10

Conclusion

10.1 Economic and Social Sustainability in the Past of EU Migration Law

The task of looking back at the history of EU law in search for answers is a challenging one due to 'the remorseless pace of development' of the EU legal framework.[1] Positioning the time of doctrinal consolidation in the present, the analysis proceeded in a necessary critical reconstruction of the history of EU migration law. This concluding chapter will first summarize the findings of the historical investigation in this section and suggest that the problem behind the new objective of sustainable migration lies not so much in the effort to align migration with economic and social demands. This has after all been a constant feature of EU law as distilled from the historical investigation. Rather the problem lies in the way the economic and social objectives of the EU are perceived by different actors. Section 10.2 analyses the limitations that exist in the way EU law has historically aligned migrants' rights to the economic and social objectives of primary law and reflects on what an EU sustainable migration can and cannot mean for the rights of migrants. Essentially this section highlights that structural features of the EU legal order set very clear limits in attempts to envision an EU sustainable migration law. Finally, Section 10.3 presents a vision of what an EU sustainable migration law could mean if the way economic and social objectives are considered was redirected and grounded on the current *acquis*.

On the findings of the historical investigation, already in the first period of Community law – reviewed in Part I – the existence of the economic pillar of sustainability was emphasized behind the attribution of rights to migrants, manifested in the language of economic objectives served by migration. This period was characterized by the reconstruction

[1] Neil Walker, 'Legal and Constitutional Theory of the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 91.

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of Western economies. Free movement of factors of production, among which was labour, was necessary to spearhead the post-war growth of the founding Member States in the 1950s and 1960s. Next to Community migrants, guest workers and workers from former colonies supported the growth of Western economies until the oil crisis of the 1970s. At the time, Community workers and TCNs employed in European industries were attributed extensive rights pursuant to a clear acknowledgement that they were all equally contributing and participating in this project of growth. Equal treatment and raising the standard of living for all people who pursued a life in the EU – and who contributed with their work towards the achievement of social progress – was a non-issue.

The changing economic circumstances after the 1970s and the repeated enlargements of the EU and its continuous legal transformation nuanced the way economic considerations served as the basis of rights and promotion of social standards. Member States became more diverse: they were differently affected by the oil crisis, and they had different economic development levels and labour needs. In these circumstances, faced with the need to seal themselves off from the effects of transnational markets and with national unemployment on the rise, they attempted to close their borders and limit the rights of migrants so as to become unattractive destinations. The plan of the Commission, as expressed in legislative proposals published at the time, continued unhindered, with the hope that the effects of the crisis would be eventually overcome. During this period, positive action to promote the social objectives of the legal order was not really considered. The reason for this was a perception that economic growth would raise living standards for the population of Member States automatically. The attribution of social rights was considered in a superficial way, being mostly focused on equal working conditions to counter the economic effects of social dumping. Overall, during this first period, the economic objectives served by migration dictated the aligned treatment of all migrants due to a demand for equal treatment for all those who contributed to the development of the Community.

In the second period, reviewed in Part II, the appearance of economic and social objectives was more ambiguous. While the economic and social pillar of sustainability continued to determine the rights attributed to migrants, elements of differentiation between EU and TCN migrants were put in place in line with the ambition to create a political community. During that time, the promise of EU growth and the changing political landscape after the fall of the Berlin Wall created the impetus

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for closer integration and more consistent protection of the individual behind the factor of production. The aspiration of reuniting Europe put emphasis on turning the project of growth into a project of prosperity for the people of Europe. At the same time, economic worries of Member States blocked any attempt by the Commission to shape a framework that could regulate the rights of migrants in light of long-term economic needs and fluctuations. Member States via the Council deflected the issue of TCNs' rights so as to maintain a semblance of control in case of fluctuations in national economies.

Regarding EU migrants, the political aspirations of the time led to the establishment of EU citizenship in primary law. However, economic concerns precluded the creation of a framework that would shape residence rights for EU migrants based on their importance for the EU polity in the making. This political aspiration was, nevertheless, considered by the Court. By insisting on the new fundamental status established in primary law, the Court significantly restricted the limitations set by secondary law regarding the rights of EU migrants. Taking the objectives of the EU project at face value, the Court also consolidated the protection of migrant workers regardless of their nationality, thereby promoting the social objectives of the EU. To do so, it maintained the approach developed in the case-law on Community migrants and extended it to TCN migrants as well, suggesting that equal contribution to the EU project required equal rights. This protective case-law was a cause of concern for Member States, who feared repercussions for their national economies. For this reason, their economic concerns appeared behind the limitation of migrants' rights in the Association Agreements, concluded or revised at the time.

Next to the political aspirations for EU citizenship, the transformation of the EU project also demanded a closer pursuit of social progress, and relatedly more emphasis on the social pillar of sustainability. Even though legislation could not be adopted to extend the rights of EU migrants in light of their citizen status, legislation attributing rights to TCN migrants resident in the EU succeeded. The results of this legislation were not as far reaching as the Commission had hoped. Despite this, it managed to convince the Member States of the need to attribute at least a minimum set of rights to those who would not pose risks to EU growth, and to the extent that they would not pose such risks. This was the case with the Students Directive, the Family Reunification Directive, and the Long-term Residents Directive adopted at that time, which created EU

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law rights for migrants, even if such rights could be significantly limited by considerations related to economic reasons.

Finally, in the third period, reviewed in Part III, the transformation of the EU project was completed, and the way in which the economic and social pillars of sustainability appear behind the regulation of migration was consolidated. From a small Community of states, based on largely similar and interdependent economies, the EU developed into a political and economic Union comprised of Member States with different systems of social protection and different levels of economic performance. The enlargement of the EU in the new millennium consolidated a diverse mix of economic needs and ideals of social progress. In parallel, the labour needs of industries began to revive, and these were matched by demographic predictions of an ageing EU population that could not sustain growth. The failure to adopt the Constitutional Treaty put an end to aspirations of making something more of the movement of individuals, and the economic crisis of 2008 consolidated the need to always balance the rights of EU migrants against potential economic risks, even if such migrants were now called EU citizens.

During this period, sustainable migration became perfected in the rights enjoyed by EU migrants. Specifically, the balancing of economic and social considerations behind the rights of EU migrants meant that they could not enjoy unlimited residence rights by virtue of their status. Rather, when they migrate, their rights should be limited based on economic considerations. If they do not contribute to the EU project, they should at least not negatively affect the economies of host states. This consideration was consolidated in Directive 2004/38, and the balancing of individual rights against economic considerations was confirmed by the Court. At the same time, economic demands and demographic projections created the need for labour migration. Despite the Member States' reluctance to harmonize migration law, it became clear that human labour was necessary not to spearhead growth, but rather to maintain it. As the Member States were very unequally affected by migration and not equally in need of migrant workers, a system of entry was created for those workers who were most needed: highly skilled workers (including researchers) and low-skilled workers. In this framework, social considerations demanded the incorporation of labour law standards in the employment of such migrants, and these are more extensive when it comes to migrants considered more vulnerable to exploitation. Fair treatment for TCNs translated into differentiated

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treatment to attract the migrants the EU project most needs, notably researchers and highly skilled workers. At the same time, the rights include very strict safeguards to avoid settlement migration for those that are only temporarily needed. What we witness in this period is also the emphasis of the Court on social rights for migrants in light of the Charter. While in the case of EU migrants, the Court has accepted the balancing of economic and social objectives carried by the EU legislature and does not invoke primary law or Charter rights as a basis for review, this is not the case for TCN migrants. In the relevant case-law, the Court has consistently invoked the Charter to extend the protection of the rights of migrants against attempts by Member States to curtail them.

The investigation identified the constant pursuit of the economic and social pillars of sustainability via the regulation of migration. The language of sustainability was not part of EU migration law until very recently. However, the economic and social pillars of sustainability have always found expression in the attempts of shaping an autonomous EU migration law as a legal system with specific characteristics. These characteristics are the attribution of rights to migrants because of their contribution to growth, the limitation of rights due to perceived risks to growth (regardless of whether such risks are evidence based or not), an emphasis on work-related rights as means to social progress without a broader conception of the individual behind the economic actor, and the incorporation of clauses to guarantee that there is always a safety valve to stop migration in case of threats to the economy. A more detailed explanation of how economic and social considerations manifested themselves in law-making and adjudication in Sections 10.1.1 and 10.1.2 will further reveal the centrality of sustainability in the development and interpretation of EU migration law.

10.1.1 Economic and Social Considerations in EU Law-Making

A preliminary point to be raised is that EU law does not channel 'a prior general political authority and its integrated sense of the public good'.[2] Rather it is a means to stabilize the commitments of Member States to achieve 'various complex public goods under a new transnational political authority'.[3] For this reason, the way economic and social

[2] Neil Walker, 'The Theoretical Foundations of EU Law' in Claire Kilpatrick and Joanne Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 38.
[3] Ibid.

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considerations are taken into account and are channelled into laws varies for different institutional actors.

The Commission is the only actor insistent on achieving long-term economic and social development for the EU. It has consistently shown a proactive stance on the attribution of rights to migrants with the aim of shaping EU instruments that can align migration with the objectives of growth and progress, thus implicitly promoting an EU sustainable migration during all the years of its legislative activity. In the regulation of entry for TCN migrants, the Commission has emphasized the need to guarantee the more efficient allocation of resources and the proper functioning of the EU economy. Each proposal the Commission issued included safeguards that could guarantee the functioning of such system, including in cases of recession. In addition, the attribution of social rights to migrants has also been constantly suggested. While originally this attribution of rights was based on the contribution of the migrant to the economy and had the purpose of minimizing unfair competition in the labour market, after the 1990s the Commission has focused on the necessity of attribution of rights to promote social cohesion across EU territory and to thus allow for more socially sustainable societies. In parallel, the Commission put a lot of emphasis on long-term approach to the regulation of migration. Despite this, in the final period examined, the Commission has become more realistic, in the sense that it suggests proposals which can secure some minimum support of the Council, rather than proposals that are actually geared towards achieving economic and social sustainability by the regulation of migration. This was the case with the regulation of admission, where even though the Commission consistently acknowledged the horizontal regulation of admission as the ideal system, it continued to pursue sectoral regulation of the matter, as it became clear that it cannot gather support for horizontal measures.[4]

In contrast to the Commission's approach, the Council takes into account economic considerations related to the specific circumstances at national level. In doing so, it does not differentiate between EU and TCN migrants, but rather relates migration as such to the economy of the Member States. Relating migrant rights to the achievements of economic objectives was emphasized only during the years prior to the oil crisis. Thereafter the Member States have repeatedly acknowledged the need to

[4] See Attracting skills and talent to the EU, COM(2022)657 final; Fitness Check on EU Legislation on legal migration SWD(2019)1055.

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commit to the common project of growth in political declarations, but when it comes to the negotiation of specific legal instruments, the focus turns to ensuring economic and social growth in the short-term and within each national setting. This largely explains the struggle behind the adoption of a framework regulating migration from third countries. In a sense, this dissonance between the Council and the Commission also points to the limits of solidarity between Member States when the EU project does not deliver unhindered growth for all the members of the club.

The problem is aggravated by the fact that economic considerations in the Council are shaped by the immediate economic circumstances on the ground, with no thought to how to align migration with future needs of national economies. In contrast to the long-term planning demanded by sustainability, the Council has been particularly short-sighted when addressing migration. Furthermore, even though the Council is supposed to reflect the collective political interests of Member States in the common EU project, national considerations predominate. Especially regarding TCN migrants, when Member States are up against national unemployment or recession, it is impossible for them to agree on any migration-related measure that could lead to the attribution rights. This is, of course, also connected to the shared competence on migration and the fact that even if Member States can foresee the demand for workers, they know that they can fulfil this demand through national migration law measures. In this context, the creation of EU rights for migrants can only cause tension in national politics. In addition to the issue of shared competence, the approach of the Council, as attested in the analysis, is tied to what Neyer has identified as institutional deficiencies of the European political order, according to which the political discourse in the Council does not identify with the integration process and is rather catered to domestic interests.[5]

Hence, even though there has been no evidence to support the negative effects of the different Commission proposals on national economies (as was the case in the context of enlargement, in the case of social rights of EU workers in the new millennium, and in the case of mobility rights for TCNs), the Council cannot reach an agreement. As to the social objectives, once again, the focus is rather on the national level. It is at the

[5] Jürgen Neyer, 'Saving Liberal Europe: Lessons from History' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration beyond Brexit* (Hart 2019) 24.

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national level that the Council considers how to promote social cohesion or how to fight national unemployment, covering labour demands with little to no concern as to how to align national approaches with the transnational aspirations of collective economic growth and social progress.

Finally, the Parliament, especially in the second period, but also throughout the examination, has put forward a rights-based approach as a means to promote the social conditions across EU territory. It also seeks to advance political ideals of including all residents in the Member States in the project of peace and prosperity. This does not seem to deliver much when it comes to the legislative proposals, which are all eventually restricted by the Council. Having seen how economic and social considerations are expressed by different EU actors and channelled into EU law-making, Section 10.1.2 turns to how these considerations are reflected in the case-law and reveals the particular use of economic and social objectives by the Court to progress integration. Looking at these two sections together identifies the centrality of economic and social considerations for all institutional actors and shows the pursuit of sustainable migration as an objective even before the explicit appearance of the term in EU policy discourse.

10.1.2 Economic and Social Considerations in the Case-Law

The analysis carried out in this book fits well with earlier scholarly examination of the Court as a political actor and claims related to judicial activism. Such claims rest on two contrasting positions described by Dawson.[6] There is a liberal position which suggests that the role of the Court in promoting EU integration is politically empowering for the individual.[7] By empowering individuals to enforce their rights under EU law, the Court is providing individuals with access to the law, and thereby opens new political pathways.[8] At the same time, there is a second, republican view on the social role of the law.[9] This view entails

[6] 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).

[7] Ibid 11 with reference to Federico Mancini and David Keeling, 'Democracy and the European Court of Justice' (1994) 57 The Modern Law Review 175.

[8] Dawson (n 6) 11.

[9] Ibid with reference to Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); Fritz Scharpf,

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that courts should express and carry forward the views of a political community as mediated in the legislation, rather than protect and empower individuals. As Dawson suggests, what is considered the proper judicial function in the liberal position becomes an 'usurpation of power' in the republican position, where individual rights and legal entitlements are utilized to overturn the settled preferences of a political community.[10] It is under this reading that the Court can be understood as a political actor, and it is in this context that the Court has been seen as 'activist' in judicially settling questions that should be balanced and decided in political arenas.[11]

The liberal position on the role of the Court has been supported by members of the Court. Former Judge and Advocate General Mancini has proudly suggested that the case-law of the Court in the early years of Community law coincides with the making of a constitution for Europe.[12] Acknowledging that the Treaty framework could not be seen as a constitutive act, Mancini described the endeavour of the Court to constitutionalize the Treaty as being 'to fashion a constitutional framework for a federal-type structure in Europe'.[13] Mancini himself admits a degree of activism on behalf of the Court in using law to foster the integration of Europe.[14] This acknowledgement fits squarely with the scholarly analysis of the central role of the Court for the construction of the EU legal order as an integrated constitutional order.[15] Looking at the role of the Court in the process of legal integration, Burley and Mattli suggested in the 1990s that its action fits a neofunctionalist model of integration where judicial actors can advance a political agenda.[16] By political agenda, Burley and Mattli meant a pro-European agenda, and they argued that the Court had promoted the role of individuals by giving them a stake in the implementation of Community law only in

'Legitimacy in the Multilevel European Polity' (2009) 1 European Political Science Review 173; Bruce Ackerman and James Fishkin, *Deliberation Day* (Yale Univ Press 2004).

[10] Dawson (n 6) 12.

[11] Ibid.

[12] Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLRev 595, 595.

[13] Ibid 596.

[14] Ibid 612.

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

[16] Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41, 57.

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such ways as would promote Community goals.[17] In their work, they tie the political and activist stance of the Court to promoting the visibility, effectiveness, and scope of EU law, as well as the power of the Court, while at the same time 'presenting itself as the champion of individual rights and the protector of the prerogatives of lower national courts'.[18] This analysis, as well as the literature examining the Court as a political actor, fits well with the findings of the present investigation and reveals that the Court has used economic and social objectives at different points in time as a means to progress integration.

Specifically, in the early years of the Community project, economic objectives dominated the reasoning of the Court. The extensive creation of rights for Community and TCN migrants was based on the contribution of the individual to the project of growth, as shown in Part I. Even in cases where such contribution was minor, the Court emphasized how the economic objectives of the project can be served by the attribution or extension of rights of migrants. The political aspirations of the EU affected the case-law during the second period, as demonstrated in Part II. At the time, there was an emphasis on the 'ever-closer Union of peoples' goal in order to extend rights beyond the economic function of EU migrants under their new citizen status. During the third period examined in Part III, there is a consistent reliance on the Charter in cases concerning TCN migrants, not driven by an economic logic, but with the aim of promoting social objectives in a legal system that recognizes the need to attribute rights to all individuals who come within its scope. At the same time, the political aspirations for a Union of peoples appear in a confusing way. While the Court acknowledges the limitation of rights of EU migrants in light of the balancing of economic and social objectives undertaken by the legislator in Directive 2004/38, it has used the political aspirations to establish a differentiation between EU and TCNs on a discourse level. Even in cases where Directive 2004/38 sets less favourable conditions for the rights of EU migrants compared to the rights of TCN migrants on family reunification, the Court emphasized the political goals of the EU for its nationals, and did not examine

[17] Ibid 60. The authors discuss the extensive construction of the scope of EU law in preliminary references, comparing it to the restrictive criteria for individual standing in actions for annulment; Fabien Terpan and Sabine Saurugger, 'The Politics of the Court of Justice of the European Union' in Paul James Cardwell and Marie-Pierre Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar 2020) 33, who refer to 'biased' Court.

[18] Burley and Mattli (n 16) 64.

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whether secondary law can stand review under the Charter.[19] It also emphasizes the rights of EU migrants *qua* citizens, but it no longer invokes primary law to extend their access to social rights. Rather, the Court defers to the balancing carried out by the legislature, and does not try to trump the limitations of Directive 2004/38 with a broader interpretation of either primary provisions on citizenship or the Charter.[20]

Looking at the evolution of the case-law, we need to bear in mind that the more progressive rulings of the Court presented in Part II took place at a time when Treaty provisions demanded non-economic free movement rights for EU citizens, while secondary law giving effect thereto was adopted prior to the relevant Treaty amendments. Directive 2004/38 came into effect after the Treaty provisions established such rights, and hence expressed the clear will of the legislature to set limits on the social rights of EU migrants *qua* citizens. This limitation by the legislature, which has led to what Muir called a deconstitutionalization process, brings to mind another comment made by scholars emphasizing the political role of the Court.[21]

According to Burley and Mattli, to enhance and preserve the power of the Court, 'they [judges] must preserve and earn anew the presumed legitimacy of law by remaining roughly faithful to its canons'.[22] This means that the Court needs to stay within the boundaries of existing law. Mancini similarly suggested that as democracy advanced and politics (meaning EU politics) asserted its claims, judges should take a step back, otherwise they risked becoming 'so embroiled in the passions' that they could harm their independence.[23] Related to this, Terpan and Saurugger have suggested that since the 1990s, the Court has been exercising self-restraint in its adjudication, also hinting that in the relevant period there

[19] Case C-930/19, *Belgian State*, ECLI:EU:C:2021:657.

[20] Moritz Jesse and Daniel Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress, Social Justice, Brexit and Other Challenges*, vol 16 (Brill Nijhoff 2020); Niamh Nic Shuibhne, 'What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano' (2016) 23 Maastricht Journal of European and Comparative Law 908.

[21] Elise Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' (2019) 2018 European Papers – A Journal on Law and Integration 1353.

[22] Burley and Mattli (n 16) 73.

[23] Mancini (n 12) 613.

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was no longer a permissive consensus on the part of the Member States.[24] Keeping this in mind, what should we make of the much more consistent approach of the Court on using the Charter as the benchmark of review in cases concerning TCN migrants? In these cases, I argue that we can see the Court being political by using the cases on TCN migration to promote the power and strength of the Charter and, thereby, to constitutionally perfect an integrated legal order. As Mancini has suggested, self-restraint does not mean strict constructionism in the interpretation of EU law.[25]

In this intricate mix of self-restraint and striving to achieve further integration, we see that just as the Court is deconstitutionalizing the rights of EU migrants *qua* citizens, it is constitutionalizing the rights of TCN migrants. When it comes to TCN migrants (either as family members of EU migrants or as individuals coming within the scope of EU law), the Court never misses a chance to use the Charter as a means to strengthen the protection afforded by the secondary legislation in place and, relatedly, to consolidate the position of the Charter in the constitutional architecture of the EU law. As Muir has suggested, the review of compliance of legislation with fundamental rights appears as a powerful integration technique.[26] This is because, as she argues, 'by merging the content of legislation and autonomous concepts having primary law value, the Court circumscribes the possibility for EU political institutions to define the format and limits of EU fundamental rights policy through legislation'.[27] Muir's point was made in relation to other areas of EU law, but finds equal application in the case-law regarding rights of TCN migrants examined in Section 9.3, where the interpretation of the Court with an emphasis on the Charter is now channelled in proposals for revision of secondary legislation.[28]

[24] Terpan and Saurugger (n 17) 34.
[25] Ibid.
[26] Elise Muir, 'The Court of Justice: A Fundamental Rights Institution among Others' in Bruno de Witte, Elise Muir, and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 92.
[27] Ibid 92–93.
[28] Proposal for a Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast), COM (2022)655 final, Explanatory Memorandum, Article 12 with reference to Case C-302/19, *INPS*, ECLI:EU:C:2020:957. See also 2024 Single Permit Directive.

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Overall, the analysis carried out in this book has shown how in the first period of aligned paths, economic aspirations drove legislative openness on migrants' rights. In the second period of political aspirations, the slow resurgence of growth matched with an anticipated enlargement of the EU (and the addition of working population) pointed to legislative closure and differentiation between EU and TCN migrants. In the third period of realization, failed political aspirations marked the economic conditioning of the rights of EU migrants and the set-up of an incoherent framework on the rights of TCN migrants. Throughout all these periods, the Commission has been proactive, while the Council has been reactive, or even destructive. This is so especially if we consider the way in which it has downgraded protection in all relevant secondary law on the rights of both EU and TCN migrants, and renegotiated International Agreements to limit the effects of EU law as construed by the Court. The Court, on the other hand, has been consistently reconstructing the rights of migrants. This reconstruction of migrants' rights takes place not in light of what the EU should become, but rather in light of what it currently is under the Treaty framework, complemented with a binding Charter, which provides sufficient basis to consolidate the constitutional architecture of EU law. The approach of all these institutions, as it derives from the past seventy years of EU migration law, is not without gaps and paradoxes. Potential ways of addressing these and framing an EU sustainable migration law are discussed in Section 10.3. Before going into that, Section 10.2 engages with the limitations that appear in the current system.

10.2 The Inherent Limits of an EU Sustainable Migration

The critical historical study conducted in this book showed that EU migration law was never meant to be inclusive, in the sense of linking migrants to a transnational legal order and creating a civic post-national membership.[29] Many authors have argued that EU migration law has been shaped on the exclusion of different people for different reasons.[30]

[29] Cf Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994).

[30] Although different authors have pointed to different reasons. See Étienne Balibar, *Nous, citoyens d'Europe?* (La Découverte 2001); Peo Hansen, 'Making Sense of a Neoliberal Fortress?: EU Migration Policy in the Nexus of Economy, Security and Rights' (Nordisk Samarbejdsråd for Kriminologi 2011); Steve Peers, 'Building Fortress Europe: The Development of EU Migration Law' (1998) 35 CMLRev; Thomas Spijkerboer,

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This book contributes to the relevant literature by suggesting that another reason for exclusion is the economic function of the migrant for the EU development project. The EU legal order is shaped around the constant pursuit of growth and progress. In this regard, an EU sustainable migration is doomed to have little room for those who cannot contribute to the project of growth.

In Section 1.3.2, I suggested that the minimum core features of sustainability are its economic, social, and environmental pillars; a long-term approach; and inter- and intra-generational justice demands. Questions on justice and its relation to the EU have been picked up by scholarship and this contribution does not aim to examine them in depth.[31] Various scholars have engaged with the possibilities and limitations of imagining distributive justice in a transnational setting.[32] Among them, Williams has suggested that, while the EU discourse includes occasional references to solidarity, economic cohesion, and social justice, there is no political or constitutional obligation for the EU to coordinate any process of redistribution of resources within or outside its borders.[33] Drawing on different theoretical contributions, this section shows how questions of justice and social and economic sustainability appear in the current form of EU migration law by identifying three limitations related to the EU's pursuit of growth, the way EU law attributes rights to migrants, and the position of migration law in the EU legal architecture.

'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) 31 Journal of Refugee Studies 216; Daniel Carter, 'Inclusion and Exclusion of Migrant Workers in the EU' and Moritz Jesse and Daniel Carter, 'The "Market Insider": Market-Citizenship and Economic Exclusion in the EU' both in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020).

[31] Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015).

[32] Daniel Augenstein, 'We the People: EU Justice as Politics' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015) with reference to Damian Chalmers, 'Damian Chalmers: Kinship, Markets, and Justice in Europe' in Grainne de Burca, Dimitry Kochenov, and Andrew Trevor Williams (eds), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair* (2013); Richard Bellamy, 'Political Justice for an Ever Closer Union of European Peoples' in Grainne de Burca, Dimitry Kochenov, and Andrew Trevor Williams (eds), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair* (2013); John Rawls, *Political Liberalism* (Columbia University Press 1993); Philip Pettit, 'A Republican Law of Peoples' (2010) 9 European Journal of Political Theory 70.

[33] Andrew T Williams, 'The Problem(s) of Justice in the European Union' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015) 39.

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To put it simply, this section highlights how sustainable migration might be an accurate term to describe parts of EU migration law, but it has not ensured that the legal framework is a just one.

On the first limitation, the historical study highlighted the close connection between the extent to which rights have been attributed to migrants by the EU and the existence of growth. This emphasis of the EU on growth has been identified by Somek as having the implication of shifting the discussion away from the political control of the economy.[34] The claim to inclusion through rights, he argues, does not extend to political concerns over the basic distributive structures; it rather takes them for granted.[35] Similarly to Somek, Wilkinson has transposed Streek's dilemma between market justice (in the form of inclusion via equal opportunities) and social justice (in the form of redistribution) to the EU, suggesting that after the golden age of post-war growth, the 'equilibrium between capitalism and democracy has become more difficult to maintain'.[36] In this book, we have seen how the only years in which the Commission could, in one way or another, make the case for a harmonized migration system that would provide for equal treatment of EU and TCN migrants was before the 1970s oil crisis. The economic circumstances from the oil crisis to this day, and the extension of the EU to cover very diverse economies, make the slightest consideration of ever returning to the post-war growth years impossible. Wilkinson's suggestion was put forward to support the contention that questions of justice in the EU should be resolved by adding political justice to the debate; this would allow democratic space to question the preference for market justice embedded in the EU system.[37] In addition to his suggestion, which is supported by other scholars, I would also add that we should reconsider whether the EU project can deliver growth to begin

[34] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 ELJ 711, 720.

[35] Alexander Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015) 308.

[36] Michael A Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015) 121, reference omitted; Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Patrick Camiller and David Fernbach trans, 2nd ed., Verso 2017).

[37] Wilkinson (n 36) 133–136.

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with.[38] The limited potential of considering the attribution of rights to migrants at times when there is no growth and the limited potential of reconsidering growth as the ultimate EU law objective point to the inherent limitations of EU migration law.[39] With the current emphasis on growth, it is hardly imaginable that EU migration law has any potential to change.

The second limitation of EU migration law relates to the conception of individual rights under EU law.[40] The analysis highlighted the intimate link behind the attribution of rights to migrants and the effects of such rights on growth. Linking rights to broader questions of justice, Somek has suggested that in a transnational market setting, the distribution of resources becomes irrelevant, and the relative treatment of individuals and equal opportunities are afforded central place.[41] Looking at the market to correct inequalities, the concern is not on redistribution, but rather on equal access to opportunities.[42] In the EU context, questions of justice become questions of rights, with an emphasis specifically on non-discrimination.[43] In such a set-up, human rights do not need to be followed by strong legislative measures and can be promoted judicially by courts. The emphasis on inclusion in the form of rights attribution, as suggested by Somek, is apparent in the development of EU migration law. This development has been based on the attribution of mobility and equal treatment rights to people as a means to achieve social progress. Given this, the maximum level of inclusion of migrants under EU law can be achieved by attributing rights to those who do not negatively

[38] See Augenstein (n 32); Agustín José Menéndez, 'Whose Justice? Which Europe?' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015); Floris de Witte, 'Emancipation through Law?' in Loïc Azoulai, Ségolène Barbou des Places, and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016). The emphasis on growth is an inherent part of sustainable development. Cf Julian Reid, 'Interrogating the Neoliberal Biopolitics of the Sustainable Development-Resilience Nexus' (2013) 7 International Political Sociology 353; For critique and alternative conceptions of sustainability see Ashish Kothari and others (eds), *Pluriverse: A Post-Development Dictionary* (Tulika Books 2019).

[39] Gareth Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015) 259 discusses how the very choice is 'constitutionally denied'.

[40] See also Augenstein (n 32) 164.

[41] Somek (n 34) 724.

[42] Ibid.

[43] See also Williams (n 33) 33 who suggests that reliance on human rights cannot resolve substantive justice issues; Somek (n 34) 720; Somek (n 35) 297.

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impact growth (by being self-sufficient and not having recourse to the social assistance system of Member States), but making the case, legal or political, for demanding inclusion (in the form of residence rights and corresponding social rights) for TCN migrants would be challenging. As Somek suggested, migrant workers' geographic movement attests 'the inclusive growth of capitalism'.[44] At the same time, people who would like to move to be part of this inclusive growth are faced with what Somek calls the most elementary obstacle, namely lack of access to a society to begin with.[45] In the current form of EU migration law, it would be extremely challenging to make the case for a right to entry or residence of economically inactive TCN migrants. Such a case could only be made in relation to migrants who have already contributed to the project of growth (like long-term residents and former workers). It is important to understand that whatever EU migration law will look like, it will always exclude those who cannot contribute – that is, unless the core parts of this legal system are amended.

A final limitation of an EU sustainable migration comes from the institutional structure of the EU and the conferral of powers. The analysis showed that only during the first period did economic and social objectives drive a positive development of the EU legal system. The similar development levels of the Member States and their common need for migration led to a common approach on how to best achieve economic and social objectives. After that period, unequal development levels and repeated economic challenges have turned Member States to considering how to best achieve economic and social objectives in closed national communities. The issue here is not (or is not mainly) the balancing of economic and social objectives, but rather the Member States' understanding of how their national objectives relate to the EU ones.[46] The problem behind achieving an EU sustainable migration lies not so much in the efforts for reform, as in the inability of Member States to perceive migration as an area of collective concern. The Commission has time and again brought consistent proposals on the negotiation table that would allow the regulation of migration to serve the economic and social

[44] Somek (n 34) 725.
[45] Ibid 722.
[46] See Niamh Nic Shuibhne, 'Editorial: Is It Time to Worry Yet?' (2009) 34 ELR 521. Cf Paul Craig, 'Institutions, Power, and Institutional Balance' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 85 on institutional failure in the migration crisis.

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objectives of the EU legal order in view of long-term needs of national economies.[47] The inability to garner support for such proposals is connected both to the shared competence of the EU in the area of migration and to the lack of social legitimacy of the EU in the eyes of national electorates.[48]

The shared competence of the EU on migration means that Member States can eventually admit the labour they need to keep their economies running via national migration schemes. This allows them to individually cover labour demands and to achieve the needed growth without regard to growth on the collective level. The existence of such national frameworks, which do not guarantee sufficient rights to migrants, creates barriers to the development at EU level. Where a position could be filled internally by the movement of a resident TCN from one Member State to another, this is now subject to barriers and delays that make it no different from entering the EU for the first time. At the same time, the pursuit of growth at state level is not always matched with considerations of promoting the social rights of migrants under national laws.

Regarding social legitimacy, the balancing of economic growth and social objectives has led to a situation where EU migrants have no claim to residence or social protection if they do not contribute to the EU economy. In addition to this, EU nationals who have not left their Member State can be subject to reverse discrimination and they are excluded from the scope of EU law. These situations are the outcome of a very specific balancing of economic and social objectives that lie behind the pursuit of sustainable migration applicable in the free movement framework. If this free movement framework was indeed discussed and understood as a sustainable migration framework, it would not lead to lack of social legitimacy. However, this framework is linked to and part of a completely different institutional discourse and aspiration of creating a political Union for the people of Europe.

Somek has suggested that the European support of freedom of choice (in the form of economic rights) was accompanied by 'a vague Durkheimian hope' that it would create solidarity on the basis of market

[47] Cf Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States, COM(1997)387 final; Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001)0386 final [2001] OJ C 332E/248.

[48] See Davies (n 39).

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transactions.[49] The lived experience of those excluded from EU law has revealed the failure to create such transnational solidarity; it has fractured the social legitimacy of the EU and shaped space for Eurosceptic tendencies.[50] Like Somek, Neyer has also pointed out that the legal and institutional set-up of the EU is made for supporting liberalization rather than social integration.[51] This set-up, paired with the fragmentation of political authority of the EU and the disempowerment of political competence at national level, means, according to Neyer, that EU politics are usually driven by national concerns of Member States, rather than addressing pan-European problems.[52]

In sum, we see the specific limits to how migration law could be sustainable for the EU. These limits stem from the emphasis on growth as the driving force of rights (and the limitation of rights when they can no longer be instrumental to sustaining growth), the emphasis on rights geared towards achieving growth (versus broader concerns with social justice), and the structure of the EU legal and political system. Nor are these limits peculiar to migration: they relate to the political, economic, and institutional set-up of the EU. The question that naturally arises is whether there is a possibility to overcome some of these limitations – at least partially – by considering how the rights of TCN migrants might develop with closer consideration of the economic and social sustainability objectives of EU law.

10.3 The Realistic Potential of an EU Sustainable Migration

Section 10.2 discussed three specific limitations of EU migration law and of the broader EU architecture. Despite these limitations, there is still some room for evolution in the EU's pursuit of a sustainable migration. To go further than demonstrating the historical embeddedness of social and economic sustainability in EU migration law, an embeddedness which is also reflected in Article 3(3) TEU, and to apply the system-

[49] Alexander Somek, 'Alienation, Despair and Social Freedom' in Loïc Azoulai, Ségolène Barbou des Places, and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016) 53.

[50] See Niamh Nic Shuibhne, 'Editorial: What Is "Europe" and Who Is It For?' (2012) 37 ELR 673; Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CMLRev 937; Davies (n 39) who attributes this to the characteristics of technical law-making which pre-empts contestation.

[51] Neyer (n 5) 26.

[52] Ibid 31.

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theoretical understanding of sustainability in the framing of an EU sustainable migration, would entail three requirements that are at present absent. First, that migration law should respect the function of the EU legal system in delivering the promised objectives of growth and social progress. Second, that migration law should be shaped with a view to long-term considerations (both in relation to the fluctuations of the economy and to the position of migrants in a society) to be able to address external stress caused to the system. And finally, that migration law should be able to respect the structure of the legal system in terms of horizontal and vertical division of competences.

Connected to the system-theoretical understanding of sustainability, a substantive question arises related to the place of justice as part of sustainability. Drawing on the work of Douglas-Scott and her proposal on employing human rights and Critical Legal Justice as a legal toolbox that can offer mechanisms to the EU to avoid injustice, without however offering an ideal, transcendental theory of justice,[53] there are ways in which migrants' rights could be extended and consolidated in a way that is better aligned to the pursuit of sustainability.

The first necessary action would be to amend secondary law so that it can better serve both economic and social objectives under long-term considerations. Account should be taken of the long-term economic fluctuations in the Member States and, relatedly, the fluctuations in labour demand that need to be effectively addressed by migration, as well as the place of migrants in future EU societies. The most far-reaching change would be the horizontal regulation of admission for all categories of migrants and the recasting of the sectoral regulation currently in place. The current legislative initiatives of the Commission paired with the failure of similar attempts in the past make such a scenario unlikely.[54]

Removing this proposal for change from the table, other more limited changes could have far-reaching results. One of these would be to demand more favourable conditions for the mobility of migrants. In general, effective mobility rights for all legally resident migrants make

[53] Sionaidh Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU' in Dimitry Kochenov, Andrew T Williams, and Gráinne de Búrca (eds), *Europe's Justice Deficit?* (Hart 2015). Douglas-Scott's Critical Legal Justice is close to Neyer's account of procedural justice in supranational systems. See Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press 2012).

[54] See proposals in Section 6.1.2; Attracting skills and talent to the EU, COM(2022)657 final and Fitness Check on EU Legislation on legal migration SWD(2019)1055.

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sense in terms of aligning migration to the economic objectives of the EU, and such an amendment would not go further than primary law provisions.[55] It is aligned with the provision of Article 79(1) TFEU as it would lead to more efficient management of flows, while it would also give substance to Article 45(2) CFR. Such a change would also be aligned with solidarity demanded under Article 80 TFEU. In 1961, when the first framework of free movement was introduced, with significant clauses limiting the rights of EU migrants, Lionello Levi Sandri suggested that the rights attributed to EU migrants derived from the 'new spirit of European solidarity'.[56] It was presented as a concession made by the Member States with a view to creating a labour market which would ensure the best use of the Community's human potential.[57] It is easy to see how true and effective mobility rights for TCN migrants resident in the EU could fit with interstate solidarity based on the promotion of the economic objectives of this legal order. This time the EU's human potential would extend to cover not only EU migrants but also TCN migrants resident in the Member States. The suggested revision of the Long-term Residents Directive could have been a first step in that direction; however, the emphasis of the Member States on maintaining economic limitations to the exercise of mobility rights through the labour market test will limit any significant transformation of the *status quo*.

Moreover, the framework of protection of rights of TCNs and the differentiation it introduces based on how much a migrant is needed should also be revisited. It can hardly be imagined that fair treatment as demanded by Article 79(1) TFEU implies differentiated attribution of rights based on how crucial a migrant is for the EU economy. The attribution of more rights to migrants who are urgently needed is both arbitrary and out of line with a long-term planning around migration law. We might know what type of migrants the EU economy needs today, but we cannot predict what type of migrants will be most needed in the future. In this context, the revision of the Single Permit Directive is

[55] Cf Moritz Jesse, 'The "Integration" of Economic Immigrants: Lessons to Be Learnt from Free Movement of Persons on the EU's Internal Market' (2023) 37 Journal of Immigration, Asylum and National Law 31. See, however, Jean-Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 22 European Journal of Migration and Law 198.

[56] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Bulletin of the European Economic Community (1961) 66.

[57] Ibid.

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welcome, but more work needs to be done to reach the extensive scope of equal treatment, family reunification rights, and access to long-term resident status enjoyed by highly skilled migrants.

Arguing for the extension of social rights of TCNs, however, is more challenging. If we look at EU migrants, the Court has acknowledged that financial solidarity among Member States dictates the attribution of social rights to them.[58] By engaging in a common project of growth, Member States have accepted that they may have to incur the costs for an EU migrant because of the economic benefits they collectively derive from the EU project. After all, a host state's citizen can migrate to another Member State, too, and will enjoy benefits there. This case for financial solidarity, no matter how strong, has not gone very far since the 2004 enlargement of the EU. If anything, the diverse nature of Member States' economies set the basis for limiting social rights of EU migrants to ensure that the strong welfare states of the West and North would not have to carry the burden for the migrants from the South and East. Regardless of whether this claim had any factual basis, this narrative redefined the degree to which EU states are ready to recognize a full extension of social rights even to the nationals of Member States who are already part of the collective project of growth.[59] It is in this limitation of social rights due to economic considerations that we can see a model of sustainable migration perfected in the free movement framework through Directive 2004/38.

The attribution of social rights to TCN migrants can be based on their contribution to the project of growth. However, an extension of social rights in a way comparable to those of EU migrants is definitely harder to

[58] It was exemplified in the extensive attribution of rights in Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458 but such a reason behind the attribution of rights existed already in Case 15/69, *Ugliola*, ECLI:EU:C:1969:46.

[59] Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017); Stamatia Devetzi, 'EU Citizens, Residence Rights and Solidarity in the Post-Dano/Alimanovic Era in Germany' (2019) 21 European Journal of Migration and Law 338; Elspeth Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in Elspeth Guild, Cristina Gortázar Rotaeche, and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014); Paul Minderhoud, 'Back to the Roots? No Access to Social Assistance for Union Citizens Who Are Economically Inactive' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017); Sandra Mantu and Paul Minderhoud, 'Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens' (2019) 21 European Journal of Migration and Law 313.

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justify. That is because the states of origin of TCN migrants are not directly involved in the EU project of growth. In Chapter 4, I analysed the extension of social rights to migrants originating from states associated with the EU and engaged in trade or economic cooperation. The interdependence of their economies created the basis for attribution of rights. However, after the setting in place of an autonomous EU migration policy that attributes rights to TCNs based on their residence, such clauses have disappeared. One might also say that they are no longer needed. How would such an inclusion be justified? In this case, it could only take place by a commitment to advancing the social objectives of the EU project in line with the approach followed by the Court, and with a stronger emphasis on human rights as a tool not only for progress but also for integration of the migrant in the national community under a long-term view of the place migrants will occupy in future EU societies.

In any case, shaping migration law that is sustainable for the EU legal system is bound to meet resistance, due the different development levels of the Member States, their different needs in migrant labour for economic gains, and the different ideological approaches to migration highlighted by populist trends in the past decade. In this context, the problem-solving capacity of positive integration at EU level could be stymied by non-negotiable conflicts between national and supranational actors.[60] The Court has the potential to reconstruct and consolidate the rights of migrants. The direction of its rulings during the period reviewed in Part III point to this conclusion. However, more clarity and coherence would be required when doing so, to also advance legal certainty and to thereby promote justice as suggested by Douglas-Scott. This reconstruction would continue on the path of rights as equal opportunities presented earlier with the corresponding limitations for broader social justice demands. It might not be the ideal option, but it is the only realistic one, considering how the EU legal system is shaped.

10.4 Conclusion

Overall, the book set out to investigate how the economic and social pillars of sustainability, as historically conveyed in the economic and social objectives of the EU legal order, have shaped migrants' rights in EU law. Starting from the inconclusive appearance of sustainable

[60] By analogy, Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 11–13.

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migration as a new objective for EU migration law and by conducting a critical legal historical study, I have demonstrated how the economic and social pillars of sustainability are embedded in the establishment and evolution of EU migration law. In addition, my analysis showed the inherent limitations of the pursuit of an EU sustainable migration for migrants' rights under EU law.

I hope that the investigation concluded in this book will inspire a closer interrogation of the concept of sustainability and its interplay with different EU legal norms. Instead of unquestionably following EU institutional discourse and integrating new policy concepts into legal writing, there is value in focusing intellectual inquiries on the extant legal framework and questioning whether there is anything new under the sun. At the same time, the close examination of the economic and social pillars of sustainability and their relation to migration can prove crucial for the extension of migrants' rights. Maintaining the focus on migration for economic growth can only get us so far. It is particularly important to extend the social and mobility rights of TCN migrants if we are to achieve socially sustainable societies.

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