1

Introduction

1.1 Scope

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

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

As the reader will discover in Section 1.3, sustainability is a contested concept, whose premise, short history, and understanding can have very diverse implications for law and policy in general. What is not contested is that sustainability has three interdependent pillars – economic, social,

[1] The objective was confirmed in the New Pact on Migration and Asylum, COM(2020) 609 final.

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and environmental – and that it entails a balancing between the pillars with a view to the long-term preservation of the whole, and under considerations of intergenerational and intra-generational justice. Subsequently, I turned to non-legal scholarship dealing specifically with sustainable migration to examine if extra-legal considerations could inform sustainable migration.

By that point, it had become clear to me that the concept of sustainable migration has little or no precedent. It implies the balancing of economic, social, and environmental considerations in the way the migration phenomenon unravels. How this balancing should take place; how the different interests of migrants, host states, and states of origin should be considered; and what kind of legal structures should operationalize it, is unclear. What is more, it also became apparent that such balancing has a very different meaning and takes into account very different parameters whether applied at the national, supranational, or global level. Therefore, as I have argued elsewhere, the recent branding of EU migration policy in the apparel of sustainability should be understood as an attempt to unite Member States behind a common slogan that sounds appealing, at times of extreme disagreement on the instruments and principles that should guide EU migration law.[2]

In attempt to go further than diagnosing the political function sustainable migration serves, and to imagine the potential implication of such an objective for EU migration law, I turned to EU legal history.[3] Through a critical historical study of different facets of EU migration law, this book traces the existence of economic and social sustainability in EU migration law long before sustainable migration was articulated as a goal for this area. Ultimately, I suggest that sustainable migration is not far from the legal framework currently in place for EU migrants. Pursuing sustainable migration in the Area of Freedom, Security and Justice (AFSJ) would mean reproducing the structures of economic exclusion that exist in free movement while attributing effective mobility rights to third country nationals (TCNs) and extending their social rights. Conceptualizing EU sustainable migration in this way would not do away with the exclusion

[2] See Alezini Loxa, 'Den Nya Migrations- och Asylpakten och Löftet om en Hållbar EU-Migration' [2022] ERT 175 on the New Pact; Alezini Loxa, 'An EU Sustainable Migration: Institutional Discourse and Migration Politics' (2024) JCMS on EU migration policy after 2015.

[3] On the importance of legal history in material areas of EU law, see Morten Rasmussen, 'Towards a Legal History of European Law' (2021) 6 European Papers – A Journal on Law and Integration 923.

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of vulnerable migrants, which is after all attributed to the inherent limitations of a legal order structured around the objectives of growth and progress. It would, however, offer more extensive protection to migrants who contribute equally to the EU project of growth, thereby guaranteeing more socially sustainable societies.

After this short overview of the problem which inspired this research, Section 1.2 develops the argument guiding the development of the book. Section 1.3 presents the indeterminacy of sustainable migration and highlights the impossibility of using the term as a basis for EU legal imagination without further research. Section 1.4 argues for the necessity of addressing the problem by virtue of the critical legal historical study undertaken; it presents the material and the boundaries of the investigation. Finally, Section 1.5 outlines the structure of the book, its significance, and objectives.

1.2 Premises of the Argument

Taking the concept of an EU sustainable migration as the starting point of the analysis, a preliminary question to ask would be: migration that is sustainable for whom? The answer could vary: migration that is sustainable for the host states, for the states of origin, for the migrants involved, for the host communities, for the EU as a whole, for the planet, or for all of the above. Considering the diverse EU policy plans connected to sustainable migration, all these would be equally valid answers; indeed, each would frame a different investigation path. At the same time, not all these paths could and should be approached by means of legal research, as sustainable migration can be connected to different political approaches to growth and the role of human movement in it.[4] This project focuses on the EU legal order itself. Consequently, it will investigate what the past can tell us about the attribution of rights to migrants in

[4] On critical views, see Jane Briant Carant, 'Unheard Voices: A Critical Discourse Analysis of the Millennium Development Goals' Evolution into the Sustainable Development Goals' (2017) 38 Third World Quarterly 16; On the issues raised for human rights law by moving migration in the sustainable development discourse, see Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: To What Extent Are Human Rights and Sustainable Development Mutually Compatible in the Field of Migration?' (2020) 16 International Journal of Law in Context 239; On a systematization of the different trade-offs involved in sustainable migration, see Judith Janker and Susan Thieme, 'Migration and Justice in the Era of Sustainable Development Goals: A Conceptual Framework' (2021) 16 Sustainability Science 1423.

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a way that is sustainable for the EU legal order and that allows the maintenance of a 'common legal space that advances common aims under common values'.[5]

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

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

An overview of the evolution of the Treaties points to the persistence of economic and social objectives in primary law. Essentially the economic and social pillars of sustainability have been constantly reflected in

[5] Neil Walker, 'Legal and Constitutional Theory of the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 111; Armin von Bogdandy, 'European Law Beyond "Ever Closer Union" Repositioning the Concept, Its Thrust and the ECJ's Comparative Methodology' (2016) 22 ELJ 519, 520.

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EU primary law through these objectives. The term 'objectives' should be understood as the imperatives behind the adoption of EU secondary law. Secondary law is adopted as means to achieve the objectives expressed in primary law. Thus, as I argue in this book, to understand the potential legal implications of an EU sustainable migration for the rights of migrants, it is essential to investigate its history, that is, to investigate how economic, environmental, and social objectives have to this day been considered behind the attribution of rights to migrants under EU law. A challenge of this investigation is that environmental aspects have never been considered in EU migration law.[6] A single Commission Staff Working Document issued in 2013 suggested that environmental aspects should be taken into account in the planning of EU migration policy; however, the Commission held that there was not enough evidence at the time to evaluate how such migration could affect flows in the EU.[7] Therefore, due to lack of material, it is impossible to conduct a historical study on this aspect of an EU sustainable migration. In this sense, there can be no history of what has not existed.

As a result, my investigation into the past will be restricted to economic and social objectives, for these are the two pillars of sustainability that predate the appearance of the novel concept of sustainable migration, by being EU primary law objectives from the establishment of this legal order. In this, they must have affected how EU law creates rights for migrants. Investigating the way economic and social objectives have shaped EU migration law can point to the inherent limits and, perhaps, to the potentials of an EU sustainable migration for the rights of migrants. In light of the above, the historical investigation undertaken in this book traces the ways in which the economic and social pillars of sustainability, as historically conveyed in the EU primary law objectives of economic growth and social progress, have shaped the rights of migrants under EU law. Specifically, I investigate how the economic and social objectives of the EU legal order, as specific manifestations of the economic and social pillar of sustainability in EU law, have shaped a

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

[7] Commission Staff Working Document, "Climate Change, Environmental Degradation, and Migration Accompanying the Communication, An EU Strategy on Adaptation to Climate Change," SWD(2013)0138 final. See also Fitness Check on EU Legislation on legal migration, SWD(2019)1055 final, Part 2/2 149.

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legal area where the national of a state becomes the subject of EU law rights by virtue of their cross-border movement and settlement (temporary or permanent) in a Member State. To explore how the parallel pursuit of growth and progress has affected the attribution, limitation, and extent of rights migrants enjoy under EU law, I focus more closely on law-making and adjudication at EU level.

The investigation of the role played by economic and social considerations entails exploring the factual elements examined by EU institutions when adopting a legal instrument or interpreting EU law. Economic considerations refer to factors related to the economy of the Member States more broadly, including, for example, labour market conditions, recession, trade. Social considerations refer to factors related to human life and society including, for example, human rights, social cohesion, education, social welfare. These considerations are taken into account in the negotiation and adoption of secondary legislation in order to steer the development of EU law in line with primary law objectives. In the interpretation of EU law by the Court of Justice of the EU, these considerations are taken into account in order to ensure that the effects of a decision will be aligned with primary law objectives. The examination of various legal instruments and case law in view of the social and economic purpose migrants' rights serve for the development of the EU legal order highlights the centrality of the economic and social pillars of sustainability in the historical evolution of EU migration law. Before going into the investigation, Section 1.3 will demonstrate why the knowledge that already exists on sustainability is not sufficient for understanding the legal implications of an EU sustainable migration.

1.3 The Indeterminacy of EU Sustainable Migration

According to the dictionary definition, sustainability means 'the quality of being able to continue over a period of time'.[8] A literal understanding of sustainability hints at the qualities of maintenance or continuity that are embedded in any application or interpretation of sustainability. However, this literal meaning is of little help in understanding the legal implications of the objective of shaping an EU sustainable migration. This is especially so, considering the many sectors that have been linked to sustainability and the many nouns that have followed the adjective

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

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'sustainable' from the 1970s onwards. To better tease out the problem we are up against, the following sections provide an overview of the concept of sustainability (Section 1.3.1), its appearance in EU law, policy, and scholarship (Section 1.3.2) as well as its recent connection to migration (Section 1.3.3).

1.3.1 *Sustainability: An Overview*

While the first recorded use of the term sustainability dates to the Enlightenment period, sustainability became popularized in the 1970s as a central part of environmental ethics, which at that time emerged as a distinct philosophical discipline.[9] The emergence of the concept was linked to concerns over the finite nature of planetary resources and the danger posed by human activities to the preservation of the environment.[10] Through a series of UN initiatives, sustainable development was proposed as a form of development better tailored to addressing the risks faced by humanity at the time.[11] By now sustainable development or sustainability has evolved into a concept of immense significance in international law and governance.[12] While there are scholars who distinguish between the two concepts, the distinction is

[9] Hans Carl von Carlowitz, *Sylvicultura Oeconomica, Oder Haußwirthliche Nachricht Und Naturmäßige Anweisung Zur Wilden Baum Zucht* (Leipzig 1713); Margaret Robertson, *Sustainability Principles and Practice* (3rd ed., Routledge 2021) 3; Marc Brightman and Jerome Lewis (eds), *The Anthropology of Sustainability: Beyond Development and Progress* (Palgrave Macmillan 2017) 3; Andrew Brennan and Lo YS Norva, 'Environmental Ethics' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Spring 2023 edition) https://plato.stanford.edu/archives/spr2023/entries/ethics-environmental/.

[10] Donella Meadows and others, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of the Mankind* (Universe Books 1972).

[11] The central material shaping the contours of the concept in international law is the Brundtland Report, World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) adopted by the United Nations General Assembly 42/187 – Report of the WCED, A/RES/42/187, 11 December 1987; Rio Declaration on Environment and Development, 13 June 1992, adopted by the UNCED at Rio de Janeiro, UN Doc A/CONF. 151/26, Vol.1, August 1992, ILM 874; Millennium Development Goals, Special Session of the UN General Assembly to Review and Appraise the Implementation of Agenda 21, 23–27 June 1997, New York; Transforming Our World: The 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[12] See Margherita Pieraccini and Tonia Novitz, 'Sustainability and Law: A Historical and Theoretical Overview' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020).

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not uniform or consistent.[13] The convergence of these terms also appears in EU policy documents. For this reason, this work also addresses sustainability and sustainable development as entailing the same demands and considerations.

In general, it is widely accepted that sustainability is a three-pillar concept involving considerations related to the economy, the environment, and the society. The relationship among the three pillars, however, is rather less clear.[14] Initially the focus was on sustainable development or sustainability as an environmental concept. The evolution of the policy discourse set the basis for theoretical conceptions of sustainability as a more general concept which encompasses three interrelated pillars, which however can be 'independent dimensions and equally important goals in themselves'.[15] Much like sustainable development, there is no uniform understanding of the elements of social sustainability, which could be of relevance to migration.[16] Nevertheless, all the relevant works engage with questions of equity and social justice.[17] As Jacobs mentioned already in the 1990s, 'inequitable societies are prone to social conflict, they are therefore likely to be socially unsustainable'.[18]

International law scholarship has provided numerous contributions on the notion of sustainability, the different degrees of normativity under which the concept appears, as well as its potential to become a general

[13] See Andrew Dobson, *Justice and the Environment, Conceptions of Environmental Sustainability and Dimensions of Social Justice* (Oxford University Press 1998), who sees sustainable development as a form of theory of environmental sustainability; Klaus Bosselman, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008), addressing sustainability as an ethical principle predating sustainable development.

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

[15] Henrik Åhman, 'Social Sustainability – Society at the Intersection of Development and Maintenance' (2013) 18 Local Environment 1153, 1155; See Tonia Novitz, 'Social Sustainability, Labour and Trade: Forging Connections' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020) on different connections forged between the pillars of sustainability.

[16] Åhman (n 15); Beate Littig and Erich Griessler, 'Social Sustainability: A Catchword between Political Pragmatism and Social Theory' (2005) 8 International Journal of Sustainable Development 65; Jesse F Dillard, Veronica Dujon and Mary C King (eds), *Understanding the Social Dimension of Sustainability* (Routledge 2009).

[17] Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) for theoretical discussions on justice and sustainability.

[18] Jacobs (n 14) 38.

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principle of international law.[19] Most of the relevant literature engages with sustainability and sustainable development in relation to economic growth and environmental considerations.[20] In the past decade, scholarly work has also paid attention to social considerations and their interplay with sustainable development, with no connection whatsoever with migration.[21] After this general overview of sustainability as a concept of relevance in international governance, the next sections turn to the EU policy field.

1.3.2 *The Disconnect of Migration from Sustainability in EU Policy and Scholarship*

Sustainability as a concept pertinent to law and policy considerations first appeared in the EU legal order in the 1990s. Sustainable development has formed part of EU primary law since the Maastricht Treaty.[22] Specifically, the Maastricht Treaty referred to sustainable development in the field of development cooperation in Article 130u TEC. The notion of sustainable development was also alluded to in Article B TEU and Article 2 TEC, by reference to the economic, environmental, and social pillars of the notion being connected *in abstracto* with progress and growth. The Amsterdam Treaty was the first instrument to explicitly introduce sustainable development as an EU objective, encompassing all the pillars of the notion and adding a special reference to the relation of

[19] Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) on sustainable development as a meta-principle; See Vaughan Lowe, *International Law* (Oxford University Press 2007) on sustainable development as an interstitial norm; See Pieraccini and Novitz (n 12) 22–24 for an overview of how sustainable development appears in International Law litigation; Nicolas de Sadeleer, 'Environmental Principles, Modern and Post Modern Law' in Richard Macrory, Ian Havercroft, and Ray Purdy (eds), *Principles of European Environmental Law, Proceedings of the Avosetta Group of European Environmental lawyers* (Europa Law Publishing 2004).

[20] For a critique, see Federico Demaria and Ashish Kothari, 'The Post-Development Dictionary Agenda: Paths to the Pluriverse' (2017) 38(12) Third World Quarterly 2588; Giacomo D'Alisa, Federico Demaria, and Giorgos Kallis (eds), *Degrowth: A Vocabulary for a New Era* (Routledge 2015).

[21] Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020); Littig and Griessler (n 16) is considered as a turning point for the beginning of engagement with social sustainability.

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

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the concept to environmental protection.[23] The reference to and inclusion of sustainable development as a primary law objective that relates to economic growth, social progress, environmental protection, and external action was maintained in the Lisbon Treaty and creates a link between this concept and virtually every area of EU policies.

In terms of policy evolution, in the beginning of the new millennium, the EU started shaping an autonomous Sustainable Development Strategy.[24] Throughout the evolution of the relevant policy, no link with migration ever appeared.[25] The first time the EU Sustainable Development Strategy became connected with migration was under the von der Leyen Commission. Specifically, von der Leyen's political programme aimed at integrating the UN 2030 Agenda on Sustainable Development in all Commission proposals, thus streamlining sustainability in EU policy, instead of having an autonomous EU Sustainable Development Strategy.[26] In a working document issued in 2020, the Commission elaborated on the different policies adopted with the aim of implementing the Sustainable Development Goals (SDGs) at EU level. In that working document, and in the SDGs' mapping tool developed by the Commission, it appears as if all the EU policies currently pursued, and all the legal acts adopted by the EU, relate to one or more SDGs.[27] Among all the different policies, the Commission mentions the New Pact on Migration and Asylum as linked to the EU's pursuit of sustainability.[28] It is safe to assume that this newly established link relates more to the diffusion of sustainability-related goals across all areas of the Commission, rather than to a conceptual connection between the Agenda and the EU migration policy. Despite this recent link, over the previous twenty years, the EU Sustainable Development Strategy had

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

[24] European Council, Presidency Conclusions, Lisbon, 23–24 March 2000; Communication, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, EU Sustainable Development Strategy, COM(2001)264 final.

[25] Ibid; Towards a global partnership for sustainable development, COM(2002)82 final; EUROPE 2020, A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final; Next steps for a sustainable European future, European Action for Sustainability, COM(2016)739 final.

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

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

[28] Commission Staff Working Document (n 26) Box 1 at 6.

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evolved in silo from the EU migration policy. The recent connection of sustainability with every aspect of EU action, and thus also with migration, obfuscates the concept's meaning and implications. A similar siloed approach exists in EU scholarly research in sustainability.

Specifically, sustainability-related research in EU law has not hitherto engaged with the links between sustainability and migration. Rather, EU law scholars have investigated sustainability in relation to environmental law, competition law, and, more recently, labour law. In the literature, there have been two broad ways of engagement with sustainability over the last twenty years. The first is scholarship that looks at how EU law can be used as a tool to address environmental problems. By emphasizing the need to equip the EU legal system with tools that can address environmental challenges, scholars looked at if and how EU law could be interpreted or applied to address such challenges. This strand includes research mostly in the fields of environmental law and competition law.[29]

Second, in more recent years, we see a shift in the perception of sustainability, such that more recent works discuss how EU law can be used as a tool to achieve more sustainable societies. The second strand of scholarship developed later in time and is tied to the conceptual evolution of sustainability during the 2000s, the evolution of EU law itself, especially after the Lisbon Treaty, and different events that have taken place in the European region. Sustainability as a concept that includes three pillars (economic, social, and environmental) finds explicit expression in Article 3(3) TEU. After the adoption of the Lisbon Treaty, many different crises have been experienced at EU level (economic/financial crisis, Brexit, migration crisis, public health crisis), which have pointed to

[29] In environmental law, see Richard Macrory, Ian Havercroft, and Ray Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing 2004); Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002); Christina Voigt and Hans Christian Bugge (eds), *Sustainable Development in National and International Law* (Europa Law Publishing 2008); Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015); Matthew Humphreys, *Sustainable Development in the European Union: A General Principle* (Routledge 2017). In competition law, see Marios Iacovides and Christos Vrettos, 'Falling through the Cracks No More? Article 102 TFEU and Sustainability: The Relation between Dominance, Environmental Degradation, and Social Injustice' (2022) 10 Journal of Antitrust Enforcement 32; Edith Loozen, 'Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability' (2019) 56 CMLRev; F Oles Andriychuk, 'The Concept of Sustainability in EU Competition Law: A Legal Realist Perspective' (2021) 23 Yearbook of Antitrust and Regulatory Studies 11.

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the inability of the existing system to achieve sustainability objectives.[30] In light of these crises, different scholars have suggested how different fields of EU law should be developed or applied as means to achieve more just and sustainable societies. This strand of scholarship continues to investigate the meaning of sustainability.[31] While most of these works are focused on fields related to economic law, some research has also emerged in the field of labour law.[32] Such a broadening of the field of enquiry follows the evolution of sustainability in international and EU policy as a concept related to every aspect of human life.

However, this conceptual opening of sustainability still does not provide much clarity as to the meaning or implications of the concept for sustainable migration. Three key lines of argument can be identified in the relevant research. First, sustainability is viewed as a concept comprised of economic, environmental, and social pillars, although not all scholarship agrees on whether these pillars are interdependent or autonomous. Second, sustainability demands the continuity or maintenance of something for the future, although not all scholars agree on what is the value to be maintained. Third, sustainability involves considerations of intergenerational and intra-generational justice, which take differentiated expression in different areas of law. In spite of the aforementioned analyses, the relevant scholarship has not yet addressed the relation of sustainability to EU migration law. Section 1.3.3 thus engages with the connection between sustainability and migration in EU policy.

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

[31] Alexandros Kyriakidis, 'Sustainability and Eurozone 2.0: Still Impossible?' in Beate Sjåfjell, Charlotte Villiers, and Georgina Tsagas (eds), *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises* (Cambridge University Press 2022); Tonia Novitz and Margherita Pieraccini, 'Agenda 2030 and the Sustainable Development Goals: "Responsive, Inclusive, Participatory and Representative Decision-Making?"' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020).

[32] Novitz (n 15); Tonia Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31 International Journal of Comparative Labour Law & Industrial Relations 243; Tonia Novitz, 'Addressing Social Dumping and Unfair Competition – An Analysis of EU Pillar Initiatives from a Sustainability Perspective' in Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe* (Edward Elgar 2022); Konstantinos Alexandris Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' (2020) 29 Social & Legal Studies 183.

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As will be argued in the section, the lack of coherence in the way this connection is made renders the scholarly gap particularly salient.

1.3.3 *The Incoherent Appearance of Sustainability in EU Migration Policy*

Migration was first linked to sustainability in the 2030 Agenda on Sustainable Development. Among the seventeen SDGs and under the umbrella of reducing inequalities, goal 10.7 targets the facilitation of 'orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.[33] Following the adoption of the Agenda, the UN Global Compact on Migration was adopted in December 2018.[34] The Compact was the first intergovernmental effort to holistically address migrant protection. Specifically, and building on already binding human rights obligations, the Compact addressed issues of migrant protection at all stages of their journey (origin, transit, and destination countries).[35]

The EU discourse on sustainable migration predated the adoption of the Compact and has developed in complete disconnect to the international policy on the matter. Specifically, after 2015, sustainable migration became the new buzzword describing the future of EU migration policy.[36] In different documents issued by the Commission from 2015 to this day, sustainability appears as a central goal of EU migration policy. Nevertheless, the connection made between sustainability and migration is nowhere elaborated in a manner which would clarify its legal implications. In previous research, I have offered a typology of the various ways in which sustainable migration appears in EU policy documents.[37] Specifically, sustainable migration appears first with a literal meaning related to the reduction in the numbers of incoming migrants. Second, the term appears with an abstract meaning as an undefined goal

[33] See Michele Klein Solomon and Suzanne Sheldon, 'The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration' (2019) 30 IJRL 584.

[34] UN General Assembly, Compact for Safe, Orderly and Regular Migration, 19 December 2018, A/RES/73/195.

[35] Ibid, point 2. On countries of origin, see objectives 2, 4; On transit countries, see objectives 5, 8, 9; On destination countries, see objectives 16-2.

[36] For a detailed analysis of the relevant policy discourse, see Loxa, 'An EU Sustainable Migration' (n 2), Section 3.

[37] Ibid, Table 1.

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or characteristic for the future of EU migration policy. Finally, sustainable migration appears closely related to specific areas. These are partnerships with third countries and returns and reintegration, the creation of sustainable legal pathways, and sustainable sharing of responsibility. Even if we were to accept that these policies form part of an EU sustainable migration, they lack coherence and create challenges for the EU legal order, making them unsuitable to use as a basis for the legal implementation of a sustainable EU migration.[38]

At the same time, scholarly research on sustainable migration has still not engaged with the potential legal implications of the concept. While the link between sustainability and migration under the Global Compact prompted scholarly investigation, the literature focused on the legal value of the Compact and its interaction with international human rights law.[39] Moreover, authors have used the term 'sustainable migration' in a declaratory manner, as a demand for a type of migration policies, without any clear definition of what these should entail.[40] Outside legal scholarship, migration studies have been investigating the relation between development and migration for a long time.[41] From the 1960s to this day, migration has been connected to development by outlining how the flow of people and, consequently, of money (through remittances), as well as of knowledge (acquired in the host country and employed in the country of origin upon return) can impact the development of host countries and countries of origin of migrants.[42]

[38] Ibid, Section 3.

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

[40] Klein Solomon and Sheldon (n 33); Eva Dick and others, 'Regional Migration Governance: Contributions to a Sustainable International Migration Architecture' (2018) Briefing Paper Deutsches Institut für Entwicklungspolitik (DIE); Tesseltje de Lange, 'A New Narrative for European Migration Policy: Sustainability and the Blue Card Recast' (2020) 26 ELJ 274.

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

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

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In this regard, it should not come as a surprise that research into potential definitions of the term 'sustainable migration' have been explored outside the field of legal science and with an emphasis on development considerations.[43] Specifically, the Peace Research Institute of Oslo produced two papers which offered definitions of sustainable migration from the perspective of migration studies and human geography. In these papers, it was acknowledged that the concept of sustainable migration, especially without an established definition, is a powerful one in the sense that its rhetorical effects can be seen as fitting both liberal and restrictive migration agendas.[44]

The relevant definitions offer a starting point for conceptualizing sustainable migration policies, but they cannot provide much guidance on legal design. Their emphasis lies on the distribution of costs and benefits and evaluation of long-term interests between the individuals, states, and societies affected, a distribution which cannot be easily translated in law, let alone EU law, which would have to consider the very different ways in which Member States are affected by migration. Moreover, these definitions encounter another obstacle, namely the position of individuals and their agency as rights-bearers in law. On this matter, Guild has highlighted the risk that arises from linking sustainable development and migration and has argued that migration should be applied within the framework of human rights standards

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

[43] See Pierre Picard and Tim Worrall, 'Sustainable Migration Policies' (2011) Université catholique de Louvain, Center for Operations Research and Econometrics 2011/40, where sustainability of migration is examined in light of the development of formulas examining the costs and benefits of labour migration under different schemes; Janker and Thieme (n 4) have tried to develop a framework for sustainable migration based on trade-offs between costs and benefits at different levels (individual, household, community/regional, national); Mohammed Al-Husban and Carl Adams, 'Sustainable Refugee Migration: A Rethink towards a Positive Capability Approach' (2016) 8 Sustainability 451, where alternative governance models are proposed on the basis of ethnographic field studies.

[44] Jørgen Carling and Marta Bivand Erdal, 'Is "Sustainable Migration" a Valuable Concept?' (PRIO Policy Brief 2018) 5; Marta Bivand Erdal and others, 'Defining Sustainable Migration', EMN Norway Occasional Papers; Alexander Betts and Paul Collier, 'Sustainable Migration: A Framework for Responding to Movement from Poor to Rich Countries' (2018) EMN Norway Occasional Papers; Cf Christina Voigt, 'From Climate Change to Sustainability: An Essay on Sustainable Development, Legal and Ethical Choices' (2005) 9 Worldviews 112, 120; See also John S Dryzek, *The Politics of the Earth: Environmental Discourses* (3rd ed., Oxford University Press 2012) 132 for similar discussions on the politics of environmental sustainability.

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rather than SDGs.[45] The aforementioned analysis points to the difficulty of identifying and operationalizing elements that can inform a legal framework structured around the objective of an EU sustainable migration.

1.4 EU Legal History as a Precondition for Understanding Sustainable Migration

Section 1.3.3 has provided an overview of sustainability as a concept of relevance to law and policy, tracing its appearance in EU policy and scholarship and its recent connection to EU migration policy. The numerous inconsistencies and divergent objectives of EU migration policy all huddle together under the umbrella of sustainable migration. These inconsistencies suggest the need to reach back into the past in the remainder of this book, in order to problematize for the future.

To put it in simply, looking at EU policy documents does not allow us to understand what sustainable migration is or how it would be different from the action that was already shaped under the EU Agenda on Migration, and previously under the Global Approach to Migration and Mobility.[46] Yet turning to law and legal scholarship does not help either, as there is no apparent link between migration law and sustainability, contrary to the link between sustainability and environmental law, competition law and, more recently, labour law. Extra-legal scholarship on sustainable migration hints at a balancing of costs and benefits on the design of migration policies, yet cannot provide guidance as to how such balancing could take place in EU law or what implications it would have for migrants' rights. In one way or another, we are in unchartered territory.

Two theoretical propositions on sustainability are of value in this unchartered territory. Under the first, sustainable migration could be understood as a political concept put forward by the Commission to unite Member States in a period of contentious migration politics, as I have argued elsewhere.[47] Already in the 1990s, Baker suggested that the commitment of the EU to sustainable development was a symbolical political act and she pointed to the function of symbols in politics as 'stimulators of change' which have transformative potential for the *status*

[45] Guild (n 4) 249.
[46] Loxa (n 2), Section 3.
[47] Ibid.

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quo.[48] In order to explore the transformative potential (if any) of sustainable migration, we need to first explore how the *status quo* under EU law engages in balancing economic and social considerations in the regulation of migration. Only after doing so can we evaluate if the symbolical commitment of the EU to sustainable migration has potential of transformation or continuity with past policies.[49] Indeed, as the remainder of the book will show, EU migration law has been developing under very specific legal structures and principles over the course of many years drawing on considerations related to the parallel – though not always interdependent – pursuit of economic and social objectives.

Under the second theoretical proposition, sustainability could be seen through the lens of system theory. In the relevant scholarship, sustainability is seen as entailing a balancing exercise between conflicting demands and based on interdependence. Building on ecology and systems theory, Lélé has argued that sustainability encompasses the attributes of dynamic equilibrium, reliability, resilience, and adaptability.[50] Similarly, in ecological economics, Constanza has proposed that sustainability of an ecosystem is the system's ability to maintain its structure and function over time in the face of external stress.[51] This system-theoretical understanding of sustainability has also been applied at EU level by Barbier who suggested that sustainability is a quality of the European Social Model.[52] By suggesting that the European Social Model is the system in question, his approach fails to conceptualize sustainability in the overarching way in which it appears as an EU primary law objective.

Following the demand set by primary law that sustainability is the objective of this legal order, I argue in this book that sustainable migration can be perceived as being connected to EU law as the system

[48] Susan Baker, 'Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union' (2007) 16 Environmental Politics 297, 314.

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

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

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

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

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in question. For migration to be sustainable, EU migration law would need to align with the sustainability objective of the EU legal order. Plainly put, it would need to respect the structure of the EU legal system in terms of horizontal and vertical division of competences, the function of the system in delivering the promised objectives of growth and social progress, and to have resilience against external stress. Chapter 10 will reflect on the findings of the historical analysis and it will connect them with the theoretical propositions presented here, to discuss if and how EU law can deliver the objective of sustainable migration. Sections 1.4.1 and 1.4.2 will in turn discuss the material and delimitations of the research carried.

1.4.1 Material

The remainder of the book develops by a historical investigation on both free movement and regulation of migration from third countries. The embeddedness of economic and social sustainability throughout the history of EU migration law is demonstrated after a historical investigation analysing the negotiation, adoption, and interpretation of various instruments regulating residence and social rights of EU and TCN migrants from the European Coal and Steel Community (ECSC) to the present day. This approach to EU migration law as a broader category of examination is rarely encountered in EU law literature any longer.[53] Migration law research and teaching under EU law is dichotomized along two distinct categories: free movement and migration from third countries.[54] There is a presumed difference in the normative foundations of the attribution of rights to each category of migrants under these frameworks.[55] Tracing the history of economic and social sustainability in the development of EU migration law by including both EU and TCN

[53] In the 1990s, various authors examined the potential convergence between the two frameworks. See David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 ELR 3; Elspeth Guild, *Immigration Law in the European Community* (Brill Nijhoff 2001).

[54] As attested by the recent publication of two separate handbooks: Daniel Thym, *European Migration Law* (Oxford University Press 2023) and Niamh Nic Shuibne, *EU Citizenship Law* (Oxford University Press 2023).

[55] The presumption has been developed and perfected in the work of Thym. See Daniel Thym, '"Citizens" and "Foreigners" in EU Law, Migration Law and Its Cosmopolitan Outlook' (2016) 22 ELJ 296; Daniel Thym, 'EU Migration Policy and Its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 CMLRev 709.

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migration does not contest this differentiation. However, by conclusively examining both these frameworks, the book reveals that there exists a thread that in fact links them in light of economic and social considerations.

In terms of doctrinal material, the fields of free movement of workers, Accession Treaties, Association Agreements, and regulation of regular migration from 1951 to 15 March 2024 are examined. The investigation extends over forty-four Association Agreements, out of which twenty-eight contain labour migration or equal treatment related clauses, all the seven Accession Treaties, eleven Regulations, and seventeen Directives, next to case-law of the Court regarding migrants' security of residence, free movement, enjoyment of the right to family life, and social rights under the relevant instruments.[56]

To demonstrate how EU institutions took into account economic and social sustainability aspects in the negotiation and adoption of the relevant instruments, the analysis is enriched by the inclusion of archival material from the Historical Archives of the EU (HAEU), the University of Pittsburgh Archive on European Integration (AEI), the CVCE, a digital research infrastructure run by the University of Luxembourg, as well as material accessed after information requests to the Commission and the Council. It should be noted that historical and geopolitical events surrounding legal evolutions are presented as they appear in analyses carried by the EU institutions, as the purpose of the investigation is to demonstrate how different EU institutions, based on their perception of factual economic and social reality, attempted to align EU migration law to the social and economic objectives of the EU legal order. Further, when going through the analysis, one might notice that the material invoked from the Commission (and hence the Commission's approach to migration) exceeds the material related to the Council (and relatedly its approach). The reason for this discrepancy relates to the very different practice of the two institutions. As Thym has pointed out, the Commission has used its monopoly of initiative 'skilfully by presenting itself as the source of technical expertise and as a repository of

[56] Social rights refer to equal treatment on access to social security, social assistance, and other state-supported facilities like education and healthcare. See similar use of the term in Karin de Vries, 'The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in European Union Law?' in Daniel Thym (ed), *Questioning EU Citizenship Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017).

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knowledge'.[57] In contrast, the Council – especially in the area of AFSJ – operates under a veil of secrecy, making it almost impossible to access the discussions that preceded the negotiation of different instruments.[58] Through the investigation of the relevant material, the book conclusively reconstructs the history of EU labour migration and shows the role of economic and social sustainability from its inception to its most recent manifestation.

1.4.2 Delimitations

What is not covered in the investigation is aspects of EU migration law related to border management, illegal migration, and asylum. The regulation regarding posted workers and intra-corporate transferees is also excluded from the examination. Finally, I engage only partially with external aspects of EU migration. These choices are made for three reasons.

First, border management and illegal migration instruments are part of the legal apparatus of the EU which is shaped by security-related considerations, and which emphasizes supranational administrative and police management.[59] In the relevant area, the EU regulates the movement of individuals by the coordination of networks of cooperation between Member States. The individual and their movement are the object, but not the subject of EU law.[60] This is also behind the exclusion of a full analysis of the external aspects of migration policy. While I examine Agreements between the EU and third countries which create EU law rights for migrants, I do not investigate more recent elements of the

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

[58] Ibid 63.

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

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

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cooperation that are focused on returns and irregular migration, or Agreements that institute transnational cooperation in migration without creating rights for individual migrants.[61]

Second, regarding asylum, there are two reasons why it is excluded from this study; one is connected to the empirical legal reality, while the second is connected to normative demands. On the empirical legal reality, the regulation of asylum has historically been disconnected from broader economic and social considerations in the EU.[62] While EU migration policy documents from 2000 onwards mix migration and asylum, and asylum has not escaped the sustainability discourse, I suggest that it is better if we stick to a clear division between EU asylum law and sustainable migration.[63] International humanitarian obligations should not be balanced against the social and economic demands constantly pursued by EU law, as this would risk of undermining the nature of international protection.[64]

Finally, posted workers and migrants falling under the Intra-Corporate Transfers Directive are excluded, not for lack of social and economic considerations in the relevant instruments, but because in this type of

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

[62] Refugees fell under the scope of EU instruments adopted in the 1950s and 1960s, long before the creation of the CEAS. See Article 4(1), Règlement n° 3 concernant la sécurité sociale des travailleurs migrants [1958] OJ 30/56; Article 2, Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2. They were also excluded from national policies geared towards halting migration after the 1970s oil crisis – see Communication, On Immigration, SEC(91)1855 final. Rather, CEAS was harmonized initially with a view to ensure Member States' compliance with their international obligations. See also the approach of the Commission until the end of 1990s, demanding differentiated treatment of asylum and migration expressed for the last time in the Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [1999] OJ C 19/1.

[63] Loxa, 'An EU Sustainable Migration' (n 2).

[64] A risk that has been materializing. See Lilian Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) who refer to 'flight from law'; See also Guild (n 4) where her arguments could apply by analogy for the case of EU asylum law.

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movement, migrants are not the subject of rights individually; rather, they draw such rights from their employer, who is the subject EU law seeks to protect. Their mobility is tied to the operational needs of international companies, and thus, their movement becomes absorbed by the transnational business transactions they serve.[65] Despite these limits, the investigation will reveal that sustainable migration has a very concrete expression in the history of EU labour migration. The concept of sustainable migration might be a recent one, but the objectives it serves can be traced back to the origins of EU law.

1.5 Structure and Objectives

In tracing the history of economic and social sustainability in the past of EU migration law, the book develops in three parts, which examine chronologically all the different areas of EU migration law from 1951 to the present. Part I begins with an examination of the period from 1951 to the Single European Act. Part II continues by reviewing material from the Single European Act to the failed Constitutional Treaty. Part III concludes the analysis by looking at the evolution of the relevant areas from 2004 to the present day. The material is categorized in the respective parts based on the following factors: legal instruments are categorized based on the date of their adoption, while case-law is categorized based on a combination of the Treaty framework applicable at the time the dispute was heard by the Court, and the secondary law applicable to the dispute. During the analysis, it will become clear that the three periods are framed not only by a Treaty framework that guided and transformed the EU structure, but also by broadly similar economic and geopolitical circumstances with specific repercussions for EU legal imagination. Once the linear historical investigation is concluded, the centrality of the economic and social pillars of sustainability in the development of EU migration law will become apparent. Finally,

[65] Cf Georg Menz, 'Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014); Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 ELJ 711. Recital 15, Article 18, Directive 2014/66/EU which refers to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1 to assimilate the degree of protection of migrants falling under these instruments.

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Chapter 10 concludes the book by presenting the findings of the historical investigation and fleshing out how the history of EU migration law informs the contemporary objective of an EU sustainable migration.

As to the significance and objectives of the book, my analysis shows that the overt emphasis on growth cannot sustain the EU legal order anymore. This conclusion is based on the premise that the impossibility of delivering unhindered growth for twenty-seven Member States, with extremely diverse industrial, economic, and social conditions, has led to a diverse and incoherent legal framework on migration, which in turn negatively impacts both growth and social progress. However, an academic analysis, let alone a legal one, cannot hope to convince the hundred million EU voters whose resistance to migration in view of its assumed economic implications underpins the inability of current EU migration law to deliver on the promise of growth for Member States, and on the issue of social and mobility rights for migrants.[66] Instead, in this scholarly contribution, I wish to make clear three things on different levels.

On the first level, I demonstrate that the novel concept of sustainable migration comes with specific limitations. Highlighting the close ties of EU migration law to economic development would mean that an EU sustainable migration is migration that supports the EU project of growth. If migrants are not a burden to national economies, and if they contribute to growth, then their residence and rights in Member States will not cause tensions. In one way or another, migration law, and especially in the EU, has always been exclusive. The non-mobile [citizen], the economically inactive, the vulnerable, the migrant whose value cannot be monetised, have always been excluded from legal protection.[67] By tracing economic sustainability in the past of EU migration law, we can make sense of the exclusionary politics of the EU towards more

[66] See Gregor Noll, 'Viciously Circular: Will Ageing Lock the European Union into Immigrant Exclusion?' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022).

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

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vulnerable categories of migrants. EU migration law will always be geared towards prioritizing the utility of migrants to the internal market. Sustainable migration thus captures the need to ensure the sustaining of the EU internal market and, relatedly, the disconnection of the individual from the market operates as a basis for exclusion.

On a second more theoretical level, I connect two strands of scholarship – free movement and migration law – and challenge the mainstream scholarly paradigm that insists on the disconnect between the rights of EU and TCN migrants.[68] The Court has indeed used free movement provisions and economic considerations to shape an EU constitutional architecture, long before these were ingrained in a Treaty text. However, since the EU legal architecture shifted due to closer integration and the adoption of the Charter, the Court has interpreted secondary law on migration in light of the Charter, in order to consolidate the rights of TCN migrants and further the social objectives of the EU project. I suggest that this judicial move does not come under a different cosmopolitan paradigm that would apply to TCN migrants, but rather utilizes secondary law on TCN migration to furnish a more complete constitutional structure after the Lisbon Treaty.

In doing so, the Court can be seen as a political actor continuing the path of using law as a means of integration.[69] In a way, the judicial approach to migrants' rights mirrors economic and social considerations in different points in time, so as to further the construction of the EU legal order. The economic considerations behind migrants' rights were highlighted by the Court before the Maastricht Treaty with the purpose of furthering the constitutional elements of the EU legal order via the construction of legal principles. This was the case not only as regards free movement provisions but also in the case-law on Association Agreements. The social considerations behind migrants' rights were highlighted by the Court after the Lisbon Treaty with the purpose of furthering the constitutional elements of EU legal order via the fortification of the Charter. To put it simply, the Court has used both economic and social objectives at different points in time to furnish a more complete constitutional structure for EU law.

[68] Above (n 55).

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

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On a more abstract level, pointing to the unsustainability of the current system, I ask the reader to imagine how an EU sustainable migration could be informed by a legal design grounded in legal rules and principles, which form part of the EU *acquis*, but which have nevertheless been sidelined in the legal instruments adopted to this day. My suggestions cannot overcome the structural limitations that characterize the EU legal order and, relatedly, EU migration law. Rather, taking a pragmatic approach on the current form of the EU legal system, I make some practical suggestions that could better align migration law to the economic and social objective of the EU project.

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