications in a number of arguments in political theory and philosophy: from concerns for the premises and functionality of state-led mechanisms of redistribution,<sup>127</sup> to considerations of cultural protection and population trends.<sup>128</sup>

On the other hand, under international law, the right of states to include and exclude finds a limit in the necessity to protect in certain instances overarching human rights;<sup>129</sup> and more broadly in an individual right to move across borders, recognised in several international law instruments although subject to several conditions and limits.<sup>130</sup> Joseph Carens traces the philosophical roots of an individual right to cross state borders to principles of both freedom and equality:<sup>131</sup> free movement is a fundamental human freedom, which is also preliminary to many other freedoms;<sup>132</sup> and it is a guarantee of equality of opportunities, which may also help reduce social and economic inequalities on a global scale.<sup>133</sup>

In the EU context, this tension between individual rights and state sovereignty breaks into two distinct but related tensions. The narrative of TCNs' rights that EU citizenship brings about frames, on the one hand, a discourse of constitutional limits to the sovereign national power to

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<sup>124</sup> See *Ogieriakhi* (ECJ), above, n. 21, para 40 (one objective of the Citizenship Directive is ensuring that rights for TCN family members become personal to them under certain circumstances). But see *Kuldip Singh*, above, n. 31.

<sup>125</sup> *Thym*, above, n. 7, at 730 ('among lawyers, State discretion in migratory matters is usually described as an expression of sovereignty, while the perspective of migrants is presented on human rights grounds').

<sup>126</sup> See A. Aleinikoff, 'International Legal Norms and Migration: a Report', in A. Aleinikoff and V. Chetail (eds.) 'Migration and International Legal Norms' (Asser Press, 2003), pp. 1-30; D. Martin, 'The Authority and Responsibility of States' in *id.*, at 31-33. For a US judicial expression of relevant principles, see *Chinese Exclusion*, Case 130 U.S. 581 (1889), at 603; also see ECtHR, *Hirsi Yamaa and others v Italy*, Appl. No. 27765/09, judgment of 23 Feb. 2012, <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-109231&filename=001-109231.pdf>, para 113.

<sup>127</sup> In the famous words of Michael Walzer, 'distributive justice presupposes a bounded world'. M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983), at 31.

<sup>128</sup> See D. Miller, 'Immigration: the Case for Limits' in A. Cohen and C. Wellman (eds.) 'Contemporary Debates in Applied Ethics' (Blackwell, 2014), pp. 363-376.

<sup>129</sup> *Hirsi Yamaa*, above, n. 126, para 114.

<sup>130</sup> See e.g. International Covenant on Civil and Political Rights, art. 12; UN Charter, art. 13(2); European Convention on Human Rights, Protocol N. 4, art. 2-3.

<sup>131</sup> See J. Carens, *The Ethics of Immigration* (Oxford University Press, 2013), at 225-254.

<sup>132</sup> *Id.* at 227.

<sup>133</sup> *Id.* at 227-228.

police borders. On the other hand, it challenges the nation state's power to bound and bond around a shared conception of collective good.

In the former sense the rights' narrative casts limits based on fundamental individual freedoms against the national (and in part supranational) competence to manage borders through the regulation of immigration. Daniel Thym has argued that focusing on the dichotomy between rights and sovereignty is in part misleading in the context of the regulation of European immigration.<sup>134</sup> The latter is best understood through a cosmopolitan lens – the argument goes – which magnifies how the embedding of human and fundamental rights of migrants in the EU migration policy tames sovereignty and protects the individual right to cross borders.<sup>135</sup> European citizenship, with its rules and narratives touching upon the status of TCNs, adds a constitutional angle to this individual right to cross (European) borders.<sup>136</sup> In the context of immigration laws and policies, individual rights to cross borders either work as boundary to a system otherwise premised on state power and control;<sup>137</sup> or are the side effect of an effort at harmonisation of Member States' rules.<sup>138</sup> In the EU citizenship perspective, the TCNs' right to pass the external borders of the EU and to achieve a status of belonging within its composing nations challenges, albeit in a limited set of circumstances, the very competence of the Member States to guard their borders.<sup>139</sup>

In the second sense, the EU citizenship narrative mounts TCNs' supranational rights against the power of the nation state to administer inclusion and exclusion so as to bound around a shared space of solidarity and redistribution. The discretion narrative is imbued with communitarian accents that represent an expression of the latter power.<sup>140</sup> The Italian Council of State suggests that inclusion as national citizens entails the undertaking of moral and material duties towards the community.<sup>141</sup> The debate of the Belgian Parliament on the reform of Belgian nationality law

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<sup>134</sup> Thym, above, n. 7, at 725-26.

<sup>135</sup> Id. at 719-721 and at 726-727.

<sup>136</sup> While according to Thym European citizenship operates in a different domain, with an integrationist and federalist stance that cannot be exported to the law on TCNs. Id. at 724-25.

<sup>137</sup> See e.g. art. 3(2) Regulation 604/2013, above, n. 36.

<sup>138</sup> See whereas 17, Directive 2003/109, above, n. 42. Also see Ben Alaya, above, n. 51 (a student's right to be admitted under Directive 2004/114 is linked to objectives of approximation of national laws, paras 22, 26 and 31).

<sup>139</sup> See Carens, above, n. 131, at 272 ('the fact that citizens of the European Union states are largely free to move from one member state to another reveals starkly the ideological character of the claim that discretionary control over immigration is necessary for sovereignty').

<sup>140</sup> See Walzer, above, n. 127, at 62, suggesting that without admission and exclusion, there could not be communities of men and women "with some special commitment to one another and some special sense of their common life"; also see J. Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984), who criticises the liberal idea of democracy as a thin one and advocates a strong democracy where citizenship is intimately linked with participation in the community.

<sup>141</sup> According to the Italian Council of State, the acquisition of citizenship "must translate not only into a benefit for the interested person but also in the new citizen's material ability to fulfill his duties of social solidarity". Italian Council of State, judgment 974/2011, of 16.02.2011, available at <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=HXLOANXXCAAGZJHM3INF3TFGH4&q=>. Accordingly, one of the aspects that administrative authorities have to consider in their discretionary decision on the grant of Italian citizenship is the ability of the applicant to be economically self-sufficient and to contribute through taxation to the needs of the Italian community. Italian Council of State, judgment 766/2011, of 03.02.2011, available at <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=HXLOANXXCAAGZJHM3INF3TFGH4&q=>.

similarly emphasizes the link between acquisition of nationality and participation in the national community.<sup>142</sup> The language of the integration agreements suggests that already when admitted to residence, TCNs are expected to prove their ability and commitment to undertake and fulfil the obligations that come with membership in a bounded national community.<sup>143</sup> The discretion narrative thus preserves the boundedness of the EU Member States.

The rights narrative on the other hand tends to un-bound the Member States. It potentially amplifies and perpetuates the ‘opening effect’ that supranational citizenship, and European integration more in general, have been found to have on the Member States ability to articulate a shared notion of collective good.<sup>144</sup> This is because the right to belong that European citizenship projects onto TCNs transcends national boundaries.

Disconnected narratives thus signal deeper contrasts between, on the one hand, the Member States’ role as guardians of bounded national spaces (and spaces that are bounded for a reason); and European citizenship’s role of translating liberal values of individual freedom and autonomy, equality and tolerance that are at the basis of the European integration project into precise citizenship rights, of free movement, equal treatment and recognition as a fellow citizen despite national otherness.<sup>145</sup> These contrasts expose in turn the dilemma that immigration poses for European liberal democracies.<sup>146</sup> If in managing their borders so as to protect national identities and the collective interest of their communities, the EU Member States compromise principles of autonomy, equality and tolerance, they dilute the liberal character of those very identities and communities. If on the other hand they surrender to EU citizenship’s menu of supranational rights, they risk endangering those identities and communities by unbounding them.<sup>147</sup>

While this dilemma has deeper roots than European citizenship,<sup>148</sup> it challenges European citizenship’s narrative of TCNs’ rights. It calls for a novel conception of legal, political and social boundaries that may justify shifting competences for border management, and protect supranational rights while accommodating the interests of national communities. The question

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[amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=HWC4ZZ2ZZ2NRSM5ECARQJCHUPCM&q=.](http://amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=HWC4ZZ2ZZ2NRSM5ECARQJCHUPCM&q=)

<sup>142</sup> Above, section II.B.

<sup>143</sup> See e.g. the text of the French integration agreement: ‘The foreigner admitted to residence in France [...] prepares his republican integration in the French society. For these purposes, he enters into a reception and integration agreement with the State.’ See *Code de l’entrée et du séjour des étrangers*, above, n. 95.

<sup>144</sup> See M. Ferrera, ‘The Boundaries of Welfare, European Integration and the New Spatial Politics of Social Protection’ (Oxford University Press, 2015). Also see A. Menéndez, ‘Editorial: a European Union in Constitutional Mutation?’ (2014) 20 *European Law Journal* 127-141, at 138.

<sup>145</sup> See art. 2 TEU, art. 18 and 20 TFEU. Also see J. Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional Sonderweg’ in J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press, 2003), 7-26, at 19-20 (on Europe’s strategy to deal with the ‘other’ as one based on constitutional toleration).

<sup>146</sup> On different views of liberalism and the inclusion/exclusion criteria they allow, see Orgad, above, n. 14, 87-88; Hampshire, above, n. 14; J. Rawls, *Political Liberalism* (Columbia University Press, 1993), 160-165.

<sup>147</sup> Orgad, above, n. 14, at 92 (referring to this dynamic as the paradox of liberalism). Also see D. Kostakopoulou, ‘Defending the Case for Liberal Anationalism’ (2012) 25 *Canadian Journal of Law and Jurisprudence* 97-118 (for a critique of liberal nationalism, and proposing an alternative idea of ‘liberal anationalism’).

<sup>148</sup> See J. Sieglow, ‘Immigration, Sovereignty and the Open Borders: Fortress Europe and Beyond’ (2005) 10 *Review of Constitutional Studies* 111-134, at 111-112.



becomes then, whether European citizenship has the ability to back its narrative of rights with a credible theory of supranational boundaries.

## **II EU Citizenship and EU Immigration: Reconciling Competing Narratives through Mutual Recognition and Democracy**

### **A EU Citizenship, National Boundaries and Mutual Recognition of Belonging**

Questions of supranational citizenship and community boundaries have several angles, and have been extensively explored in different literatures. In part, they have been treated as questions of identity, focusing on the possibility of shifting the boundaries of perceived belonging in Europe.<sup>149</sup> They have also been looked at from a political angle, addressing the feasibility of redesigning political boundaries at the supranational level.<sup>150</sup> This article is rather concerned with the perspective of rights. Which boundaries shift in conjunction with European citizenship's articulation of a frame of supranational rights for second country nationals, and tangentially for TCNs? How do the obligations of rights' providers change, when the boundaries of the community of the entitled become supranational? And how does the supranational status of rights' holders relate to the status of national citizens?

While the rights perspective does not exhaust, of course, the question of boundaries, addressing these questions may help interpret the disconnect in rules and narratives that the first part of this article denounced, thereby clarifying the role that EU citizenship may play in the context of EU immigration.

The first-sight reality of European citizenship may inspire skeptical answers to the questions set above. European citizenship has been accused of being the side product of a market project. While it enhances and enlarges the sphere of autonomy of European economic actors, it does not trigger truthful reshaping of the community of solidarity that social citizenship relies upon.<sup>151</sup> In the absence of a supranational welfare system that may back an effort in this sense, European citizenship does not offer a sustainable recipe for the Member States to work as supranational rights' providers. Nor can it sustain the level of bonding that would legitimate a supranational architecture of redistribution. On the contrary, it is a 'misnomer' that threatens the Member States' ability to preserve their vest of social states.<sup>152</sup> The rebounding of the national welfare states, and retrenchment into nationalism, which ongoing social and economic crises have catalysed,<sup>153</sup> underline the shortfalls of European citizenship.

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<sup>149</sup> See Strumia, *Supranational*, above, n. 57, at 111-116.

<sup>150</sup> See e.g. D. Curtin, *Postnational Democracy: the European Union in Search of a Political Philosophy* (Kluwer Law International, 1997).

<sup>151</sup> See e.g. M. Everson, 'A Citizenship in Movement', (2014) 15 *German Law Journal* 965-984, at 967-970; A. Somek, 'Europe: Political not Cosmopolitan', (2014) 20 *European Law Journal* 142-163.

<sup>152</sup> A. Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship' (2014) 15 *German Law Journal* 907-934, at 907-908.

<sup>153</sup> See e.g. 'A New Settlement for the United Kingdom in a Reformed European Union', letter from David Cameron to Donald Tusk, 10 November 2015, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475679/Donald\\_Tusk\\_letter.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf).

National rebounding protects in this sense important collective goods, of which the nation states remain perhaps the most effective guardians. At the same time, the very possibility for the Member States to push back on their role as supranational rights providers reveals the fragile and contingent nature of the rights of second country nationals. While the CJEU has tried to make of these rights a ‘fundamental status’,<sup>154</sup> they remain limited and conditional.<sup>155</sup> In times of crisis they have become exposed to political resistance and to legal setbacks.<sup>156</sup> If residence was once thought to represent ‘the new nationality’,<sup>157</sup> it may seem these days that national citizenship is back with a vengeance as the ultimate source of rights and security.<sup>158</sup> If the supranational entitlements of second country nationals face such uncertain destiny, what can it be of the ones of TCNs? This sobering vision, while holding much truth, disregards in part the conceptual legacy of supranational citizenship.

European citizenship was never meant to supersede national citizenship, either as a source of status, repository of identity, venue of political encounter, or container of rights.<sup>159</sup> It has rather stretched European national citizenships beyond their own borders, giving them an extra-territorial reach.<sup>160</sup> In doing this, it has not only expanded the sphere of autonomy of individual national citizens, but also problematised the boundaries of their social and political spaces of belonging, grounding state obligations, albeit limited ones, towards those outside the core circle of membership.

European citizenship’s problematising of national boundaries is best evident in the context of the law on free movement. The European citizens’ right to move and reside in the several Member States entails a number of transnational components:<sup>161</sup> the right to export benefits and entitlements tied to nationality to a host Member State;<sup>162</sup> the right not to be burdened, or discriminated for having exercised the freedom to move;<sup>163</sup> the right to equal treatment with nationals of host Member States;<sup>164</sup> and a broader right to belong across Member State borders, for instance through seeing the family life one has built while exercising free movement rights protected upon return to a Member State of origin.<sup>165</sup> From the perspective of the individual citizens, these rights signify an extension of the boundaries of their national citizenships, whose

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<sup>154</sup> See e.g. Case C-184/99, *Grzelczyk* EU:C:2001:458.

<sup>155</sup> Art. 21 TFEU. Articles 7, 14 Directive 2004/38, above, n. 16.

<sup>156</sup> See Cameron’s letter to Tusk, above, n. 153. Also see Case C-333/13, *Dano*, EU:C:2014:2358.

<sup>157</sup> G. Davies, “‘Any Place I Hang my Hat?’”, or: Residence is the New Nationality’, (2005) 11 *European Law Journal* 43-56.

<sup>158</sup> See Spaventa, above, n. 81, at 2-4.

<sup>159</sup> The very language of the Treaties suggests that it is additional and does not replace national citizenship. But see Spaventa, above, n. 81, at 2 (European citizenship in this sense rests on a paradox).

<sup>160</sup> See F. Strumia, ‘Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground in Trans-Atlantic Perspective’ in Kochenov, above, n. 81.

<sup>161</sup> Art. 20-21 TFEU.

<sup>162</sup> See e.g. Case C-503/09, *Lucy Stewart* EU:C:2011:500.

<sup>163</sup> See e.g. Case C-224/02, *Pusa* (Opinion of A.G. Jacobs) EU:C:2003:634; Case C-406/04, *De Cuyper* EU:C:2006:491.

<sup>164</sup> Art. 18 TFEU.

<sup>165</sup> O and B, above, n. 24. For an analysis of these components, see F. Strumia, ‘Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging’ (2013) 32 *Yearbook of European Law* 432-459, at 441-447; also see Strumia, above, n. 160.

content comes to reach beyond national borders while opening up a dimension of belonging also in other Member States.<sup>166</sup> From the perspective of the Member States, enforcement of these rights implies a rule of mutual recognition of European citizens' national belonging.<sup>167</sup> Free movement of European citizens entails in other words a right to belong across borders which mirrors into an implied obligation of mutual recognition on the part of the Member States.

European citizenship thus declines in the domain of membership and belonging a notion of mutual recognition that is both a fundamental regulatory mechanism in the context of the internal market and the AFSJ,<sup>168</sup> and a normative aspiration for the project of European integration.<sup>169</sup>

Mutual recognition informs operational rules on free movement of persons: rules of recognition enable migrant European citizens to bring along to other Member States a number of accessories, from the more mundane (drivers' licenses),<sup>170</sup> to the more hard earned (diplomas and professional qualifications),<sup>171</sup> to the more identity-signifying (the spelling of their names).<sup>172</sup> At a higher level a system of mutual recognition of national belonging represents the foundation stone for the architecture of free movement of European citizens: each Member State has to uphold without questions the determination of any other Member State as to who belongs as a citizen in their national community, for purposes of extending to such citizens a measure of belonging into its own community.<sup>173</sup> Recognition in this sense implies a measure of trust among the Member States as well as among their nationals. Bonds of trust allow the opening of national borders and the blending of several communities of national others into a community of supranational citizens.<sup>174</sup>

While it has been observed that principles applying in the field of free movement cannot be as easily extended to the field of immigration from third countries,<sup>175</sup> two elements from this European citizenship's recipe to generate belonging from otherness are potentially transferable to the domain of TCNs' immigration: the inclination to recognise, rather than reject diversities; and trust rather than suspicion as a basis for relevant decisions of inclusion and exclusion.

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<sup>166</sup> See Strumia 'Individual Rights', supra note 165. Also see Case C-135/08, Rottmann (Opinion of A.G. Poiares Maduro), above, n. 62, para 16 (European citizenship 'confers on the nationals of the Member States a citizenship beyond the State').

<sup>167</sup> On the notion of mutual recognition of belonging see Strumia, above, n. 57, 278-314; also see Strumia, above, n. 165.

<sup>168</sup> For a comprehensive analysis, see Janssens, above, n. 9.

<sup>169</sup> See Nicolaïdis, 'Trusting the Poles?', above, n. 6; Nicolaïdis and Shaffer, above, n. 4, at 293 (on mutual recognition as a *modus operandi* for the EU as a whole); Nicolaïdis, 'Kir Forever?', above, n. 6, at 454-455 (on mutual recognition as a way to live with our differences in a European democracy).

<sup>170</sup> Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences OJ L 403, 30.12.2006, p. 18-60.

<sup>171</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ L 255, 30.9.2005, p. 22-142.

<sup>172</sup> Case C-353/06 Grunkin and Paul EU:C:2008:559; Case C-148/02 Garcia Avello EU:C:2003:539.

<sup>173</sup> Since clarified in Micheletti, above, n. 31.

<sup>174</sup> Nicolaïdis, 'Kir Forever?' above, n. 4 at 455 (Weiler's idea of a community of others lives on through the practice of mutual recognition).

<sup>175</sup> As free movement responds to different logics and different objectives. See Thym, above, n. 7, at 721 and 735-736; Spaventa, above, n. 81, at 11 (subtracting fellow citizens to executive discretion is precisely the point of European citizens' migration law).

In fact these elements already apply in the context of the EU common immigration policy, only they apply in a flipped manner in comparison to the domain of free movement, and of the internal market more in general.<sup>176</sup> Mutual recognition is a well-known rule in the context of the area of freedom, security and justice (AFSJ).<sup>177</sup> It presides to the functioning of European Arrest Warrants, to the enforcement of judicial decisions in civil and criminal matters, and to the enforcement of expulsion decisions.<sup>178</sup> As the list suggests, rules of mutual recognition in the AFSJ are functional to easing the circulation of judgments and administrative decisions, rather than to facilitating the movement of persons and goods.<sup>179</sup> Similarly, mutual trust among the Member States is conducive to enforcement of government action.<sup>180</sup> It rests on the presumption that all Member States comply with equivalent standards of fundamental rights protection, barring active inquiry in this respect.<sup>181</sup> Ultimately in the context of the AFSJ rules of mutual recognition work to amplify the effects of governmental discretion rather than to reinforce individual freedoms.<sup>182</sup>

European citizenship promises an alternative version of mutual recognition that could push back the balance towards individual freedoms also in the AFSJ, at least with regards to the common immigration policy. This is because European citizenship works on the nature of mutual recognition: in the context of citizenship, it is no longer just an operational rule, a mode of transnational governance, and a philosophical principle.<sup>183</sup> It becomes a norm of belonging.

Through this norm of belonging based on mutual recognition, national boundaries change in texture. European citizens' spheres of autonomy, as well as their entitlements, begin to extend across national borders. In this way their spaces of action and of interest as national citizens of differently bounded nation states become to some extent enmeshed. And similarly enmeshed become, by reflection, the spaces of actions of the European denizens, the TCNs. In this sense mutual recognition of belonging expresses, in the context of citizenship rights and statuses, Europe's character as a democratic community.

## **B European Citizenship as Democratic Citizenship**

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<sup>176</sup> Nicolaïdis, 'Trusting the Poles?', above, n.6, at 688-690; S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', in Schmidt (ed.), above, n. 9; Mitsilegas, above, n. 53.

<sup>177</sup> Of which the common immigration policy represents a part.

<sup>178</sup> See respectively Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190, 18.7.2002, p. 1–20, art. 81(1) and 82(1) TFEU; Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals OJ L 149, 2.6.2001, p. 34–36.

<sup>179</sup> Mitsilegas, above, n. 53, at 320-22; Möstl, above, n. 9, at 407-08.

<sup>180</sup> But see Janssens, above, n. 168, at 255 (on versatility of mutual recognition that may work either as a principle facilitating enforcement, or protecting individuals from further prosecution through the *ne bis in idem* principle).

<sup>181</sup> See Lenaerts, above, n. 9 at 7; also see Opinion 2/13, EU:C:2014:2454, para 191. But see NS, above, n. 52.

<sup>182</sup> Möstl, above, n. 9, at 407-09.

<sup>183</sup> Nicolaïdis, 'Trusting the poles? : Mark 2', above, n. 9, at 267.

The idea of European democracy entails a ‘union of peoples understood both as states and as citizens that govern together but not as one’.<sup>184</sup> Recognition is at the basis of belonging in such a community of multiple demoi.

Kalypso Nicolaïdis’ definition raises a concern from a citizenship perspective: whether the individual persons whose spheres of autonomy intersect through the exercise of supranational rights can turn into peoples, expressing joint political citizenship by governing together. In other words, how can the ‘accidental cosmopolitans’ in the eyes of Alexander Somek turn into democratic citizens?<sup>185</sup> The question points, on the one hand, to the well-known shortcomings of European political citizenship,<sup>186</sup> and to the political side of the notion of democracy.<sup>187</sup> From a different angle, which is rather the focus here, this question links back to the argument that enhanced individual autonomy, bolstered by the porousness of national borders, does not reflect into transnational collective commitments.<sup>188</sup> The mutual recognition content of supranational citizenship challenges the latter argument: recognition of individual transnational entitlements calls for an effort at internalising the points of view of the members of other demoi and redirects in part the obligations of both citizens and governments.<sup>189</sup> In this sense, the interdependence of the citizens’ spheres of autonomy creates a space to renegotiate collective commitments.

For such renegotiation to effectively take place, a measure of political appropriation of the transnational space, as well as a shared notion of collective good are needed. In the former respect, the austerity/non-austerity line in political discourses across Europe that have surrounded the sovereign debt crises may represent a burgeoning form of such appropriation.<sup>190</sup> In the latter respect, European citizens’ autonomous pursuits suggest, to some extent, a notion of collective good that cuts across national borders. It is the search of the European ‘good life’ after all that prompts EU citizens to claim mutual recognition of their belonging through the exercise of free movement rights: enhanced autonomy is conducive to the pursuit of employment, adequate welfare protection, ultimately social inclusion.<sup>191</sup> These are the collective goods that the Europeans care about.<sup>192</sup> The obligations that supranational provision of such collective goods triggers for the Member States ultimately express a shared vision of the state as the ‘protector of some space away from the market’.<sup>193</sup> Extension of citizens’ autonomy points to the need for the Member States to exercise relevant obligations, to a certain extent, on behalf of one another, but

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<sup>184</sup> Nicolaïdis, ‘European Democracy and its Crisis’, above, n. 6, at 353. Also see Case C-499/06, Nerkowska (Opinion of A.G. Poiares Maduro) EU:C:2008:132, para 23 (on ‘the society of peoples of the Union’).

<sup>185</sup> Somek, above, n. 151, at 144.

<sup>186</sup> See Menéndez, above, n. 144, at 137-138 (the crisis has even reverted the democratisation of Europe).

<sup>187</sup> For discussions of democracy focused on the political nature of the demos, see Bellamy, above, n. 6; Cheneval and Schimmelfennig, above, n. 6; Lindseth ‘Equilibrium, Democracy, and Delegation in the Crisis of European Integration,’ (2014) 15 German Law Journal 529-568.

<sup>188</sup> See J. Weiler, ‘Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’, (2014) 12 International Journal of Constitutional Law, 94-103; Somek, above, n. 151, at 145-147.

<sup>189</sup> See Nicolaïdis, ‘The Idea of European Democracy’, above, n. 6, at 267; Bellamy, above, n. 6, at 510.

<sup>190</sup> The Greek crisis provided one such example. See P. Eeckhout, ‘The Greek Crisis and the Dysfunctional European Political Space’ available at <<https://londonbrussels.wordpress.com/2015/07/21/the-greek-crisis-and-the-dysfunctional-european-political-space/>>.

<sup>191</sup> See F. De Witte, Justice in the EU – The Emergence of Transnational Solidarity (Oxford University Press, 2015) at 169 and 171-172.

<sup>192</sup> Somek, above, n. 151, at 145 and 161-163.

<sup>193</sup> Id.

it does not put up for question the relevant role of the Member States and the need to protect their ability to discharge redistributive duties also in respect of static citizens.<sup>194</sup> Eventually, it seems, the accidental cosmopolitanism of European citizens does express membership in a polity, a democratic one, where belonging is transferable among multiple *demoi*, on the ground that those *demoi*'s conceptions of the common good are akin and may justify a commitment to no othering of their mutual members.<sup>195</sup>

This commitment to no othering translates into a rule of mitigation in respect of the Member States' power to include and exclude EU citizens or TCNs. The rule points to the Member States' shared responsibilities as guardians of a segment of the borders of a democratic polity.<sup>196</sup> The interests of all other Member States have to be taken into account when deciding on the inclusion or exclusion of a TCN, whose status will have Europe-wide implications. In a democratic direction, the Italian Council of State in March 2015, in denying naturalisation to a TCN on grounds of public security, remarked that with Italian citizenship comes the right to move freely in the EU Member States.<sup>197</sup> Thus the security interest the Italian government was protecting through the refusal of its nationality –hinted the Council of State- was actually a shared interest that the Italian State had to defend on behalf of all the other Member States.

### **C Bridging the Disconnect through the Democratic Argument**

Notions of mutual recognition of belonging and democracy ultimately capture the way European citizenship has problematised national boundaries, for second country nationals as well as, by reflection, for TCNs. In respect of the latter, these notions help spell out the nature of the rights that European citizenship brings about for TCNs, as well as the scope of the obligations that European citizenship imposes on Member States in respect of TCNs. As a result mutual recognition and democracy lay out a possible bridge between disconnected rules, narratives and rationales.

The norm of mutual recognition suggests that TCN spouses, partners and parent caretakers derive from their European citizen family members a right to be included across national borders, even in spite of competing state priorities. This right to belong across borders suggests a way to reconcile rules on TCNs' status descending of European citizenship, and of the Member States' immigration and nationality regimes.

The rule of mitigation that democratic notions of mutual trust, shared responsibility, and no othering suggest offers a reading key to European citizenship's rights narrative in turn. It may help apply the latter narrative to re-interpret the competing immigration and naturalisation one based on discretion.

First, a mutual trust perspective suggests that the Member States in exercising their discretion in making inclusion and exclusion determinations, and in applying their integration requirements,

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<sup>194</sup> See De Witte, above, n. 191 at 186.

<sup>195</sup> See Nicolaïdis, 'The Idea', above, n. 6, at 257.

<sup>196</sup> Id. at 269-70 and at 359. See also Nicolaïdis, 'European Democracy', above, n. 6, at 356; Cheneval and Schimmelfennig, above, n. 4, at 340-341.

<sup>197</sup> Italian Council of State, judgment 1084/2015, of 4 March 2015, available at <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=KF6Q6CBW7XAJC5QCEKRWCEUEWY&q=>.

are called to take into account the point of view of any other directly involved Member States. They may have to recognize for instance determinations on residence, rights, integration previously made by another Member State in respect of the same TCN, or in respect of a TCN in the same situation.<sup>198</sup> The logics of European citizenship make recognition of such “grains” of inclusion a right for TCNs and simultaneously limit Member States’ powers in this sense.

Ideas of shared responsibility and no othering tame power in the context of admission and naturalisation also in a second direction. They remind that any Member State in administering inclusion and exclusion, even in respect of a TCN’s first admission, acts not only on behalf of itself, but on behalf of all other Member States. The right that it grants or denies to the TCN entails a claim, if not a right, to belong not only within its borders but across them and throughout the EU. For this reason, the process of granting or denying such right should incorporate the perspectives of other Member States, even if just potential, as well as the perspectives of European citizenship and its substance. The need to incorporate such perspectives limits, or channels, each Member State’s discretion.

To clarify with an example, had Lassana Bathily been a resident of Spain waiting for naturalisation there rather than in France at the time of becoming a hero in a dramatic French situation, Spain would have done well, in a democratic perspective, to accelerate his naturalisation process thereby incorporating a French point of view in running its process of inclusion.

Ultimately, European citizenship’s democratic norm of belonging mitigates the tension between national competence to police the borders and supranational rights: sovereignty is not superseded by a right to move across borders, but needs to be exercised in a way conscious of the external implications of that right.<sup>199</sup> In this sense, European citizenship’s contribution to the logics of immigration regulation in Europe is not in terms of stripping the Member States of their powers; it is rather in terms of showing the Member States a way to exercise a power that stays theirs in a mutually conscious and mutually respectful way.<sup>200</sup> The point thus is not harmonization of admission and naturalisation rules, but is rather encouraging shared understandings of those rules that preserve, but soften national boundaries.

Those national boundaries, as discussed above, are not only an expression of the states’ police power, but they also enclose a space of redistribution of collective goods. The question then arises as to what the democracy argument demands in terms of redistribution of these collective goods, and in terms of their redistribution for the benefit of outsiders. In this respect, the argument remains indeterminate. Redistributive questions turn in significant part on concrete issues of welfare and tax system design that the notion of democracy by itself is not equipped to address. They also turn on the scope of existing notions of collective good. In this respect, while current trends re-emphasize the role of the nation state as the proper venue to configure social citizenship,<sup>201</sup> as suggested earlier,<sup>202</sup> a democratic conception of European citizenship

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<sup>198</sup> See Strumia, above, n. 165, at 453-454; also see Strumia, above, n. 57, at 292-295.

<sup>199</sup> See Nicolaïdis, ‘European Democracy and its Crisis’, above, n. 6, at 356.

<sup>200</sup> But see M. Maduro, ‘So Close and Yet so Far: the Paradoxes of Mutual Recognition’ in Schmidt, above, n. 7, at 235-37 (on not underestimating the effects of mutual recognition on sovereignty).

<sup>201</sup> See De Witte, above, n. 181, at 208 (‘the EU has disentangled the pursuit of justice from the structures of the nation state’).

<sup>202</sup> Above, section III.B.

potentially makes room for renegotiating existing notions of collective good and of solidarity. According to Floris De Witte, aspirational solidarity limits the authority of the Member State in Europe.<sup>203</sup> The democratic argument further suggests that the kernel of solidarity that a right to belong across borders calls for also redirects such authority. It provides a rationale to exercise it not only to guarantee protection of the interests of insiders, but also to protect the rights of outsiders, whether they are second country nationals or TCNs.

It may be opposed to this that in the absence of supranational bonding, solidarity cannot go very far. However even accepting that solidarity really requires bonds, and that it cannot rather rest on a shared vision of ‘good life’ combined with awareness of the shared risk of being unable to attain such ‘good life’, a democratic polity entails its own genre of bonds. In Kalypso Nicolaïdis forceful words, it is a

“mosaic of intertwined mental and physical landscapes open to each other's soft influences and hard laws, and bound together not by some overarching sense of common identity or peoplehood but by the daily practice of mutual recognition of identities, histories, social contracts”.<sup>204</sup>

The democratic argument on European citizenship faces further challenges. It may be accused of overstating the importance of a few scattered rules on European citizenship family members, and of a subtle rights narrative on inclusion that may well fade into silence. There is a question of feasibility: how is the rights narrative to concretely affect debates and rules on immigration in the EU? As well as a question of opportunity: in a climate of political unrest surrounding several key integration questions, including immigration,<sup>205</sup> and at a time when EU institutional mechanisms are proving inadequate,<sup>206</sup> attaching so much importance to the feeble echoes of European citizenship’s tale of rights may seem utopian, if not naïve. The refugee crisis, with the shortcomings it has highlighted in the Common European Asylum System and the divided reactions it has triggered among the Member States,<sup>207</sup> casts an additional shadow on the resilience of any rights’ narrative.

In terms of feasibility, at a time when immigration has become one of the most divisive issues in European and national political debates, the strength of the European citizenship’s narrative is in that it speaks directly to case workers and courts which are called to apply the rules. If resistance and retrenchment prevail in the political arena, where rights of migrants are cast against the legitimate worries of the host countries for their social cohesion and financial commitments, the citizenship narrative keeps alive an albeit feeble discourse on rights. To a moderate extent, the rights narrative has already percolated to the national level. In Belgium, in the aftermath of the Zambrano judgment, and in the wake of an opinion of the Council of State, the Law on

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<sup>203</sup> De Witte, above, n. 191 at 172.

<sup>204</sup> Nicolaïdis, ‘Trusting the Poles?’, above, n. 6, at 682-83.

<sup>205</sup> Although some see signs of progress on a common approach to immigration. See Charlemagne, ‘The Birth-Pangs of a Policy’, *The Economist*, 25 Jul. 2015.

<sup>206</sup> Thoughts go to the Euro-zone crisis.

<sup>207</sup> For an overview of these shortcomings, see Communication from the Commission - Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197, 6 April 2016, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards\\_a\\_reform\\_of\\_the\\_common\\_european\\_asylum\\_system\\_and\\_enhancing\\_legal\\_avenues\\_to\\_europe\\_-\\_20160406\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf) p. 3-5 (last visited 24 May 2016).



Foreigners was amended to extend family reunification rights with TCN family members to ascendants of Belgian nationals.<sup>208</sup> Also, provisions on denaturalisation in the reformed Code of Nationality were amended at the suggestion of the same Council of State to take into account the Rottmann judgment.<sup>209</sup>

In terms of opportunity, it is true that the discontent currents that confront the European integration project have stripped European citizenship of much of its pragmatic bite. Yet the democratic argument illuminates the aspirational and exhortatory value of the concept of European citizenship.<sup>210</sup> In its heyday in the 90s and early 2000s, European citizenship has offered a supranational platform for individual right and social protection ideals that resonate in all Member States' traditions.<sup>211</sup> At a time when both legal achievements and political consensus are plummeting in Europe, this platform may provide an important 'restore point'. In fact, the democratic argument emphasizes that many of the interests that the Member States, and their public opinions, have grown so defensive of, are ultimately shared. Shared is, for instance, the interest in devising a strategy to cope with an unprecedented refugee crisis that stays true to European values, while taking into account the reception capacities of the Member States. While European citizenship can offer no ready solutions, with its democratic character, it reminds that at the roots of the European project there was an endeavor to take into account and internalize into the actions of a nation state the perspective of the other. Whether the other, citizen from the Member State next door, or the other, migrant landing on European shores.

It is from taking stock of this element of sharedness as well as commitment to no othering that European citizenship stands for, that renegotiation of a common European project, and of an acceptable social contract, may begin. Otherwise the Europeans who were meant to expand their cherished freedoms beyond national borders, are bound to fall back within the chains of their cozy but parochial national identities.<sup>212</sup>

#### IV Conclusion

Of the three disenchanting perspectives on European citizenship that were introduced at the beginning, this article's quest responds more directly to the third: the apparent dilution of the

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<sup>208</sup> See Opinion of the *Conseil d'État*, n 49 356/4 of 4 April 2011, available at <http://www.lachambre.be/FLWB/PDF/53/0443/53K0443015.pdf>; see also Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial, 8 July 2011, *Moniteur Belge*, 12 September 2011, 58915-58928, available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2011070829](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2011070829). The CJEU judgment in *Ben Alaya* (above, n. 49) also invites to question to what extent the judicial narrative of citizenship affects judicial interpretation of EU immigration law.

<sup>209</sup> See Opinion of the Belgian *Conseil d'État* 49.941/AG/2/V of 16 and 23 August 2011, available at <http://www.dekamer.be/FLWB/PDF/53/0476/53K0476011.pdf>, para. 14.1.1-14.4.

<sup>210</sup> See Kochenov, above, n. 81 at 29 (the approach to EU citizenship must necessarily be aspirational). On the propelling value of ideas in the construction of European integration, also see in general, C. Parsons, *A Certain Idea of Europe*, (Cornell University Press, 2003).

<sup>211</sup> As expressed in cases such as C-456/02, *Trojani* EU:C:2004:488; Case C-85/96, *Martínez Sala* EU:C:1998:217; *Grzelczyk*, above, n. 154.

<sup>212</sup> The expression is inspired by J. Rousseau, *Du Contrat Social ou Principes du Droit Politique* (Pléiade édition, 1762), p. 1 'L'homme est né libre, et partout il est dans les fers' (J. Rousseau, *Discourse on Political Economy and the Social Contract*, translated by C. Betts, Oxford University Press, 1994, p. 45 'Man is born free; and everywhere he is in chains').

legacy of rights of European citizenship when one witnesses the experience of TCNs at Europe's frontiers. However the article's findings suggest higher level thoughts on the broader challenges confronting European citizenship, including the evolving resistance to free movement and the political relevance of the notion of supranational citizenship. Therefore, there is a narrower as well as a broader conclusion to it.

In a narrower sense, and in relation to the original question set out in the introduction, European citizenship contributes to the status of TCNs the echoes of a democratic norm of belonging across borders. This norm dictates rights for at least a few TCNs and it lays a bridge across disconnected visions of inclusion in Europe that affect many. The bridge is fragile and swings vigorously in the stormy tones that characterise European immigration debates. However it marks a path and its conceptual premises also address two challenges emerging in the regulation and discourse of inclusion in Europe. With regards to the anomalous federalism of EU immigration discussed in Part II, a norm on belonging across the boundaries of several demoi offers a new justification for protection of individual rights in the context of shared immigration competences. Rights of migrants and citizens work not as outward limit to powers which are then used to share or shift burdens according to different rationales, but as the very reason for sharing responsibilities. With regards to the liberalism challenge presented in part III, the imperative of belonging across borders solicits softer application of integration requirements and management of discretion, so as to internalise the preferences of others. Value is returned this way to tolerance and equality.

Beyond the condition of TCNs, a recognition-based norm of belonging confirms that the core status in Europe is national citizenship. While European citizenship, through the annexed free movement rights, stretches part of the content of national citizenship across national boundaries, those same national boundaries are not in question. The Member States ultimately retain competence to control them, but in respect of the rights of a discrete minority of migrant European nationals. A reflection in this sense could begin to tame the sense of threat that seems to sustain nationalist and Euro-sceptic political agendas. The democratic argument may further appease this sense of threat by highlighting the role of European citizenship in blending ways of life that rest on similar conceptions of individual and collective good. Immigration, which has dug such profound rifts in European discourses, may appear to be the least likely context to shed light on this side of European citizenship. Yet while European citizens bicker about their differences and close their doors to one another, immigration reminds that the door the migrants are knocking on, or bursting through, is ultimately a common one: it is the prospect of living the good, peaceful life that the European citizens live behind that door-without entirely understanding the shared vision underpinning it- that attracts migrants after all.

Ultimately a democratic interpretation of European citizenship's *acquis* suggests how a marriage with little love and even less understanding such as the one among the European peoples can survive bad weather as a union of mutual respect. It also lays bare the one bond that from several sides supports a supranational citizenship architecture: trust. This is the one citizenship cell from which all the others, rights, voice, solidarity, inclusion, have to descend.