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Francesca Strumia

**Walking the Blurry Line in EU Immigration:
European Citizenship and its Democratic Bridge
between the Member States' Power to Exclude and the
Third Country Nationals' Right to Belong**

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**Walking the Blurry Line in EU Immigration:
European Citizenship and its Democratic Bridge between the Member
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Francesca Strumia*

Abstract

This paper questions to what extent European citizenship matters for the status and rights of third country nationals (TCNs) in the EU, and how the underlying rationales of European citizenship may contribute to a rethinking of the rules of engagement and cooperation in the context of the EU common immigration policy. While the contribution of European citizenship to the inclusion of TCNs is often neglected, in fact it infiltrates the domain of immigration and nationality with logics of rights, where logics of state power otherwise prevail. This contrast of rights and power emerges in the rules on the status of TCNs deriving, respectively, from European citizenship, and from the EU and the Member States' immigration and nationality laws; it echoes into a disconnect in the narratives, supranational and national, that develop around the interpretation of these rules; and ultimately it points to a gap in the rationales underpinning citizenship on the one hand, and immigration on the other one. To address this gap, the paper questions the implications of the right to belong across borders that European citizenship expresses in the context of free movement of EU nationals. This right to belong across borders points to a democratic norm of belonging based on mutual recognition. This norm offers a bridge between contrasting rules and disconnected narratives, and suggests new rationales for cooperation in the context of the common immigration policy.

* Lecturer in Law, University of Sheffield. I am very grateful to Dora Kostakopoulou, Kalypso Nicolaïdis, Eleanor Spaventa, Paul James Cardwell, Peter Spiro, Leila Hadj-Abdou and Natalia Stepaniuk for their insightful comments on earlier versions of this article. I am also grateful to the participants at the Oxford University EU Discussion group for their helpful feedback.

Introduction

On 20 January 2015, Lassana Bathily became a European citizen. This is the day he was naturalized as a French national on the ground of the exceptional services he had rendered to France just a few days earlier, when he had helped save a number of people in the context of a terrorist attack in Paris. The following month, European citizenship (and Italian nationality) were instead, initially, denied to Rani Pushpa, an Indian woman who after living 10 years in Italy had complied with all legal requirements to become an Italian national, however had not learnt Italian.

Two stories that for different reasons made the headlines remind that inclusion of immigrants in Europe, as residents or as citizens, is not a right, but rather a concession of the Member States, exercising their own powers in matters of immigration and nationality, and acting within the frame of a common immigration policy.

Except that European citizenship tells a different story in this respect. This paper's goal is to unravel the latter story and understand the role of European citizenship in the context of the inclusion of third country nationals (TCNs). European citizenship, being an automatic addition to nationality, at first sight has little to do with the inclusion of TCNs. This paper argues however that it infiltrates a discourse of rights into processes of TCNs' inclusion. This discourse inspires a supranational narrative on inclusion, contrasting with a competing national one, which rather exalts the power of nation states to manage borders and administer admission and naturalization.

There is a disconnection between the two narratives, which at first sight adds to a number of other puzzles that the regulation of inclusion and exclusion already faces in Europe: overlapping competences, a web of opt-in and opt-outs, the tension between borders control and protection of human rights, the one between universalism of EU liberal values and particularism of EU national cultures, interstate solidarity and burden shifting. If the inclusion narrative of European citizenship opens up a disconnection however, the rationale for inclusion that European citizenship entails may help bridge the two narratives. The paper explores this rationale for inclusion through the lens of selected concepts from the literature on transnational mutual recognition and

demoicracy.¹ It ultimately suggests a possible way to reconcile the disconnection by interpreting one narrative in light of the other.

The paper contributes, first, to the literature on mutual recognition.² Its European citizenship lens magnifies connections between notions of mutual recognition in political theory and international relations,³ and technical legal ones in the area of freedom, security and justice (AFSJ).⁴ It also adds to the literature on European citizenship, stretching transnational understandings of the same in a new direction.⁵ Finally, the paper offers hints to ongoing debates on interstate cooperation and sharing of responsibilities in the EU common immigration policy,⁶ and on civic integration and liberal nationalism.⁷

¹ K. Nicolaïdis, “Trusting the Poles? Constructing Europe through Mutual Recognition” (2007) 14 *Journal of European Public Policy* 682-698; K. Nicolaïdis, G. Shaffer, “Transnational Mutual Recognition Regimes: Governance without Global Government” (2005) 68 *Law and Contemporary Problems* 267; K. Nicolaïdis, “Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition” in M. Poiares Maduro (Ed.), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2007); Nicolaïdis, “Trusting the poles? : Mark 2 - towards a regulatory peace theory in a world of mutual recognition” in Lianos, Blanc (Eds.), *Regulating Trade in Services in the EU and the WTO : Trust, Distrust and Economic Integration* (CUP 2012); on demoicracy, K. Nicolaïdis, “The Idea of European Demoicracy” in J. Dickinson, P. Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law* (OUP 2012); K. Nicolaïdis, “European Demoicracy and its Crisis” (2013) 51 *Journal of Common Market Studies* 351-369; F. Cheneval, F. Schimmelfennig, “The Case for Demoicracy in the European Union” (2013) 51 *Journal of Common Market Studies* 334-350; R. Bellamy ‘An Ever Closer Union among the Peoples of Europe: Republican Intergovernmentalism and Demoicratic Representation within the EU’ (2013) 35 *Journal of European Integration* 499-516.

² Kostoris Padoa Schioppa (Ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave MacMillan 2005); Janssens, *The Principle of Mutual Recognition in EU Law*, (OUP 2013); Schmidt (Ed.), *Mutual Recognition as a New Mode of Governance* (Routledge 2008); Lenaerts, “The Principle of Mutual Recognition in the Area of Freedom, Security and Justice”, The Fourth Annual Sir Jeremy Lever Lecture, University of Oxford, 30 January 2015; Möstl, “Preconditions and Limits of Mutual Recognition”, 47 *CML Rev* (2010), 405-436.

³ See e.g. Nicolaïdis, “Trusting the Poles?”, op. cit., *supra* note 1.

⁴ See e.g. Möstl, op. cit., *supra* note 1.

⁵ See e.g. Kostakopoulou, “European Union Citizenship: Writing the Future” 13 *ELJ* (2007) 623-646; Bellamy, “Evaluating Union Citizenship: Belonging, Rights and Participation within the EU” 12 *Citizenship Studies* (2008) 597-611; Bauböck, “Why European Citizenship? Normative Approaches to Supranational Union” 8 *Theoretical Inquiries in Law* (2007) 453-488; Bauböck, *Transnational Citizenship*, (Edward Elgar 1994); Weiler, “Bread and Circus: the State of European Union” 4 *Columbia J. Eur L* (1998), 223-248; Nic Shuibne, “The Resilience of EU Market Citizenship” 47 *CML Rev* (2010), 1597-1628.

⁶ See e.g. Mitsilegas, “Solidarity and Trust in the Common European Asylum System”, 2 *Comparative Migration Studies* (2014) 181; Caruso, “Lost at Sea” 15 *GLJ* (2014), 1197-1208 (for a compelling parallel between EU migration policy and Economic and Monetary Union); Trevisanut, “Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management” in Azoulay, de Vries (Eds.) *EU Migration Law: Legal Complexities and Political Rationales* (OUP 2014).

⁷ See e.g. Kostakopoulou, “The Anatomy of Civic Integration” 73 *Modern Law Review* (2010) 933-958; Sarah Wallace Goodman, “Controlling Immigration through Language and Country Knowledge

Part one charts the rules on the status of TCNs developed, respectively, in the penumbra of European citizenship, and as part of the EU common immigration policy and the Member States' immigration and nationality policies. It illustrates and compares the frames and purposes of relevant rules (1.1); it considers and contrasts a supranational and a national narrative developed through the interpretation and application of each set of rules (1.2); and ultimately it reflects on the disconnect that these rules, their purposes, and their narratives portray (1.3). Part two focuses on the rationales informing the regulation of inclusion and exclusion. It elaborates on how the disconnect in European rules and narratives echoes into a broader tension between rights and sovereignty (2.1); it offers a democratic interpretation of the role of European citizenship in the context of this tension, analyzing how mutual recognition principles informing the European citizens' right to free movement translate into a norm of belonging (2.2); and it applies this norm to attempt a reconciliation of the disconnect in the rules, narratives and rationales (2.3). This yields an answer to the question of how European citizenship matters for TCNs and for rules of engagement and cooperation in immigration, as well as broader reflections on the conceptual potential of European citizenship, which are taken up in the conclusion.

1. The Status of TCNs in the EU: Competing Rules and Narratives

1.1. Rule Frames and Purposes

1.1.1. European Citizenship

European citizenship has at first sight little bearing on the admission, status and rights of TCNs. It is an addition to national citizenship, which it follows automatically,⁸ and it is not an independent category in the context of either EU, or Member States' immigration laws. However, it has grounded a set of judicial and legislative rules on the

Requirements" 34 *West European Politics* (2011), 235-255; van Oers, Ersbøll, Kostakopoulou (Eds.), *A Re-definition of Belonging?*

Language and Integration Tests in Europe (Martinus Nijhoff 2010); Joppke, "The Inevitable Lightening of Citizenship" 51 *European Journal of Sociology* (2010), 9-32; Orgad, "Illiberal Liberalism-Cultural Restrictions on Migration and Access to Citizenship in Europe", 58 *AJCL* (2010), 53-106; Hampshire, "Liberalism and Citizenship Acquisition: How Easy Should Naturalization Be?" 37 *Journal of Ethnic and Migration Studies* (2011), 953-971.

⁸ TFEU, art. 20.

admission of selected classes of TCNs, as well as principles on the interpretation of Member States' nationality laws.

First of all, TCNs who are family members of migrant European citizens within the meaning of the Citizenship Directive enjoy a number of derivative rights.⁹ Rights of entry and residence,¹⁰ equal treatment, labor market access, and long-term integration¹¹ are recognized to the TCN family member in order to ensure the exercise of the European citizen's right to free movement under 'objective conditions of freedom and dignity'.¹² ECJ case law has interpreted and stretched the boundaries of relevant rights. It has clarified for instance the conditions for the entry and residence in a host State of spouses of migrant European citizens;¹³ the conditions under which TCNs family members may obtain a right of permanent residence;¹⁴ the limits to documentary burdens that can be imposed on the TCN family member in the Member State of nationality of the sponsor European citizen.¹⁵

Case law has brought European citizenship to bear even on TCN family members whose situations do not fall within the scope of the Citizenship Directive. The ECJ has interpreted Treaty provisions on European citizenship to require that the TCN parent caretaker of a minor European citizen be entitled to reside with her in a host Member State in order to make the minor's right to free movement effective.¹⁶ As a further protection of the effectiveness of free movement, the CJEU has affirmed the right of a TCN family member to reside in the Member State of origin of the sponsor European citizen, so as to allow European citizens to continue the family life they may have built

⁹ Directive 2004/38, O.J. 2004, L 158.

¹⁰ *Id.*, art. 5-7.

¹¹ *Id.*, art. 24, 23 and 16(2).

¹² *Id.*, whereas 5.

¹³ Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, EU:C:2003:491; then revisited by case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, EU:C:2008:449.

¹⁴ Case C-162/09, *Secretary of State for Work and Pensions v Taous Lassal*, EU:C:2010:592; C-244/13 *Ewaen Fred Ogieriakhi v Minister for Justice and Equality and Others*, EU:C:2014:2068.

¹⁵ Case C-202/13 *The Queen, on the application of Sean Ambrose McCarthy and Others v Secretary of State for the Home Department*, EU:C:2014:2450.

¹⁶ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, EU:C:2004:639.

or developed during the exercise of free movement.¹⁷ Even in the absence of free movement or other cross-border links, the claim for a right to reside and work of a minor European citizen's TCN parent caretaker has to be accommodated, if a contrary determination would lead to interference with the genuine substance of the European citizen's rights.¹⁸

As a result the rules surrounding European citizenship accord protected status to a number of classes of TCNs: spouses of migrant citizens, partners of returning migrant citizens, parent caretakers of migrant minor citizens, or of non-migrant but threatened ones.¹⁹ These European citizenship-dependent statuses are to some extent parallel to the statuses of TCN family members of migrant EU workers. The latter also enjoy a privileged status under EU law.²⁰ European citizenship has however gone a step further, bringing the legacy of citizenship to bear on the condition of relevant TCNs. While the recognition of rights to TCN family members of migrant workers fits clearly within the context of a market project, the condition of TCN family members of European citizens depends on the scope of transnational membership in the EU.²¹ It has to do with how European citizenship transforms the meaning and boundaries of national citizenship.²²

¹⁷ Case C-456/12, *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.*, EU:C:2014:135; also see case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, EU:C:1992:296 (construing a similar right for family members of migrant workers).

¹⁸ Case C-34/09, *Gerardo Ruiz Zambrano. v. Office national de l'emploi (ONEm)*, EU:C:2011:124. Subsequent cases have qualified the *Ruiz Zambrano* judgment. See *infra* note 68.

¹⁹ The Court restated the rules on the rights of TCNs deriving from European citizenship in case C-40/11 *Yoshikazu Iida v Stadt Ulm*, EU:C:2012:691.

²⁰ Family members of migrant workers derive rights from Regulation 492/2011, O.J. 2011, L 141/1, art. 10. These have been extensively interpreted in case law. See case C-413/99, *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493; case C-529/11 *Olaitan Ajoke Alarape, Olukayode Azeez Tijani v Secretary of State for the Home Department*, EU:C:2013:290; case C-480/08 *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department* EU:C:2010:83; case 310/08 *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department* EU:C:2010:80. For a more restrictive application, see case C-45/12 *Office national d'allocations familiales pour travailleurs salariés (ONAFS) v Radia Hadj Ahmed* EU:C:2013:390.

²¹ The distinction tracks the one between free movement as a right for workers and as a right for citizens. For a recent discussion in this sense see De Cecco, "Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law" 15 GLJ (2014) 383-406, at 386-88.

²² See Wagner, "European Citizenship of Last Resort: Migrant Strategies and Civic Practices in the Danish Family Unification Dispute", paper prepared for the 19th International Conference of Europeanist, Boston Massachusetts, 22-24 March, 2012, at 25 (European citizenship family reunification rules are a form of "citizenship of last resort" for Danish families including a TCN, used to "challenge prevailing understandings of the rights and boundaries of national membership").

This transformation depends not only on the statuses that European citizenship entails for TCNs but also on the limits that European citizenship brings to the Member States' power to grant and withdraw national citizenship. While nationality remains an exclusive competence of the Member States,²³ European citizenship case law clarifies that relevant powers must be exercised in compliance with EU law and taking into account, in particular, the rights and status of European citizens.²⁴ Member States cannot impose additional conditions before treating as full-fledged European citizens the nationals of other Member States;²⁵ and they cannot denaturalize a citizen without considering, in a proportionality perspective, the consequences in terms of loss of European citizenship.²⁶ One further status appears thus to be imbued with European citizenship considerations: the one of TCNs aspiring to naturalization.

Ultimately, European citizenship affects the condition of TCNs in a piecemeal but consistent fashion. It designs in the penumbra of citizenship a number of right-protective statuses.

1.1.2. EU Common Immigration Policy and National Rules

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

Under the Treaties, the EU is competent to develop a common policy on asylum, immigration and external borders control.²⁷ The common policy on asylum finds implementation in a recently recast package of directives and regulations comprising the 'common European asylum system'.²⁸ The common immigration policy encompasses, among others, 'the conditions for entry and residence, and the standards

²³ See Declaration n. 2 annexed to the Treaty of Maastricht on Nationality of a Member State.

²⁴ Case C-369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, EU:C:1992:295; case C-135/08, *Janko Rottmann v Freistaat Bayern*, EU:C:2010:104.

²⁵ Case C-369/90 *Micheletti*.

²⁶ Case C-135/08 *Rottmann*. For a further discussion of this case and of *Micheletti* see *infra* para 1.2.1.2.

²⁷ TFEU, art. 67.

²⁸ TFEU, art. 78. Also see Regulation 604/2013, O.J. 2013, L180 (Dublin Regulation); Directive 2011/95, O.J. 2011, L 337 (Qualification Directive); Directive 2013/32, O.J. 2013, L180 (Procedures Directive); Directive 2013/33, O.J. 2013, L 180 (Reception Conditions Directive).

on the issue by the Member States of long-term visa and residence permits'²⁹ and 'the definition of the rights of third country nationals residing legally in a Member State'.³⁰

Under the umbrella of these Treaty provisions, the EU has adopted comprehensive policy programs,³¹ regulations,³² and a range of directives addressing specific categories of TCNs aspiring to entry³³ and specific entitlements of admitted TCNs.³⁴ EU level provisions are in any case interstitial or complementary to Member State level immigration law, which although residual in character, is still predominant in scope.³⁵

This double level of rules makes for a multitude of statuses for TCNs. Residence permits for TCNs are governed, as a general rule, by Member States' domestic law.³⁶ This is the case for residence permits for workers, family members, students, asylum seekers. However EU law has carved out, within each of the above classes, broader or narrower subclasses whose residence rights are EU law driven:³⁷ for instance, among workers, the highly skilled, and among asylum seekers, those who are given either refugee status or subsidiary protection under relevant EU law rules.³⁸

²⁹ TFEU, art. 79 par. 2 a).

³⁰ TFEU, art. 79 par. 2 b).

³¹ See e.g. Conclusions of the 1999 European Council in Tampere <http://www.europarl.europa.eu/summits/tam_en.htm> (last visited 26 Jul. 2015); O.J. 2010, C115, Stockholm Programme-an Open and Secure Europe serving and Protecting Citizens.

³² See e.g. Regulation 562/2006, O.J. 2006, L 105 (Schengen Border Code); Regulation 656/2014, O.J. 2014, L 189 (on the surveillance of external sea borders).

³³ E.g. Council Directive 2009/50 O.J. 2009, L 155 (Blue Card Directive, on the admission of highly qualified workers); Council Directive 2004/114, O.J. 2004, L375 (on the admission of students and trainees); Council Directive 2005/71, O.J. 2005, L 289 (on the admission of researchers-the latter two directives under revision at the time of writing); Directive 2014/66, O.J. 2014, L157 (on intra-corporate transfers).

³⁴ E.g. Directive 2003/109 O.J. 2004, L 16 (Long Term Residence directive); Directive 2011/98, O.J. 2011, L343 (single permit directive).

³⁵ This is particularly true in the field of economic migration, where the Member States maintain a multitude of specific provisions. See e.g. UK Tier 1 visas for entrepreneurs, <<https://www.gov.uk/tier-1-entrepreneur/overview>> (last visited 26 Jul. 2015); Italian start-up visas <<http://italiastartupvisa.mise.gov.it/>> (last visited 26 Jul. 2015). Also see COM(2014) 287 final, 2014, Communication from the Commission to the European Parliament and the Council on the Implementation of Directive 2009/50.

³⁶ In the area of freedom, security and justice, comprising the common immigration policy, competence is shared between the EU and the Member States, TFEU art. 4(2)(j).

³⁷ For students, the relation between national and EU categories is reverted as EU law has tended to occupy the field. See Directive 2004/114, *supra* note 33.

³⁸ See Directive 2011/95, *supra* note 28. Although the new TFEU provisions aim for a uniform EU status of asylum and subsidiary protection (TFEU art. 78), the Member States retain other distinct humanitarian migration statuses. See e.g. Legislative Decree 286/1998, *Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (Italian Immigration Act), art. 18.

This fragmentation of statuses reflects in part an uneasy division of competence between the EU and the Member States beyond the Treaty rules, and an uncertain terrain for supranational cooperation in the immigration field. Conflicting priorities depending on geographic position and histories of migration, a puzzle of opt-in and opt-outs, and dualism between mutual trust and mutual suspicion, make for a sense of lack of direction in relevant supranational cooperation.³⁹ Cooperation has resulted, for instance, in clear, albeit not necessarily fair rules on asylum seekers' reception,⁴⁰ and in swift mechanisms of recognition of enforcement decisions against illegal migrants.⁴¹ On the other hand, the harmonization of statuses for legal migrants has incurred much resistance, yielding the above mentioned plethora of TCNs statuses, as well as 'softer' Member States obligations.⁴²

In the context of these supranational rules of different sign, fundamental rights and individual rights do have a place. EU law instruments explicitly refer to fundamental rights protection and the European courts test governmental conduct with regards to immigration against relevant standards.⁴³ However protection of relevant rights represents an outer limit to the coordinated exercise of state power, rather than an objective of supranational coordination.⁴⁴

³⁹ For an overview of the opt-out regime, see Peers et al., "EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law" (Martinus Nijhoff, 2012), at 26-28. On the delicate relation between trust and suspicion, see case ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, judgment of 21 January 2011. Also see Toner, "The Lisbon Treaty and the Future of European Immigration and Asylum Law" in Azoulay, de Vries (Eds.), *EU Migration Law* (OUP 2014), at 33-34.

⁴⁰ Dublin Regulation, *supra* note 28.

⁴¹ See Directive 2001/40, O.J. 2001, L149 (mutual recognition of expulsion decisions).

⁴² The Blue Card directive (*supra* note 33) exemplifies these softer obligations. See e.g. art. 18 on admission to residence in a second Member State. But see case C-491/13, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, EU:C:2014:2187 (Member States must admit TCN students who meet requirements under Directive 2004/114).

⁴³ See e.g. Dublin Regulation, *supra* note 28, art. 3(2); Regulation 656/2014, *supra* note 32, art. 4. Also see case *M.S.S.*, *supra* note 39; joint cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865. Also see Thym, "EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook" 50 CML Rev (2013) 709, at 719-721 (EU migration policy refutes the idea of alienage without legal protection).

⁴⁴ See Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-state Cooperation to the Slow Emergence of the Individual", 31 YBEL (2012) 319-72 (on the balance between state interests and individual rights in the AFSJ).

Supranational cooperation in the context of the EU common immigration policy thus expresses a sort of anomalous federalism: despite commitment to fair sharing of responsibilities among equal participants in a supranational system,⁴⁵ and despite commitment to fundamental rights, the supranational cooperation frame works primarily to upgrade and reinforce states' interests already clearly set through national level immigration laws;⁴⁶ inter-state loyalty is selective and contingent;⁴⁷ and while formally protected through the fundamental rights frame the interests of individual denizens are ultimately entrusted to a puzzle of overlapping statuses.

While there is no supranational frame of cooperation for access to nationality, the coexistence of 28 different nationality laws adds to the puzzle of TCN statuses. For instance, the TCN highly skilled workers, or the TCN students, whose statuses are harmonized under EU law, further divide into TCN highly skilled workers in Belgium, Spain, Poland or else; and into TCN students in the Netherlands, Germany or Italy or else. Their paths to citizenship differ, and their respective spaces of action are not as borderless as the ones of birth-right citizens.⁴⁸

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

⁴⁵ TFEU art 80. Also see Stockholm Programme, *supra* note 31.

⁴⁶ See Mitsilegas, *op. cit.*, *supra* note 44, at 320-22.

⁴⁷ As shown by contemporary debates on resettlement and relocation plans for refugees. For an overview see <http://eulawanalysis.blogspot.co.uk/2015/05/the-new-eu-migration-agenda-takes-shape.html> (last visited 27 Jul. 2015).

⁴⁸ See Strumia, *Supranational Citizenship and the Challenge of Diversity – Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff 2013), at 258-266.

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

1.2. The Narratives

1.2.1. The Supranational Narrative

A first narrative unravels through the reasoning and the *dicta* in ECJ judgments interpreting European citizenship-dependent rules on the status of TCNs. This ‘supranational’ narrative emphasizes that in some instances inclusion descends from European citizenship as a right; that European citizenship entails limits to the power of the Member States to admit or exclude, and to grant or withdraw nationality; and that European citizenship has a substance of its own.

1.2.1.1. Inclusion as a Right

The case law interpreting TCN family members’ rights under the Citizenship Directive and under the Treaty provisions on European citizenship tends to treat recognition of a residence status to relevant TCNs as a right of theirs.⁴⁹

Breach of relevant rights on the part of a Member State may give rise to state liability. In December 2014, the Irish High Court condemned the Irish State to pay approximately Euro 107,000 in damages to Mr. Ogieriakhi, a Nigerian national, for having wrongfully denied his right to permanent residence in Ireland under the Citizenship Directive, as the spouse of a EU national.⁵⁰ Mr. Ogieriakhi had lost his job as a result and sued the Irish State for damages.⁵¹

In the course of the proceedings to ascertain state liability, the Irish Court referred a question to the CJEU. It aimed at clarifying whether residence in a host Member State while separated from the sponsor European citizen spouse counted towards

⁴⁹ See e.g. case *O and B supra* note 17, para 56; case *Sean Ambrose McCarthy, supra* note 15, para 33; case C-34/09, *Zambrano*, para 45.

⁵⁰ High Court of Ireland, *Ogieriakhi -v- Minister for Justice and Equality & ors (No.2)*, [2014] IEHC 582, judgment of 22 December 2014.

⁵¹ *Id.* para 25, and 1-2 (Ogieriakhi brought the action after naturalizing in Ireland).

achievement of the right to permanent residence under the Citizenship Directive.⁵² In responding in the affirmative, the ECJ highlighted the rights' nature of Mr. Ogieriakhi's claim to permanent residence under the directive: he had to be regarded, in the words of the court, 'as having acquired a right to permanent residence' under the relevant provisions.⁵³ The Irish High Court refers to this very passage of the ECJ judgment to support its own determination that Mr. Ogieriakhi 'had become entitled to permanent residence in Ireland'.⁵⁴

Entitlement of the TCN equals limited discretion for the host Member State: the Irish High Court notes that under the relevant provisions of the Citizenship Directive, no discretion whatsoever was left to Ireland.⁵⁵ Having disregarded the limits of its own discretion contributed to make the Irish government liable to Mr. Ogieriakhi.⁵⁶

The narrative goes further: beyond limiting governmental discretion in residence matters, European citizenship also inspires a tale of limits in respect to nationality decisions.

1.2.1.2. EU Law Limits to Nationality Decisions

According to the supranational narrative, decisions on nationality, albeit a competence of the Member States, have to respect EU law principles and, in particular, the rights of European citizens. The idea that EU law represented a limit to Member States' decisions on the grant and withdrawal of nationality has echoed throughout ECJ case law ever since the *Micheletti* case.⁵⁷ Subsequent cases clarified the scope of relevant limits.⁵⁸ In

⁵² Case *Ogieriakhi* (ECJ), *supra* note 14, para 25.

⁵³ *Id.* para 47.

⁵⁴ *Ogieriakhi* (High Court of Ireland) *supra* note 50, para 12.

⁵⁵ *Id.* para 48: "the terms of both Article 16(1) and Article 16(2) of the 2004 Directive are absolutely unambiguous [...]. Assuming the conditions of Article 16(2) apply, Member States enjoy no discretion in the manner." In this case it is a national court that corroborates the supranational narrative.

⁵⁶ Excess of discretion is one factor in determining a serious infringement of law for purposes of state liability. *Id.* para 47-48. Also see case C-46/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1996:79 para 55-58.

⁵⁷ Case C-369/90 *Micheletti*, para 10 (a Member State cannot impose additional conditions to recognize nationality granted by another Member State for purposes of the exercise of Treaty freedoms).

⁵⁸ Case C-300/04, *M.G. Eman and O.B. Sevinger v. College van burgemeester en wethouders van Den Haag* EU:C:2006:545; case C-192/99, *Kaur*, EU:C:2001:106; case C-145/04, *Spain v. United Kingdom*, EU:C:2006:543.

recent years, the Court has returned to the issue in the *Rottmann* case,⁵⁹ concerning the denaturalization proceedings in Germany of an Austrian national who had acquired German nationality through fraud. *Rottmann* had lost Austrian nationality in acquiring the German one and would thus have remained stateless following his denaturalization in Germany. The referring German court asked the ECJ whether EU law required a Member State to refrain from denaturalizing a national if denaturalization would have caused loss of European citizenship and statelessness.⁶⁰ The ECJ replied that EU law requires, on the part of national authorities, an assessment of proportionality of the relevant decision in light of the consequences of denaturalization for the citizen's, and his family's, status and rights under EU law.⁶¹

The decision provides an opportunity to question the margin of autonomy left to the Member States in the sphere of nationality.⁶² In the words of Advocate General Maduro, writing the opinion for the case,

“if the situation comes within the scope of Community law, the exercise by the Member States of their retained powers cannot be discretionary. It is subject to the obligation to comply with Community rules”.⁶³

In the words of the Court, “the Member States have the power to lay down the conditions for the acquisition and loss of nationality, [...] the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union [...] is amenable to judicial review carried out in the light of European Union law.”⁶⁴

EU law, and particularly in the wake of *Rottmann*, the rights attaching to European citizenship, thus constrain the Member States' power and discretion in administering nationality. This suggests that European citizenship is not just a mere appendix of nationality, but has a substance of its own.

⁵⁹ Case C-135/08, *Rottmann*.

⁶⁰ *Id.* para 35.

⁶¹ *Id.* para 54-56.

⁶² See Laura Montanari, “I Limiti Europei alla Disciplina Nazionale della Cittadinanza”, (2010) *Diritto Pubblico Comparato e Comunitario* 948, at 954; Daniele Gallo, “La Corte di Giustizia rompe il vaso di Pandora della cittadinanza europea”, (2012) *Giorn. Dir. Ammin.* 39, at 43; also see case C-135/08, *Rottmann* (Opinion of A.G. Poiares Maduro), para 23; Kochenov, “Annotation of case *Rottmann*” 47 *CML Rev* (2010), 1831, at 1835-38.

⁶³ Case C-135/08, *Rottmann* (Opinion of A.G. Poiares Maduro), para 20.

⁶⁴ Case C-135/08, *Rottmann*, para 48.

1.2.1.3. The Substance of European Citizenship

The first time that an explicit discourse on the substance of European citizenship has made its appearance in the supranational narrative is in the 2010 *Ruiz Zambrano* case.⁶⁵ The ECJ resorted to the substance of European citizenship to ground the entitlement of a TCN to reside and work in Belgium as the father care-taker of two Belgian-born and Belgian national children. Denial of the relevant right of residence and work would have interfered, in the words of the court, with the genuine enjoyment of the substance of the children's European citizenship rights, as the children would have been *de facto* compelled to leave the European Union with their father.⁶⁶ Hailed as revolutionary for its dispensing with cross-border elements in applying European citizenship,⁶⁷ the innovative potential of the decision has actually been tamed in subsequent cases.⁶⁸

The substance doctrine contributes in any case an important thread to the supranational narrative of inclusion: it suggests that there is a substantive core to the rights of European citizenship, which may dictate the overruling of regular admission requirements and procedures for a TCN, and yield an independent right to inclusion.⁶⁹ Despite the vagueness that still surrounds it in the European citizenship's law, the doctrine strengthens and confirms a commitment to individual rights in the European

⁶⁵ Case C-34/09, *Zambrano*.

⁶⁶ *Id.*, para 42-45.

⁶⁷ See Dimitry Kochenov, "A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe", 18 CJEL (2011), 55, at 58-59; also see case C-34/09, *Zambrano* (opinion of AG Sharpston); Koen Lenaerts, "Civis Europeus Sum: from the Cross-Border Link to the Status of Citizen of the Union" 3 *FMW-Online Journal on Free Movement of Workers within the European Union* (2011), 6, 7-8.

⁶⁸ The court has indicated that the doctrine is exceptional in character. See Case C-256/2011, *Murat Dereci v. Bundesministerium für Inneres*, EU:C:2011:734; case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277; it does not cover lesser interferences such as with the mere desire to keep a family together in a given Member State. See joint cases 356/11 and 357/11 *O, S v. Maahanmuuttovirasto and Maahanmuuttovirasto v L* EU:C:2012:776, para 52; case C-87/12 *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:291, para 38. Also see case C-86/12, *Adzo Domyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:645.

⁶⁹ For further analysis of this case see Strumia, "Ruiz Zambrano Un-layered: 468 Days that Made the Immigration Case of One Deprived Worker into the Constitutional Case of Two Precarious Citizens" in Nicola, Davies (Eds.), *EU Law Stories: Comparative and Contextual Histories of European Jurisprudence* (forthcoming CUP).

citizenship's narrative on TCNs inclusion.⁷⁰ This challenges some of the main tenets of an alternative 'national' narrative.

1.2.2. The National Narrative

The interpretation and application of EU and national rules on immigration and of national rules on naturalization on the part of courts, administrators and policy makers yields a second narrative on the inclusion of TCNs in the EU. This second narrative is Member States' focused, even though EU laws and policies developed within the frame of supranational cooperation in the context of the EU common immigration policy also feed into it,⁷¹ as do the CJEU judgments interpreting EU immigration law.⁷² It is at the national level however that immigration and nationality laws are ultimately interpreted and applied on the ground, and it is the narrative at this level that the supranational one comes to challenge.

A first *leit-motive* in this national narrative is discretion of national authorities in making decisions on inclusion of TCNs, whether as residents or as nationals. A further one is integration: inclusion of a TCN requires a measure of integration into the social and cultural community of a specific Member State.

1.2.2.1. Discretionary Inclusion

Discretion informs several determinations on inclusion and exclusion at Member States' level. It is built into criteria for the grant of visas and residence permits under both

⁷⁰ On the role of European citizenship for individual rights protection see Kochenov, 'The Citizenship Paradigm' 15 CYELS (2012-13), 196; but see Spaventa, "Earned Citizenship – Understanding Union Citizenship through its Scope" in Kochenov (Ed.), *Citizenship and Federalism in Europe: the Role of Rights* (forthcoming CUP) (for a point of view on how European citizenship may be seen as impoverishing rather than enriching its beneficiaries).

⁷¹ EU level regulation adds common rules, minimum standards and support measures, whose concrete implementation falls within Member States' immigration powers, and is thus reflected in relevant legislation and in surrounding debates. See e.g. Italian Immigration Act, *supra* note 35, art. 9*ter* (on EU long term residents); *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial*, Moniteur Belge of 31 December 1980 ('Belgian Law on Foreigners'), art. 40-47 (on European citizens and their family members).

⁷² See e.g. case C-491/13 *Ben Alaya* 42; case C-502/2010, *Staatssecretaris van Justitie v Mangat Singh*, EU:C:2012:636; case C-571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others*, EU:C:2012:233.

national and EU law, and transpires from the language in which relevant requirements are expressed. The UK Immigration Rules,⁷³ for instance, clarify that

‘A person who is neither a British citizen nor a Commonwealth citizen with the right of abode nor a person who is entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations requires *leave to enter* the United Kingdom’.⁷⁴

The concept of ‘leave to enter’ reminds that entry is a granted concession of the authorities, even when relevant requirements are met. Terminology used in the guidance on the Tier 1 (Entrepreneur) visa confirms this idea of concession.⁷⁵ In clarifying the conditions for obtaining the relevant visa, the guidance refers in fact repeatedly to notions of ‘leave to enter’, ‘leave to remain’, ‘grant of leave’, ‘permission to stay’.⁷⁶ Similarly, the Italian Immigration Act lists the conditions according to which a foreigner ‘may be allowed to stay’.⁷⁷

The Belgian *Cour Constitutionnelle* has made the point clear in a judgment interpreting the Belgian law on the residence of foreigners: grant of a residence permit under relevant provisions “*constitue une faveur et non un droit*”.⁷⁸

Even beyond admission to residence, discretion is an important element in the context of naturalization processes.⁷⁹ Under the nationality law of several Member States, competent authorities retain a margin of discretion in deciding on the opportunity of the grant of citizenship, even when legal requirements are satisfied. The naturalization stories of Lassana Bathily in France and of Rani Pushpa in Italy provide a telling example. Lassana’s inclusion story took a sudden turn following the dramatic events in Paris in which he had distinguished himself. The French Ministry of the Interior at this

⁷³ Home Office, Visas and Immigration Operational Guidance Collection, Immigration Rules, <<https://www.gov.uk/government/collections/immigration-rules>> (last visited 3 Apr. 2015).

⁷⁴ *Id.* para 7.

⁷⁵ Guidance on Tier 1 (Entrepreneur) visa; <<https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-entrepreneur>> (last visited 9 Mar. 2015).

⁷⁶ *Id.*

⁷⁷ Italian Immigration Act, *supra* note 35, art. 4.

⁷⁸ *Cour Constitutionnelle* (Belgian Constitutional Court), judgment of 26 September 2013, n.123, at 7.

⁷⁹ See e.g. *Nuove Norme sulla Cittadinanza*, Law no. 91 of 1992, G.U. 1992, n. 38 (Italian Citizenship Act), art. 9. Also see Ministry of the Interior of the Czech Republic, Granting Nationality of the Czech Republic, <<http://www.mvcr.cz/mvcren/article/granting-nationality-of-the-czech-republic.aspx>> (last visited 27 Jul. 2015).

point exercised its discretion to accelerate Lassana's application for French citizenship, which had been pending since 2011.⁸⁰ In the case of Rani Pushpa, discretion cut the other way: an Italian mayor decided that poor Italian skills had to prevent Rani from taking an oath on the Italian constitution, even if she had complied with all legal requirements for naturalization (which do not include language knowledge).⁸¹ The competent *prefetto* (representative of the Ministry of the Interior), in overruling the mayor's determination, pointed out that the latter had entailed a misuse of discretion.⁸²

Case law on the review of naturalization decisions both confirms and justifies governmental discretion as an element of the inclusion process. The Italian *Consiglio di Stato* (Council of State), for instance, has repeatedly held that the grant of nationality is the result of a highly discretionary evaluation on the part of the administrative authorities.⁸³ The scope of this discretion is clarified in a 2007 memorandum of the Ministry of the Interior on the interpretation of Italian citizenship law:

“Administrative discretion in the grant of Italian citizenship encompasses the assessment of the foreigner's family and social life [...] as well as the authenticity of his aspiration to become an Italian citizen. [...]”⁸⁴

The discretion tale suggest that the Member States' may legitimately guard the boundaries of their national communities. A second *leit-motiv* in the national narrative corroborates this impression: inclusion requires integration.

⁸⁰ See <http://mobile.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Lassana-Bathily-est-devenu-francais> (last visited 26 Jul. 2015).

⁸¹ See http://www.huffingtonpost.it/2015/03/01/sindaco-nega-cittadinanza_n_6778770.html (last visited 26 Jul. 2015). Also see Italian Citizenship Act, *supra* note 79.

⁸² See <http://www.stranieriinitalia.it/attualita-alla-fine-ha-vinto-rani-pushpa-cittadina-italiana-anche-se-non-sa-l-italiano-19834.html> (last visited 26 Jul. 2015); Rani had applied for nationality as the spouse of an Italian national in which case naturalization is an entitlement, see Italian Citizenship Act, *supra* note 79, art. 5. Nationality laws often recognize nationality as an entitlement, rather than as a concession, also to second generation immigrants. See Italian Citizenship Act, art. 4(2). Also see Czech Citizenship Law, Act 186/2013, art. 31-36. Also see Ěižinský, “New Law on the Acquisition of Czech Citizenship: Introduction to the Main Changes Valid as of January 2014”, <http://www.migrationonline.cz/en/e-library/new-law-on-the-acquisition-of-czech-citizenship-introduction-to-the-main-changes-valid-as-of-january-2014> (last visited 26 Jul 2015).

⁸³ See *Consiglio di Stato* (Italian Council of State), Judgment no. 3006/2011, of 20 May 2011.

⁸⁴ Italian Ministry of the Interior, Memorandum K.60.1 of 5 January 2007.

1.2.2.2. Integration in a National Community

Social and economic integration has become, over the course of the last decade, a preliminary requirement in several Member States for a TCN to obtain or maintain a residence permit. France, Italy, Austria and Luxembourg, for instance, require that entrants sign an integration agreement with the State, under whose terms they undertake to attend integration courses and activities, and commit to the achievement of set integration objectives.⁸⁵

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

“Integration, meaning a process designed to promote the coexistence of Italian citizens and foreign nationals legally residing in the country, is based on mutual commitment to participate in the economic, social and cultural life, under the values enshrined in the Italian Constitution. [...] in order to be integrated, foreign nationals are required to [...] respect share and promote the democratic values of freedom, equality and solidarity that are at the basis of the Italian Republic.”⁸⁶

Other Member States have gone a step further and introduced requirements that applicants for a residence permit begin a process of integration even before admission into the host State. This is the case in the Netherlands, under the terms of the Civic Integration Act implemented in 2007.⁸⁷ Several categories of TCNs applying for a

⁸⁵ For France see *Code de l'entrée et du séjour des étrangers et du droit d'asile*, art. 311-19 ; for Italy, Italian Immigration Act, *supra* note 35, art. 4-bis; for Austria, *Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz - NAG)*, para 14, <<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004242>>; also see Integration Agreement, <<http://www.migration.gv.at/en/living-and-working-in-austria/integration-and-citizenship/integration-agreement.html#c2563>> (last visited 26 Jul. 2015). For Luxembourg, *Loi du 16 décembre 2008 concernant l'accueil et l'intégration des étrangers au Grand-Duché de Luxembourg*, <<http://eli.legilux.public.lu/eli/etat/leg/loi/2008/12/16/n5>> (last visited 28 Jul. 2015); *Règlement grand-ducal du 2 septembre 2011 fixant les conditions d'application et modalités d'exécution relatives au contrat d'accueil et d'intégration*, <<http://eli.legilux.public.lu/eli/etat/leg/rgd/2011/09/02/n5>> (last visited 28 Jul. 2015).

⁸⁶ See template Italian integration agreement, http://www.libertaciviliimmigrazione.interno.it/dipim/export/sites/default/it/assets/accordi_integrazione/0185_Accordo_di_Integrazione_Inglese.pdf (last visited 28 Jul. 2015).

⁸⁷ See *Wet Inburgering Buitenland*, 15 March 2006.

residence permit in the Netherlands have to pass a civic integration test at the competent Dutch Embassy prior to obtaining the permit.⁸⁸

Integration requirements are a common feature also in the nationality laws of several EU Member States.⁸⁹ The latest reforms of EU nationality laws witness to their increasing diffusion. Similar requirements have been introduced in the Luxembourg nationality law with a 2007 reform;⁹⁰ in the new Czech nationality law, effective as of January 2014;⁹¹ and in the Belgian Code of Nationality, reformed in 2012.⁹² Parliamentary debates surrounding the latter reform shed light on the narrative underpinning such requirements of integration. According to one of the members of the Belgian Parliament, the aspiration to become citizen of a nation implies the desire “to share the values of the nation one wants to belong to, to integrate in its identity, and to make such desire known to everybody”. As a result, nationality policy requires

“an in-depth, sincere reflection on the necessary link between the acquisition of nationality in a country, and the national community which is at the basis of such country”. It requires “taking into account the concerned person’s intention to integrate in the country of residence, and granting nationality upon successful completion of this integration”.⁹³

Integration requirements in European nationality laws encompass language knowledge, civic and social integration, acquaintance with history and constitutional values, or even assimilation. The French *Conseil d’État* relied precisely on lack of assimilation, in a

⁸⁸ See Dutch Immigration and Naturalisation Service, Civic Integration, <<https://ind.nl/EN/individuals/residence-wizard/other-information/civic-integration>> (last visited 28 Jul. 2015); also see Kostakopoulou, “The Anatomy”, op.cit., *supra* note 7, at 933-934; Orgad, op.cit., *supra* note 7, at 63.

⁸⁹ For an overview, see Strumia, *Supranational Citizenship*, op. cit., *supra* note 48, at 64-79.

⁹⁰ *Loi du 23 octobre 2008 sur la nationalité luxembourgeoise*, Memorial n. 158 of 27 October 2008.

⁹¹ Act 186/2013 on Citizenship of the Czech Republic, Collection of Acts No. 77/2013, 1774, para 14-15 (English summary available at < http://eudo-citizenship.eu/docs/bibliographyFiles/CZR_English%20summary%20of%20Act%20186_2013_Consulate%20General.pdf> (last visited 28 Jul. 2015).

⁹² *Loi modifiant le Code de la nationalité belge afin de rendre l’acquisition de la nationalité belge neutre du point de vue de l’immigration*, 4 December 2012, Moniteur Belge 393 of 14 December 2012.

⁹³ See Galant, in Full report of the plenary seating of the Chamber of Representatives of 24 October 2012, para 05.09, < <http://www.lachambre.be/doc/PCRI/PDF/53/ip108.pdf>> (last visited 28 Jul. 2015).

landmark 2008 judgment, to uphold rejection of the naturalization application of the Moroccan wife of a French national, who habitually wore a *niqab*:⁹⁴

“[Mme A] has engaged in a radical practice of her religion, incompatible with the essential values of the French community [...]; as a result she does not comply with the assimilation requirement in art. 21.4 of the civil code;”⁹⁵

Even when integration is not a named requirement under applicable nationality laws, it is often part of the concrete assessment of administrative authorities. So much explains the Italian *Consiglio di Stato*, in whose words, relevant authorities must ascertain “whether the foreigner has been successfully integrated in Italy, so that he can be said to belong to the national community”.⁹⁶

The national rush towards integration requirements also has a EU level counterpart. TCNs integration has been a EU priority ever since the European Council in Tampere,⁹⁷ re-emphasized, most recently, in the 2015 European Agenda on Migration, which makes ‘effective integration’ one of the priorities for a new policy on legal migration.⁹⁸ Recognition to the EU, with the Treaty of Lisbon, of a precise competence in matters of TCN integration has opened up further options for EU intervention in this field.⁹⁹ Several policy initiatives have contributed in the last decade to a EU integration policy: the Council’s 2004 Common Basic Principles for immigrant integration;¹⁰⁰ the Commission’s 2005 Common Agenda for Integration;¹⁰¹ the EU website on integration and the Integration Fund;¹⁰² and the 2011 Common Agenda for the integration of Third

⁹⁴ See *Conseil d’État* (French Council of State) judgment n. 286798 of 2008, of 27 June 2008, *Faiza M.*

⁹⁵ *Id.*

⁹⁶ Italian Council of State, judgment 3006/2011, *supra* note 83.

⁹⁷ Conclusions of the Tampere European Council, *supra* note 4.

⁹⁸ COM(2015) 240 final, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration”, 2015, at III.4.

⁹⁹ TFEU, art. 79(4).

¹⁰⁰ European Council, “Common Basic Principles on Immigrants Integration Policy”, November 2004, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/82745.pdf> (last visited 28 Jul. 2015).

¹⁰¹ COM(2005) 389 final, “Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union”, 1 Sep. 2005.

¹⁰² <<http://ec.europa.eu/ewsi/en/>>. The European Integration Fund (EIF) had a budget of EUR 825m for the period 2007-2013. For 2014-2020 it has been replaced by the Asylum, Immigration and Integration Fund (AMIF) with a budget of ca EUR 3.1 million.

Country Nationals.¹⁰³ The latter clearly sets forth the objectives of the EU integration policy, which include promoting the participation of migrants at the social and economic level through a genuine commitment in this sense of the receiving community, and the grounding of bottom-up processes of integration.¹⁰⁴

This focus on a bottom-up integration element distinguishes EU level integration policies from Member State level ones. However the emphasis of the integration tale does not change: it falls on national closure rather than supranational opening; and on discretionary inclusion rather than on ideas of inclusion as a right.

1.3. The Disconnect

The contrast between individual rights protection and accommodation of state priorities, which surfaced in the rules on European citizenship and on immigration and nationality respectively, ripens into a full-fledged disconnect throughout the narratives. According to the national narrative, inclusion of a TCN, whether as a resident or as a citizen, ultimately depends on the discretion of national authorities. While the supranational narrative emphasizes that inclusion through residence, in a number of situations linked to European citizenship, is a right; and that decisions on inclusion through nationality have to respect EU law and the rights of European citizens. This limits the discretion of national authorities as well as, potentially, the bite of integration requirements that constellate the national narrative. Further, if inclusion in the national narrative depends on the good fit of the entrant in the social and cultural fabric of the host Member State, in the supranational narrative respect for the substance of European citizenship provides an alternative driver for inclusion independent of integration.

Disconnected narratives label similar situations in different ways. For instance a rejected asylum seeker according to the national narrative may be the admissible parent caretaker of a European citizen according to the supranational one; a national legitimately denaturalized for fraud according to the national narrative may be a wrongfully disentitled European citizen according to the supranational one. Awkward practical results may follow. What for instance if Mr. Zambrano had been in Italy rather

¹⁰³ COM(2011) 455 final, “European Agenda for the Integration of Third-Country Nationals” 20 July 2011.

¹⁰⁴ Id.

than in Belgium and he had failed to comply with the terms of his integration agreement? Would protection of the substance of his subsequently born European citizen child have saved him from expulsion?¹⁰⁵

It could be counter-argued that the European citizenship's rules and narrative, rather than challenging the national ones, simply extend exceptions to the discretion frame that are known also to the national narrative. Family considerations – the argument could go – warrant deviations from general immigration rules,¹⁰⁶ and European citizenship does no more than applying relevant considerations to TCN family members of migrant (and exceptionally also static) European citizens. However first, family considerations only go so far in immigration law and policy.¹⁰⁷ Second, European citizenship tends to emancipate the position of the TCNs it affects from family considerations, rather embedding it into a frame of rights meant to bestow autonomous statuses upon their holders.¹⁰⁸ This shift in perspective makes for the disconnect and for the resulting potential inconsistencies.

Beyond suggesting inconsistent outcomes, the disconnect in the narratives highlights a further challenge for the regulation of immigration and nationality in the EU.¹⁰⁹ EU Member States strive to manage their borders and control entry through them so as to protect national identities and a notion of bounded community; however, if in managing migration to protect their identities and communities they compromise principles of equality and tolerance, they dilute the liberal character of those very identities and

¹⁰⁵ The Italian integration agreement requirement does not apply to TCNs who hold a residence permit for family purposes or as family members of European citizens. See Italian Immigration Act, *supra* note 35, art. 4-bis. However, it is not clear that a person in Mr. Zambrano's situation would have qualified for one of these residence permits.

¹⁰⁶ Family reunification is an autonomous ground for admission under most immigration laws; under EU law, family reunification of TCNs is governed by Directive 2003/86, O.J. 2003, L 251. Also see *supra* note 82, on the entitlement to nationality for spouses of nationals and for second generation immigrants; and note 20 on the family members of migrant workers. Further the right to family life under art. 8 of the ECHR, and art. 7 of the Charter of Fundamental Rights potentially work as a limit to state priorities in immigration matters.

¹⁰⁷ See Wallace Goodman, *op. cit.*, *supra* note 7 (integration programmes have turned into migration control instruments precisely for family reunification migrants).

¹⁰⁸ Also see case *Ogieriakhi* (ECJ), *supra* note 14, para 40 (One objective of the Citizenship Directive is ensuring that rights for TCN family members become personal to them under certain circumstances).

¹⁰⁹ For a reflection on different views of liberalism, and the kind of inclusion/exclusion criteria they allow, see Orgad, *op.cit.*, *supra* note 7, 87-88; Hampshire, *op. cit. supra* note 7; Rawls, *Political Liberalism* (CUP 1993), 160-165, (referring to society “as a fair system of cooperation between free and equal citizens”).

communities.¹¹⁰ The tension between governmental discretion and cultural integration in the national narrative, and rights, legal limits and the substance of a non-national citizenship in the supranational one echoes this struggle between nationalist retrenchment on the one hand, and liberal principles on the other one.¹¹¹

This is a struggle that permeates rules and discourses on immigration and naturalization in the EU even independently of European citizenship.¹¹² European citizenship's contribution only makes it more acute. The reason is that European citizenship translates liberal values of freedom, equality and tolerance that are at the basis of the European integration project into precise citizenship rights, of free movement, equal treatment and recognition as a fellow citizen despite national otherness.¹¹³ In this sense, it seems, an inclusion model for TCNs consistent with the European citizenship's project would have to be one emphasizing freedom of choice from a menu of different options for belonging, and equal treatment of entrants of different origins, language and culture, rather than a model based on national discretion and rigid integration requirements segmented nation by nation.¹¹⁴ This emerging contrast of inclusion models suggests that the disconnect between the European

¹¹⁰ Orgad, *op.cit.*, *supra* note 7, at 92 (referring to this dynamic as the paradox of liberalism). Also see Kostakopoulou, "Defending the Case for Liberal Anationalism" XXV *Canadian Journal of Law and Jurisprudence* (2012), 97 (for a critique of liberal nationalism, and proposing an alternative idea of "liberal anationalism").

¹¹¹ On the compatibility of integration requirements with liberal principles see Bauböck, Joppke (Eds.), "How Liberal are Citizenship Tests", *EUI Working Papers*, 2010/41. Also see Weiler, "Bread and Circus: The State of European Union" 4 *CJEL* (1998), 223, at 243 (the Community ideal is heir to Enlightenment liberalism); Joppke, "The Transformation of Citizenship: Status, Rights, Identity" 11 *Citizenship Studies* (2007), 37-48, at 46 (liberalism has two souls, autonomy and tolerance); Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008), at 82-99 (naturalization implies nationalization; a civic registration model would rather favor a needed national conception of citizenship).

¹¹² See Sieglow, "Immigration, Sovereignty and the Open Borders: Fortress Europe and Beyond" 10 *Rev. Const. Stud.* (2005), 111, at 111-112 (a tension between commitment to liberal values and on the other hand commitment to cultures of the composing nation states informs European integration and EU immigration policy).

¹¹³ See TEU art. 2. TFEU art. 18 and 20. Also see Weiler, "In defense of the Status Quo: Europe's Constitutional Sonderweg" in Weiler, Wind (Eds.), *European Constitutionalism beyond the State* (CUP 2003) at 19-20 (on Europe's strategy to deal with the 'other' as one based on constitutional toleration).

¹¹⁴ European citizenship is both a post-national project as it points to bonds alternative to the national ones. Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (Univ. of Chicago Press, 1994); and a cosmopolitan project as it offers rights across national borders. See Kostakopoulou, "European Union Citizenship" *op. cit.*, *supra* note 5, at 630-631 (suggesting European citizenship's capacity to reconcile cosmopolitanism and liberal nationalism). But see Acosta Arcazo, "Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Postnational Form of Membership" 21 *ELJ* (2015) 200, at 205-207 and 213-15 (arguing that the Long Term Residence Directive introduces a form of subsidiary European citizenship representing a true form of post-national membership in Europe, which also dictates strict scrutiny of integration requirements).

citizenship regime and the immigration and nationality one runs deeper than the rules and their narratives; it ultimately intersects a broader dilemma on the scope of rights and the limits to power in the context of immigration.

2. Inclusion and Exclusion Rationales: Rights, Sovereignty and European Citizenship's Democratic Norm

2.1. From a Disconnect in the Narratives to a Contrast of Rationales

In the frame of rules on the residence and naturalization of TCNs, European citizenship configures specific TCN statuses aimed at protection of individual rights rather than at accommodation of state priorities. As to the inclusion narratives developed around relevant rules, European citizenship inspires a discourse on rights and limits to power, in contrast with a competing one on discretion and conditional grants of status. Ultimately, the rules and narratives of European citizenship protect a right to belong in a domain where the mainstream rules and narratives rather point towards the state's power to exclude. In this sense, European citizenship puts the finger on a tension between rights and sovereignty that is at the very heart of legal and philosophical conundrums on the regulation of cross-border movement.¹¹⁵

Under international law, states have a right to manage their borders and to decide in their discretion on the admission and exclusion of aliens.¹¹⁶ The international law right of states to admit and exclude migrants depends on considerations of sovereignty and jurisdiction, on the states' obligation to cater for the needs of its citizens, and ultimately on the right to self-determination.¹¹⁷ It also entails the right to autonomously set opportunities for the integration and membership of migrants.¹¹⁸ As states have a right

¹¹⁵ Thym, "EU Migration Policy", *op. cit.*, *supra* note 43, at 730 ("among lawyers, State discretion in migratory matters is usually described as an expression of sovereignty, while the perspective of migrants is presented on human rights grounds").

¹¹⁶ See Aleinikoff, "International Legal Norms and Migration: a Report", in Aleinikoff, Chetail (Eds.) "Migration and International Legal Norms" (Asser Press 2003); Martin, "The Authority and Responsibility of States" in *id.*, at 31-33. For a US judicial expression of relevant principles, see *Chinese Exclusion*, Case 130 U.S. 581 (1889), at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation"); also see ECtHR, *Hirsi Yamaa and others v Italy*, Appl. No. 27765/09, judgment of 23 Feb. 2012, para 113.

¹¹⁷ See Nafziger, "The General Admission of Aliens under International Law", 77 AJIL 804 (1983), 817-822; Martin, *op. cit.*, *supra* note 116, at 31-33.

¹¹⁸ Aleinikoff *op. cit.*, *supra* note 116, at 20.

to exclude, it is at least contested under international law whether migrants have a right to enter.¹¹⁹

The states' legal power to exclude finds justifications in a number of arguments in political theory and philosophy: from concerns for the premises and functionality of state-led mechanisms of redistribution,¹²⁰ to considerations of cultural protection and population trends.¹²¹

On the other hand, under international law, the right of states to include and exclude finds a limit in the necessity to protect in certain instances overarching human rights;¹²² and more broadly in an individual right to move across borders, recognized in several international law instruments although subject to several conditions and limits.¹²³ Joseph Carens traces the philosophical roots of an individual right to cross state borders to principles of both freedom and equality:¹²⁴ free movement is a fundamental human freedom, which is also preliminary to many other freedoms;¹²⁵ and it is a guarantee of equality of opportunities, which may also help reduce social and economic inequalities on a global scale.¹²⁶

While principles of freedom and equality are at the basis of the European integration project,¹²⁷ the immigration policy of the EU, in line with the ones of the individual Member States, upholds and confirms the sovereign power to exclude: entry is rarely a right for a TCN.¹²⁸

Daniel Thym has suggested that debates on rights versus sovereignty tend to fall into false dichotomies in the context of European immigration. Not only the simple

¹¹⁹ See Human Rights Committee, General Comment 27, Freedom of movement (Art.12),

U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 4; also see Nafziger op. cit., *supra* note 117, at 805.

¹²⁰ In the famous words of Michael Walzer, "distributive justice presupposes a bounded world". Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York Basic Books 1983), at 31.

¹²¹ See Miller, "Immigration: the Case for Limits" in Cohen, Wellman (Eds.) "Contemporary Debates in Applied Ethics" (Blackwell 2014).

¹²² Case *Hirsi Yamaa*, *supra* note 116, para 114.

¹²³ See e.g. International Covenant on Civil and Political Rights, art. 12; UN Charter, art. 13(2); European Convention on Human Rights, Protocol N. 4, art. 2-3.

¹²⁴ See Carens, *The Ethics of Immigration*, (OUP 2013), at 225-254.

¹²⁵ *Id.* at 227.

¹²⁶ *Id.* at 227-228.

¹²⁷ TEU, art. 2.

¹²⁸ But see Acosta Arcarazo, op. cit., *supra* note 114 (for a reading of the Long Term Residence Directive as a limit to such power to exclude). Also see case C-491/13 *Ben Alaya*.

dichotomy between self-government and migrants' interests, but also a deceiving one between citizenship's equality of rights and migrants' deprivation of rights.¹²⁹ Even without calling into question the armory of citizenship, according to Thym, EU migration policy is best understood through a cosmopolitan lens that transcends these dichotomies.¹³⁰ This lens shows clearly that EU migration policy already protects a version of the individual right to move across borders, in the form of fundamental and human rights of migrants.¹³¹

The argument here is that European citizenship offers one further, indispensable lens to chart the conceptual premises of migration regulation in the EU.¹³² With its rules and narratives which support, albeit in a piecemeal fashion, the TCNs right to belong, it strengthens the premises of a right to move across borders in the context of EU immigration policy.¹³³ It approaches this right from a different direction in comparison to provisions on fundamental and human rights of migrants and other provisions based in immigration policy. In the latter provisions, individual rights to cross borders work as a boundary to a system that is otherwise premised on state power;¹³⁴ or are the side effect of an effort at harmonization of Member States' rules.¹³⁵ In the citizenship perspective, the TCNs right to pass the external borders of the EU and to achieve a status of belonging within its composing nations becomes, albeit in a limited set of circumstances, the center of focus rather than the limit. European citizenship therefore blends two spheres that have traditionally remained distinct: the one of citizenship and its legacy of rights; and the one of sovereign control of membership and alienage, where there are rights, but these have at best a secondary role.

¹²⁹ Thym, "EU Migration Policy", *op. cit.*, *supra* note 43, at 725-26.

¹³⁰ *Id.* at 726-727.

¹³¹ *Id.* at 719-721.

¹³² While according to Thym European citizenship operates in a different domain, with an integrationist and federalist stance that cannot be exported to the law on TCNs. *Id.* at 724-25.

¹³³ See Carens, *op. cit.*, *supra* note 124, at 272 ("the fact that citizens of the European Union states are largely free to move from one member state to another reveals starkly the ideological character of the claim that discretionary control over immigration is necessary for sovereignty").

¹³⁴ See e.g. Dublin Regulation *supra* note 28, art. 3(2). Also see Kostakopoulou, *The Future Governance*, *op. cit.*, *supra* note 111, at 78 (human rights for resident aliens are in any case commitments of states).

¹³⁵ See e.g. Long Term Residence Directive, *supra* note 34, whereas 17. Also see case C-491/13 *Ben Alaya* (a student's right to be admitted under Directive 2004/114 is linked to objectives of approximation of national laws, paras 22, 26 and 31).

But how can European citizenship bridge the tension between these two spheres, between individual interests and state priorities, discretion and rights, and ultimately between sovereignty and freedom? Certainly a discrete set of rules on family members of European citizens, and the lofty narratives surrounding them cannot do as much. European citizenship's capacity in this sense depends -it is argued- on the spill-over of rationales from the field of free movement of EU nationals to the one of migration of TCNs. In both fields, European citizenship plays albeit with different intensity a similar role of challenging national boundaries to protect individual rights.

Building an analogy between the role of European citizenship in free movement and in immigration faces critiques along two lines. On the one hand it has already been observed that principles applying in the field of free movement cannot be as easily extended to the field of immigration from third countries as free movement responds to different logics and different objectives.¹³⁶ On the other hand, the role of European citizenship in the context of free movement marks, according to some views, the character of European citizenship as a market project, bent on material aspirations, undermining the social cohesiveness of traditional citizenship, and creating novel ranks of exclusion.¹³⁷ Such a citizenship model is inadequate to support more ambitious goals of rights-protection and immigrants' inclusion. In the former respect, even if the objectives of free movement of EU nationals are different, an element is common to European citizenship's involvement in the latter field and in the one of TCNs migration: European citizenship stretches rights across national borders, whether these are rights of second country nationals or of TCNs. It thus has the effect of grounding state obligations towards those outside the core circle of membership.¹³⁸ This transnationalizing effect that European citizenship has on rights points to the democratic character of its membership concept, one that relies on malleable boundaries among

¹³⁶ Thym, "EU Migration Policy", op. cit., *supra* note 43, at 721 and 735-736; Spaventa, op. cit., *supra* note 70, at 11 (subtracting fellow citizens to executive discretion is precisely the point of European citizens' migration law).

¹³⁷ See e.g. Everson, "A Citizenship in Movement", 15 GLJ (2014) 965-984, at 967-970.

¹³⁸ See Bauböck, *Transnational Citizenship*, *supra* note 5 (a rights-based idea of citizenship on a transnational plan grounds state obligations towards non members). For an alternative transnational vision of European citizenship see Kostakopoulou, "European Union Citizenship" op. cit., *supra* note 5, at 624 (contextualizing European citizenship in a scenario of nested, interacting citizenships).

different *demoi* and on mutual recognition among their members.¹³⁹ This democratic norm of membership represents in turn part of the unexplored conceptual space that even a market-born paradigm of citizenship harbors.¹⁴⁰ Spelling out this norm may chart part of that uncharted territory, and illustrate at the same time European citizenship's contribution to the immigration field.

2.2. European Citizenship, Mutual Recognition, Democracy

The European citizens' right to move and reside in the several Member States entails a number of transnational components:¹⁴¹ the right to export benefits and entitlements tied to nationality to a host Member State;¹⁴² the right not be burdened, or discriminated for having exercised the freedom to move;¹⁴³ the right to equal treatment with nationals of host Member States;¹⁴⁴ and a broader right to belong across Member State borders, for instance through seeing the family life one has built while exercising free movement rights protected upon return to a Member State of origin.¹⁴⁵ From the perspective of the individual citizens, these rights signify an extension of the boundaries of their national citizenships, whose content comes to reach beyond national borders while opening up a dimension of belonging also in other Member States.¹⁴⁶ From the perspective of the Member States, enforcement of these rights implies a rule of mutual recognition of European citizens' national belonging.¹⁴⁷ Free movement of European

¹³⁹ See Nicolaïdis, "European Democracy and its Crisis", *supra* note 1, at 363 (on transnationalism as one of the guiding principles of democracy).

¹⁴⁰ See Nic Shuibne, *op. cit.*, *supra* note 5, at 1619 (there is ample space within the market citizenship paradigm to accommodate further developments).

¹⁴¹ 20-21 TFEU.

¹⁴² See e.g. case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* EU:C:2011:500.

¹⁴³ See e.g. case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* EU:C:2004:273, (Opinion of A.G. Jacobs); case C-406/04 *Gérald De Cuyper v Office national de l'emploi* EU:C:2006:491.

¹⁴⁴ TFEU, art. 18.

¹⁴⁵ Case *O and B* *supra* note 17. For an analysis of these components, see Strumia, "Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging" 32 YBEL (2013), 432, 441-447; also see F Strumia, "Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground in Trans-Atlantic Perspective" in Kochenov (Ed.), *Citizenship and Federalism in Europe*, *op. cit.*, *supra* note 70.

¹⁴⁶ See Strumia "Individual Rights", *op. cit.*, *supra* note 145. Also see case C-135/08, *Rottmann* (opinion of A.G. Poiares Maduro), para 16 (European citizenship 'confers on the nationals of the Member States a citizenship beyond the State').

¹⁴⁷ On the notion of mutual recognition of belonging see Strumia, *Supranational Citizenship*, *op. cit.*, *supra* note 48, 278-314; also see Strumia, "Looking for Substance", *op. cit.*, *supra* note 145.

citizens entails in other words a right to belong across borders which mirrors into an implied obligation of mutual recognition on the part of the Member States.

European citizenship thus declines in the domain of membership and belonging a notion of mutual recognition that is both a fundamental regulatory mechanism in the context of the internal market and the AFSJ,¹⁴⁸ and a normative aspiration for the project of European integration.¹⁴⁹

Mutual recognition informs operational rules on free movement of persons: rules of recognition enable migrant European citizens to bring along to other Member States a number of accessories, from the more mundane (drivers' licenses),¹⁵⁰ to the more hard earned (diplomas and professional qualifications),¹⁵¹ to the more identity-signifying (the spelling of their names).¹⁵² At a higher level a system of mutual recognition of national belonging represents the foundation stone for the architecture of free movement of European citizens: each Member State has to uphold without questions the determination of any other Member State as to who belongs as a citizen in their national community, for purposes of extending to such citizens a measure of belonging into its own community.¹⁵³ Recognition in this sense implies a measure of trust among the Member States as well as among their nationals. Bonds of trust allow the opening of national borders and the blending of several communities of national others into a community of supranational citizens.¹⁵⁴

Two elements from this European citizenship's recipe to generate belonging from otherness are potentially transferable to the domain of TCNs immigration: the inclination to recognize, rather than reject diversities; and trust rather than suspicion as a basis for relevant decisions of inclusion and exclusion.

¹⁴⁸ For a comprehensive analysis, see Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013).

¹⁴⁹ See Nicolaïdis, "Trusting the Poles?", op. cit., *supra* note 1; Nicolaïdis, Shaffer, op. cit., *supra* note 1, at 293 (on mutual recognition as a *modus operandi* for the EU as a whole); Nicolaïdis, "Kir Forever?" op. cit., *supra* note 1, at 454-455 (on mutual recognition as a way to live with our differences in a European democracy).

¹⁵⁰ Directive 2006/126, O.J. 2006, L 403.

¹⁵¹ Directive 2005/36, O.J. 2005, L 255.

¹⁵² Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* EU:C:2008:559; case C-148/02 *Carlos Garcia Avello v Belgian State* EU:C:2003:539.

¹⁵³ At least ever since clarified in case *Micheletti*, *supra* note 24.

¹⁵⁴ Nicolaïdis, "Kir Forever?" op. cit., *supra* note 1, at 455 (Weiler's idea of a community of others lives on through the practice of mutual recognition).

In fact these elements already apply in the context of the EU common immigration policy, only they apply in a flipped manner in comparison to the domain of free movement, and of the internal market more in general.¹⁵⁵ Mutual recognition is a well-known rule in the context of the the area of freedom, security and justice (AFSJ).¹⁵⁶ It presides to the functioning of European Arrest Warrants, to the enforcement of judicial decisions in civil and criminal matters, and to the enforcement of expulsion decisions.¹⁵⁷ As the list suggests, rules of mutual recognition in the AFSJ are functional to easing the circulation of judgments and administrative decisions, rather than to facilitating the movement of persons and goods.¹⁵⁸ Therefore in this field mutual recognition accommodates diversity among the enforcement process of the different Member States rather than among regulatory standards for professionals and goods. Similarly, mutual trust among the Member States is conducive to enforcement of government action.¹⁵⁹ It rests on the presumption that all Member States comply with equivalent standards of fundamental rights protection, barring active inquiry in this respect.¹⁶⁰ Ultimately in the context of the AFSJ the balance that mutual recognition pursues between individual freedom and public interest tilts towards the latter.¹⁶¹

European citizenship promises an alternative version of mutual recognition that could push back the balance towards individual freedoms also in the AFSJ, at least with regards to the common immigration policy. This is because European citizenship works on the nature of mutual recognition: in the context of citizenship, it is no longer just an operational rule, a mode of transnational governance, and a philosophical principle.¹⁶² It becomes a norm of belonging.

¹⁵⁵ Nicolaidis, “Trusting the Poles?”, *op. cit.*, *supra* note 1, at 688-690; Lavenex, “Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy”, in Schmidt (Ed.), *op. cit.*, *supra* note 1; Mitsilegas, *op. cit.*, *supra* note 44.

¹⁵⁶ Of which the common immigration policy represents a part.

¹⁵⁷ See respectively Framework Decision 2002/584, O.J. 2002, L 190; TFEU art. 81(1) and 82(1); Directive 2001/40, *supra* note 41.

¹⁵⁸ Mitsilegas, *op. cit.*, *supra* note 44, at 320-22; Möstl, *op. cit.*, *supra* note 1, at 407-08.

¹⁵⁹ But see Janssens, *op. cit.*, *supra* note 148, at 255 (on versatility of mutual recognition that may work either as a principle facilitating enforcement, or protecting individuals from further prosecution through the *ne bis in idem* principle).

¹⁶⁰ See Lenaerts, *op. cit.*, *supra* note 1 at 7; also see CJEU Opinion 2/13, Opinion on the Basis of Art. 218(11) TFEU, EU:C:2014:2454, para 191. But see case NS, *supra* note 43.

¹⁶¹ Möstl, *op. cit.*, *supra* note 1, at 407-09.

¹⁶² Nicolaidis, “Trusting the poles? : Mark 2”, *op. cit.*, *supra* note 1, at 267.

The content of this norm is closely related to the quality of the EU as a demoi-cratic community, a ‘union of peoples understood both as states and as citizens that govern together but not as one’.¹⁶³ Recognition is at the basis of belonging in such a community of multiple *demos*, one that Kalypso Nicolaïdis has forcefully described as a

“mosaic of intertwined mental and physical landscapes open to each other's soft influences and hard laws, and bound together not by some overarching sense of common identity or peoplehood but by the daily practice of mutual recognition of identities, histories, social contracts”.¹⁶⁴

The compenetration among the *demos* of Europe, and their mutual opening, call for an effort on the part of citizens and governments at internalizing the point of view of others.¹⁶⁵ This internalization effort expresses, on the one hand, a mode of political interaction in a shared polity.¹⁶⁶ On the other hand, it points to a norm of transferable belonging capable of shifting its centre of gravity among the multiple *demos*. European citizenship embodies this latter norm of demoi-cratic belonging based on mutual recognition.¹⁶⁷

The norm of belonging potentially translates into a rule of inclusion emphasizing the Member States’ shared responsibility for drawing and policing the boundaries of the *demos*, and a commitment to no othering, whether the other is a EU national or a TCN.¹⁶⁸ Such a rule, which inspires mitigation of national power in the context of

¹⁶³ Nicolaïdis, “European Democracy and its Crisis”, *supra* note 1, at 353. Also see case C-499/06, *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, EU:C:2008:300 (Opinion of A.G. Poiares Maduro), para 23 (on “the society of peoples of the Union”).

¹⁶⁴ Nicolaïdis, “Trusting the Poles?”, *op. cit.*, *supra* note 1, at 682-83.

¹⁶⁵ See Nicolaïdis, “The Idea of European Democracy”, *op. cit.*, *supra* note 1, at 267 (democracy calls for an “enlarged mentality” in a Kantian sense, “of thinking and judging from the point of view of everyone else”); Bellamy “An Ever Closer Union among the Peoples of Europe”, *op. cit.*, *supra* note 1, at 510 (democracy calls for a notion of mutual respect among the people of the various states).

¹⁶⁶ In discussing democracy here the emphasis falls not on the political nature of the *demos*, but rather on the softness of their boundaries that have become permeable to political voice, but also to membership. For discussions of democracy more focused on the political nature of the *demos*, see Bellamy “An Ever Closer Union among the Peoples of Europe”, *op. cit.*, *supra* note 1; Cheneval Schimmelfennig, *op. cit.*, *supra* note 1; Lindseth “Equilibrium, Democracy, and Delegation in the Crisis of European Integration,” 15 *GLJ* 529 (2014).

¹⁶⁷ See Nicolaïdis, “The Idea of European Democracy”, *op. cit.*, *supra* note 1, at 257 (on the need to consider the various ways in which European citizenship expands citizens’ opportunities in a democratic frame).

¹⁶⁸ See Nicolaïdis, “The Idea of European Democracy”, *op. cit.*, *supra* note 1, at 269-70; Nicolaïdis, “European Democracy and its Crisis”, *supra* note 1, at 356; Cheneval Schimmelfennig, *op. cit.*, *supra* note 1, at 340-341.

processes of inclusion and exclusion, needs not be limited to EU nationals.¹⁶⁹ In respect of the immigration of TCNs, it can be thought of as additional and complementary to admission criteria, and to *ius sanguinis* and *ius soli* rules, in the same way in which European citizenship is additional and complementary to national citizenship.¹⁷⁰

This rule of inclusion emphasizing recognition and trust, shared responsibility and no othering,

lays a bridge between disconnected rules, narratives and rationales of supranational citizenship, and of immigration and nationality.

2.3. A Democratic Bridge across the Gap

The democratic norm of belonging and its rule of inclusion help define first of all the individual interests protected through European citizenship-linked TCN statuses. TCN spouses, partners and parent caretakers derive from their European citizen family members a right to be included across national borders, even in spite of competing state priorities.

If the implications of a right to belong across borders help reconcile the rules, the principles in which democratic belonging finds expression, mutual trust, shared responsibility, no othering, bridge disconnected narratives. They offer a reading key to the supranational narrative, which may help to apply the latter narrative to re-interpret the competing national one. First, a mutual trust perspective suggests that the Member States in exercising their discretion in making inclusion and exclusion determinations, and in applying their integration requirements, are called to take into account the point of view of any other directly involved Member States. They may have to recognize for instance determinations on residence, rights, integration previously made by another Member State in respect of the same TCN, or in respect of a TCN in the same situation.¹⁷¹ The logics of European citizenship make recognition of such “grains” of

¹⁶⁹ Nicolaïdis, “European Democracy and its Crisis”, *supra* note 1, at 359 (on democracy as an exercise at power mitigation).

¹⁷⁰ See Strumia, *Supranational Citizenship*, *op. cit.*, *supra* note 48, at 300-303.

¹⁷¹ For an elaboration of operational suggestions in this sense, see Strumia, “Looking for Substance”, *op. cit.*, *supra* note 145, at 453-454; also see Strumia, *Supranational Citizenship*, *op. cit.*, *supra* note 48, at 292-295.

inclusion a right for TCNs and simultaneously limit Member States' powers in this sense.

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

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

Ultimately, European citizenship's norm of belonging also mitigates the tension in the principles: sovereignty is not superseded by a right to move across borders, but needs to be exercised in a way conscious of the external implications of that right.¹⁷² In this sense, European citizenship's contribution to the logics of immigration regulation in Europe is not in terms of stripping the Member States of their powers; it is rather in terms of showing the Member States a way to exercise a power that stays theirs in a mutually conscious and mutually respectful way.¹⁷³ The point thus is not harmonization of admission and naturalization rules, but is rather encouraging shared understandings of those rules that preserve, but soften national boundaries. European citizenship with its

¹⁷² See Nicolaidis, "European Democracy and its Crisis", *supra* note 1, at 356 (peoples both as states and as citizens must internalize socio-economic and democratic externalities).

¹⁷³ But see Poiares Maduro, "So Close and Yet so Far: the Paradoxes of Mutual Recognition" in Schmidt (Ed.) *op. cit.*, *supra* note 1, at 235-37 (on not underestimating the effects of mutual recognition on sovereignty).

norm of democratic belonging therefore supports and perfects a cosmopolitan paradigm already represented in the common immigration policy.¹⁷⁴

This theory of democratic belonging may be accused of overstating the importance of a few scattered rules on European citizenship family members, and of a subtle supranational narrative on inclusion that may well fade into silence. There is a question of feasibility: how is the supranational narrative to concretely affect debates and rules on immigration in the EU? As well as a question of opportunity: in a climate of political unrest surrounding several key integration questions, including immigration,¹⁷⁵ and at a time when EU institutional mechanisms are proving inadequate,¹⁷⁶ attaching so much importance to the feeble echoes of European citizenship's tale of rights may seem utopian, if not naïve.

In terms of feasibility, the strength of the European citizenship's narrative is in that it speaks to the first line actors in immigration, administrators and courts. It speaks to the ears of these actors while potentially bypassing unobserved hardened political wills. For this reason, it holds the potential to trigger processes of socialization from below.¹⁷⁷ In fact, there are signs, albeit on a discrete scale, that the supranational narrative has already percolated to the national level.¹⁷⁸ In terms of opportunity, when it comes to EU and Member States immigration policy, the only element that can perhaps draw political consensus, and drive progress in institutional design is a vision of cooperation that

¹⁷⁴ Thym, "EU Migration Policy", op. cit., *supra* note 43, at 730; also see Nicolaïdis, Shaffer, op. cit., *supra* note 1, at 270 (mutual recognition as the incarnation of Kant's cosmopolitan law).

¹⁷⁵ Although some see signs of progress on a common approach to immigration. See Charlemagne, "The Birth-Pangs of a Policy", *The Economist*, 25 Jul. 2015.

¹⁷⁶ Thoughts go to the Euro-zone crisis.

¹⁷⁷ On mechanisms of socialization, see e.g. Checkel, "Why Comply? Social Learning and European Identity Change", 55 *IO* 553 (2003); Goodman, Jinks, "How to Influence States: Socialization and International Human Rights Law" 54 *Duke L. J.* 621 (2005).

¹⁷⁸ See e.g. Opinion of the Belgian *Conseil d'État* 49.941/AG/2/V of 16 and 23 August 2011 <http://www.dekamer.be/FLWB/PDF/53/0476/53K0476011.pdf> (accessed 8 July 2015), ¶ 14.1.1-14.4 (on provisions of the reformed Belgian nationality law being inconsistent with the Rottmann ruling-eventually leading to revision of relevant provisions); also see *Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial*, 8 July 2011, *Moniteur Belge*, 12 September 2011 (2011 Amendment to the Belgian law on foreigners – responding to *Zambrano* with an extension of family reunification rights to ascendants of Belgian nationals). The CJEU judgment in the *Ben Alaya* case also invites to question to what extent the judicial narrative of citizenship affects judicial interpretation of EU immigration law.

transcends the contingencies of immediate pressure and at the same time reassures the Member States of their autonomy and sovereignty.

European citizenship offers just that.

Conclusion

European citizenship's relevance to Europe and to the project of integration is under threat from several perspectives. First, the right of free movement in which European citizenship finds its most concrete expression is in practice relevant to few but draws the attention of many in Euro-skeptical political agendas of different sorts. Second, European citizenship's political irrelevance becomes egregious at a time when Europe is confronted with harsh expressions of national voice and tangible threats of exit. Finally, European citizenship's rights-protection legacy appears nullified by the dehumanizing experience of several TCNs at Europe's frontiers.

This paper's quest responds more directly to this third perspective. However its findings suggest higher level thoughts on the relevance of European citizenship that embrace in part also the other two. Therefore, there is a narrower as well as a broader conclusion to it.

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

requirements and management of discretion, so as to internalize the preferences of others. Value is returned this way to tolerance and equality.

Beyond the condition of TCNs, the reflections on European citizenship's democratic norm of belonging indicate new potential sources for checks and balances in the relations among the Member States, and among their nationals. In this sense, a broader conclusion touches upon, and invites to further explore, the conceptual promise of European citizenship for integration's discontents, and its institutional reform prospects. A recognition-based norm of belonging may suggest political citizenship in new shapes;¹⁷⁹ it may inspire mechanisms for protection of Member States' autonomy other than through competence principles; and it may provide an ingredient for the glue to keep together different Europes going at variable speeds.¹⁸⁰

Ultimately, European citizenship does not move the masses, does not warm up identities, and does not speak with a roaring political voice. Yet it releases a vision of coexistence, whether among nationals of different Member States, or between citizens and foreigners, that is irreplaceable for European integration.

¹⁷⁹ Possibly in the context of the new political space resulting of the Greek crisis. See Eeckhout, "The Greek Crisis and the Dysfunctional European Political Space" <<https://londonbrussels.wordpress.com/2015/07/21/the-greek-crisis-and-the-dysfunctional-european-political-space/>> (last visited 29 Jul. 2015).

¹⁸⁰ See Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Adams et Al. (Eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice* (Hart 2013), at 151 (on the contrast between dis-uniform Europe and unitary European citizenship).

