Special Issue
Constitutional Identity in the Age of Global Migration

Constitutional Identity and Integration: EU Citizenship and the Emergence of a Supranational Alienage Law

By Sara Iglesias Sánchez[*]

Abstract

This Article examines some central questions concerning the status of EU foreigners—non-EU nationals legally residing in the EU. First, it addresses the peculiarities of the status of EU citizens and the special nature of EU immigration law as the basis for the construction of an EU alienage law. Second, it examines whether and to what extent the emergence of a supranational immigration and alienage law—with a focus on integration—interacts with the broader debate on European and national constitutional identity. Third, the Article analyzes the legal difficulties for the application of the equal treatment principle between EU citizens and EU foreigners taking as a point of reference the different roles of restrictions and conditions based on the notion of integration.

[*] Legal Secretary, Court of Justice of the EU. All the opinions expressed are purely personal to the author.

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A. Introduction: EU Citizens and EU Foreigners

EU citizenship law and EU migration law conform two different areas of EU law. They have emerged separately and continue to be regulated in different parts of the treaties on which the EU is founded (the Treaties). Their constitutional structure, content, and legal implementation is not only dissimilar but it is also, to a great extent, disconnected. Without attempting at offering an exhaustive account of the complex legal scenario,[1] this section outlines several salient features of both regimes, which are relevant for the joint consideration of the status of EU citizens and the emergence of a supranational alienage law.

I. The specificity of the Citizenship of the Union

The citizenship of the European Union is a peculiar legal category. It is, certainly, neither the first nor the only instance of multinational citizenship. The mindful creation of a supranational polity—halfway between an international organization and a federal state—is, however, particularly innovative in its effects on individual rights due to the uniqueness of the European integration process and the features that govern the relationship between EU law and national legal orders. It is not by coincidence that EU law has proclaimed its most defining features by claiming a direct relationship between citizens and the EU legal order.[2] This—together with the emancipation of EU law from the reciprocity conditions usually attached to international treaties[3]—has buttressed the position of the individual under EU law, which is more solid than that derived from international treaties granting reciprocal national treatment. The formal enactment of the status of the citizenship of the Union, together with a major constitutional revamp of the Treaties by the Treaty of Maastricht, officialized the ambition of the EU legal order to recognize the persons formerly known as "Member States nationals" as its own subjects.

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[1] For some broader analyses that are to be found in the literature, see, e.g., Daniel Thym, *Citizens and Foreigners in EU Law: Migration Law and Its Cosmopolitan Outlook*, 22 EUR. L.J. 296 (2016); Francesca Strumia, *European Citizenship and EU Immigration: A Demoi-cratic Bridge between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude*, 22 EUR. L.J. 417 (2016); Sara Iglesias Sanchez, *The Protection of Fundamental Rights of Citizens of the Union and Third Country Nationals: Reinforcing Coherence Through a New Interpretation of the Non-discrimination Principle*, 15 EUR. J. MIGRATION & L. 137 (2013).

[2] *See* ECJ, Case 26/62, van Gend & Loos, EU:C:1963:1, Judgment of February 5, 1963.

[3] Member States cannot, under any circumstances, plead the principle of reciprocity to justify infringement of EU law. *See, e.g.*, ECJ, Cases 90/63 and 91/63, EU:C:1964:80, Commission v. Luxembourg and Belgium, Judgment of 13 November 1964; ECJ, Case 232/78 Commission v. France, EU:C:1979:215, Judgment of September 25, 1979; ECJ, Case 325/82 Commission v. Germany, EU:C:1984:60, Judgment of February 14, 1984, para. 11; ECJ, Case 270/83, Commission v. France, EU:C:1986:37, Judgment of January 28, 1986, para. 26. The implementation of the obligations imposed by EU law cannot be made subject to a reciprocity conditions, either. *See, e.g.*, ECJ, Case C-405/01, Colegio de Oficiales de la Marina Mercante Española, EU:C:2003:515, Judgment of September 30, 2003, para. 61.

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Despite its audacious supranational nature, however, EU citizenship is still reminiscent of international dynamics. It is tied down to the possession of the nationality of one of the Member States. Member States therefore retain the master key to membership and to determine European identity in its most entrenched cultural and ethnic meaning. Foreigners become citizens from one day to another after an accession Treaty.[4] Citizens may become foreigners as well after secession from the Union.[5] The landmark judgment in *Rottmann* shows, however, some hard limits on this formerly perceived as a quasi-absolute power of Member States regarding the entry/exit gates to European citizenship: Deprivation of nationality, which inevitably entails the loss of EU citizenship, is not excluded from judicial review at the EU level.[6]

A list of enumerated rights of limited innovative content accompanied the ground-breaking decision of constitutionalizing a citizenship of the Union: Free movement rights; consular protection from other Member States abroad; the right to vote and stand as a candidate for European and municipal elections; the right to petition to the European Parliament; the right to apply to the Ombudsman; and, the right to communicate with the EU institutions in one's own language. Even though the constitutional framework of EU citizenship has remained rather stable,[7] the interpretation of the relevant Treaty provisions and legislation over the last twenty-five years has given rise to a multifaceted and complex status, which is today the object of a fully-fledged area of legal expertise: EU citizenship law. Despite the signs of exhaustion of the existing citizenship model in the aftermath of the long lasting economic and constitutional crisis,[8] EU citizenship is still proposed as the guiding element for constitutional progress in the EU.[9]

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[4] For a case dealing with those developments on infringements linked to illegal immigration, see ECJ, Case C-218/15, Paoletti and Others, EU:C:2016:748, Judgment of October 6, 2016.

[5] *See, e.g.*, Dimitry Kochenov, *EU Citizenship and Withdrawals from the Union: How Inevitable is the Radical Downgrading of Rights?* 111 LEQS DISCUSSION PAPER SERIES (2016); ELSPETH GUILD, BREXIT AND ITS CONSEQUENCES FOR UK AND EU CITIZENSHIP OR MONSTROUS CITIZENSHIP (2017).

[6] *See* ECJ, Case C-135/08, Rottmann, EU:C:2010:104, Judgment of March 2, 2010, para. 39. The Court had already established that even though acquisition and loss of nationality remains a competence of the Member States, it has to be exercised respecting EU law. *See* ECJ, Case C-369/90, Micheletti and Others, EU:C:1992:295, Judgments of July 7, 1992, para. 10; ECJ, Case C-179/98, Mesbah, EU:C:1999:549, Judgment of November 11, 1999, para. 29; Case C-192/99, Kaur, EU:C:2001:106, Judgment of February 20, 2001, para. 19; ECJ, Case C-200/02, Zhu and Chen, EU:C:2004:639, Judgment of October 19, 2004, para. 37.

[7] The citizen's initiative has been inserted as an EU citizenship right by the Treaty of Lisbon, Article 24.

[8] *See* QUESTIONING EU CITIZENSHIP: JUDGES AND THE LIMITS OF FREE MOVEMENT AND SOLIDARITY IN THE EU (Daniel Thym ed.) (forthcoming 2017).

[9] *See* Dimitry Kochenov, *On Tiles and pillars: EU Citizenship as a Federal Denominator*, *in* CITIZENSHIP AND FEDERALISM IN THE EUROPEAN UNION: THE ROLE OF RIGHTS 3 (D. Kochenov ed., 2017).

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EU citizenship law has its pillars in Part II of the Treaty on the Functioning of the EU (TFEU) and in the legislative acts adopted on its basis, of which the most paradigmatic act is the so-called "Citizens Directive."[10] Nevertheless, a broader conception of EU citizenship must include the entire *acquis* on free movement of persons, which lays the foundations and gives real flesh to that "fundamental status." The content of EU citizenship remains, for the rest, undetermined. Although the relationship of EU citizenship and fundamental rights is the object of a lively doctrinal discussion,[11] the application of fundamental rights remains tied to the scope of EU law as determined by Article 51 of the Charter. From this vantage point, EU citizenship is destined to be a fundamental status which, for the time being is composed of a bundle of limited EU powers and of individual rights strongly dependent on the exercise of the EU fundamental freedoms, which generally entail cross-border movement.

Despite the rich *acquis* of citizenship and free movement rights, the EU is still struggling to define the essential content of its citizenship. The two main symbolic issues that structure the constitutional added value of EU citizenship are the protection against expulsion and the access to social assistance and benefits. Recent case-law shows the challenges and difficulties in building up a stable and solid framework of reference of those two core citizenship topics.[12] The completion of solidarity is moreover being held hostage by the lack of harmonization in social and taxation fields, and the ghost of "benefits tourism" has awaken with renewed force in the era of the economic crisis. The recent saga of cases following the judgment in *Dano* are particularly highlighting in terms of the conflicts that underlie the construction of transnational solidarity and of a robust system of supranational citizenship.[13]

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[10] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L 158, 30.4.2004, 77–123.

[11] *See, e.g.*, Armin von Bogdandy et al., *Reverse Solange–Protecting the Essence of Fundamental Rights Against EU Member States*, 49 COMMON MKT. L. REV. 489 (2012); Dimitry Kochenov, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, 19 EUR. L.J. 502 (2013); Sara Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, 20 EUR. L.J. 464 (2014); Dominik Düsterhaus, *EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?*, *in* EU CITIZENSHIP AND FEDERALISM, THE ROLE OF RIGHTS (D. Kochenov ed., 2017); Niamh Nic Shuibhne, *Integrating Union citizenship and the Charter of Fundamental Rights*, *in* QUESTIONING EU CITIZENSHIP. JUDGES AND THE LIMITS OF FREE MOVEMENT AND SOLIDARITY IN THE EU (Daniel Thym ed.) (forthcoming 2017).

[12] *See* Alessandra Lang, *The Protection of Vulnerable People and the Free Movement of Persons within the European Union: Two Worlds Apart?*, *in* PROTECTING VULNERABLE GROUPS: THE EUROPEAN HUMAN RIGHTS FRAMEWORK 291 (Francesca Ippolito & Sara Iglesias eds., 2015); Dora Kostakopoulou & Nuno Ferreira, *Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship*, 20 COLUM. J. EUR. L. (2013); Daniel Thym, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, 52 COMMON MKT. L. REV. 17 (2015).

[13] *See* ECJ, Cases C-333/13, Dano, EU:C:2014:2358, Judgment of November 11, 2014; ECJ, C-67/14, Alimanovic, EU:C:2015:597, Judgment of September 15, 2015; ECJ, C-299/14, García-Nieto and Others, EU:C:2016:114,

Nonetheless, the limitations and fluid content of the status of EU citizenship have not precluded its consolidation as a truly fundamental status. The most basic EU citizenship provision, Article 20 TFEU, has enabled the development of a ground-breaking case law. It began with the Ruiz Zambrano judgment, which increasingly overcomes the cross-border approach to EU citizenship and lays the ground for a right to effectively remain in the territory of the Union.[14] This case law, which is probably the most far-reaching and innovative case law connected with the status of EU citizenship, serves as a basis for derivative residence rights for third country nationals where no other residence right exists.

II. Particularities of the Status of EU Foreigners

After being already included in the sphere of EU action as an area of common interest under the intergovernmental Third Pillar created by the Maastricht Treaty, the Treaty of Amsterdam "communitarized" and laid the ground for an EU asylum and migration policy. That incipient legal background still regarded immigration as an area where European integration was needed in an instrumental manner to buttress free movement in the internal market. The competences to define the entry and rights of foreigners—technically called "third country nationals" in the EU jargon—were enunciated in a broad manner, covering conditions of entry and residence, including family reunification as well as the rights and conditions for legal residents to reside in other Member States.[15]

Despite the broad scope of EU competences on legal migration, the constitutional status of the rights of foreigners under EU law remains underdeveloped. The lack of a constitutional approach to the rights of foreigners is even present in the terminological field. The Treaty and the different instruments of EU legislation and EU policy documents speak invariably of "immigration policy". In some legal systems, the notion of immigration policy evokes the regulation of migration flows and market access.[16] The content of the so called EU migration policy, however, has a broader dimension that encompasses the status and rights of

judgment of February 25, 2016; ECJ, C-308/14, Commission v. United Kingdom, EU:C:2016:436, Judgment of June 14, 2016; Opinion of Advocate General Wathelet, Case C-442/16, Gusa, EU:C:2017:607.

[14] *See, e.g.*, ECJ, Case C-34/09, Ruiz Zambrano, EU:C:2011:124, Judgment of March 8, 2011; ECJ, C-165/14, Rendón Marín, EU:C:2016:675, Judgment of September 13, 2016; ECJ, C-304/14, CS, EU:C:2016:674, Judgment of September 13, 2016; ECJ, C-133/15, Chavez-Vilchez and Others, EU:C:2017:354, Judgment of May 10, 2017.

[15] *See, e.g.*, Treaty of Maastricht Establishing the European Community art. 63(3), (4).

[16] For a distinction between immigration or migration law, as covering the law governing territorial admission—and eventually, expulsion—as opposed to "alienage law," which deals with rights of non-citizens, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). On the historical genesis and scope of the concept of "(im)migration law" (Aufenthaltsrecht), see Jürgen Bast, Aufenhaltsrecht und Migrationssteuerung, Tübingen (Mohr Siebeck) 2011, 25–28.

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foreigners. This Article focuses on the elements of the Treaty and of EU immigration policy instruments which go beyond admission conditions and procedure and rather define a status for those foreigners admitted to the EU. Therefore, it chooses the concept of "foreigner's law" as a more accurate notion to refer to the status of foreigners within the EU as a political community. That notion relates to the rights and the status that foreigners enjoy once they have been admitted in the European Union, by gaining residence in one of its Member States.

Granted, Treaty competences in this field contain strong elements of migration management and fight against irregular policy. Nevertheless, the Treaty framework is also devoted to the creation of legal bases for the determination of the rights of third country nationals and asylum seekers through common standards through EU law.[17] When considered from this vantage point, the EU legislature is not completely free when adopting rules according to those legal basis: the Treaty contains already the core foundations of a constitutional status of EU foreigners, setting out the core principles for a European foreigners law, which will be analyzed in the following discussion.

Indeed, the TFEU lays down the basic foundations upon which to construe the basic status of third country nationals, even if it does so in a less grandiloquent manner when compared with the principles that inspire the interpretation and development of the concept of the citizenship of the Union. The principles are contained in Article 67, paragraph 2 TFEU. First, according to the first indent of that provision, "the Union shall constitute an area of freedom, security and justice with *respect for fundamental rights* and the *different legal systems and traditions* of the Member States" (emphasis added). These two principles are paramount, as they translate the need for a balance which is particularly relevant in the field of EU foreigners law. Indeed, both the need for "respect of fundamental rights" as the foundational core, and the respect for "differences legal systems and traditions" evoke the difficult balance between the need for common EU rules and standards, which convey an autonomous level of protection in terms of fundamental rights and the different national legal approaches and traditions. These are particularly divergent in the field of the rights and status of foreigners. Second, Article 67(2) TFEU, the second indent, provides that the Union "shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on *solidarity* between Member States, which is *fair towards third-country nationals*" (emphasis added). This paragraph encapsulates the most important governing principles of the European Foreigners

[17] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 79(2)(b) [hereinafter TFEU], for "the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States."

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law whose content, however, remains undefined: Inter-state solidarity[18] and "fair treatment" towards third country nationals.

Those two components of Article 67 TFEU demonstrate the tension that underlies the definition of the status of foreigners in the EU: Respect for fundamental rights, respect of national differences, and a blurred notion of "fair treatment." The latter marks a visible difference from the "equal treatment" rule that applies to EU citizens. This results in a constitutional approach with a rather thin normative content, which contains mostly legal basis and broad inspiring principles: The development of the core of alienage status is mostly left to EU legislation. This marks a first and profound contraposition between the constitutional treatment of the status of EU citizenship and that of EU foreigners law; whereas EU citizenship rights are mostly Treaty based, the TFEU has a very limited substantive content with regard to EU foreigners. This applies, naturally, with regard to entry and residence rights. Different from the regime applicable to EU citizens, who have a Treaty-based right to free movement, the role of acts adopted by the EU institution to determine immigration status in the common immigration policy is paramount. Permits granted in application of the conditions laid down in EU laws are endowed with constitutive nature,[19] and are not merely declaratory—as were the case with regard to EU citizens. However, the Treaty refrains from determining a minimum content of the rights of third country nationals after admission. For this purpose, it is necessary to have resort to legislative acts in combination with the fundamental rights guaranteed by the Charter.

The difficulties in defining the status of EU foreigners' law lay with the piecemeal approach of legislation.[20] Different directives regulate some basic rights and some procedural requirements for admission of certain categories of foreigners and for the acquisition of permanent status. As a result of the limited exercise of existing EU competences in migration law, EU foreigners' law remains partial, covering only certain foreigners and certain rights.

A first generation of rules, adopted by a special legislative procedure, emerged to build up the basic ground of the status of EU foreigners. Those rules have already been subject to modifications and a second generation of legal migration rules has been adopted, focusing in economic migration. Today, the EU legal migration *acquis* includes laws governing the conditions of access to a Member State for the purpose of family reunification; qualified work; research; temporary work and intra-corporate transfer; studies or internships; access to long-term residence status and the core rights to be enjoyed by all the persons holding

[18] This Article does not explore the principle of solidarity. For a source in this regard, see Opinion of Advocate General Bot, Cases C-643/15 and C-647/15 Slovakia and Hungary v. Council, EU:C:2017:618. *See also* Jürgen Bast, *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, 22 EUR. PUB. L. 289 (2016).

[19] *See* ECJ, Case C-40/11, Iida, EU:C:2012:691, paras. 45–48.

[20] Even though an EU codification was considered, it never became a reality. For a proposal in this sense, see Steve Peers, *An EU Immigration Code: Towards a Common Immigration Policy,* 14 EUR. J. MIGRATION & L. 33 (2012).

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permits on those basis, as well as the procedures for acquiring and the minimum rights attached for migrant workers under the single permit.[21]

In this framework, interpretation and application of legislation of EU law in the field of migration encounters a lot of uncertainties because of the open textured nature of legislative texts—which are directives often drafted in ambiguous terms and leaving a wide margin of appreciation to states in many of their provisions.[22]

III. Citizens and Foreigners in the EU

The difficulties in the interpretation of EU foreigners law do not only follow from the ambiguous and open-textured nature of legislative texts. Probably the most endeavoring task is that of facing a new body of law which is conceptually and materially similar with EU free movement law, a core field of EU law with a strong normative and conceptual background inherited from 50 years of free movement case law and legislation. The question is therefore, how to integrate the interpretation of EU legislation in the field of rights of foreigners with regard to the existing approaches to EU citizenship and free movement law, in view of the limited constitutional guidance provided by the Treaty.

There is not an explicit construction of the relationship between the new legal status of EU foreigners and the progressively consolidated statute of EU citizenship. In this context, it cannot come as a surprise that the introduction of the citizenship of the Union rooted in Member State nationality could be perceived also as an attempt to defining inclusion through the exclusion of non-citizens from the European project.[23] A more optimistic

[21] *See* Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] O.J. L 251, p. 12; Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-country Nationals Who Are Long-term Residents; Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-country Nationals for the Purposes of Highly Qualified Employment ([2009] O.J. L 155, p. 17; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a Single Application Procedure for a Single Permit for Third-country Nationals to Reside and Work in the Territory of a Member State and on a Common Set of Rights for Third-country Workers Legally Residing in a Member State [2011] O.J. L 343, p. 1; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the Conditions of Entry and Stay of Third-country Nationals for the Purpose of Employment as Seasonal Workers [2014] O.J. L 94, p. 375; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-country Nationals in the Framework of an Intra-corporate Transfer, [2014] OJ L 157, p. 1; Directive 2016/801 of the European Parliament and of the Council of 11 May 2016 on the Conditions of Entry and Residence of Third-country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing [2016] OJ L 132, p. 21.

[22] *See* Philippe De Bruycker, *Legislative Harmonization in European Immigration Policy*, *in* INTERNATIONAL MIGRATION LAW: DEVELOPPING PARADIGMS AND KEY CHALLENGES 329 (R. Cholewinski, R. Perruchoud & E. MacDonald eds., 2007).

[23] For this discussion, see Andreas Føllesdal, *Third country nationals as Euro-Citizens—The Case Defended*, *in* WHOSE EUROPE? THE TURN TOWARDS DEMOCRACY 104 (D. Smith & S. Wright eds., 1999); Michael A. Becker, *Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals,* 7 YALE HUM. RTS. & DEV. L.J. 132

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approach, however, portrays EU citizenship at a first attempt to civic multinational citizenship. EU citizenship, as a multilingual, multicultural, and multinational citizenship—built upon national citizenships which are often themselves pluralistic in culture, language, religion, etc.—already opens the path for a legal construct of membership not based on monolithic identities. This made EU citizenship a very interesting test-case, and raised the hopes that, eventually, a declaration of independence of EU citizenship from Member State nationality would give rise to a genuine form of civic citizenship.[24] Nevertheless, the progressive introduction of the common migration policy made it clear that the status of EU citizens and that of the "third country nationals" was going to be developed in an independent and unconnected fashion. The ultimate consequences of such reality even cause disruptions in the path towards naturalization: The lack of coordination in nationality laws of the Member States provokes systemic failures which may lead to solutions "illogical and full of contradictions." [25] First, naturalization policies do not take into account residence in the EU as a whole for access to nationality for third country nationals. Second, naturalization may even entail the loss of EU conferred rights conferred by EU citizenship law. This paradoxical effect may occur in particular in the context of Directive 2004/38 [26] and also in the context of EU immigration Directives[27]: Those who naturalize in the Member State

(2004); Steve Peers, *Towards Equality: Actual and Potential Rights of Third-country Nationals in the European Union*, 33 COMMON MKT. L. REV. 7 (1996).

[24] *See, e.g.*, Mark Bell, *Civic Citizenship and Migrant Integration*, 13 EUR. PUB. L. 311 (2007); Marie-Jose Garot, *A New Basis for European Citizenship: Residence?*, *in* EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE 229 (Massimo La Torre ed., 1998). For a renovated discourse on civic citizenship, see Diego Acosta Arcarazo, *Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership*, 21 EUR. L.J. 200 (2015).

[25] *See* Opinion of Advocate General Bot, C-165/16, Lounes, EU:C:2017:407, para. 87.

[26] *See* Opinion of Advocate General Bot, C-165/16, Lounes, EU:C:2017:407. According to this opinion, naturalized EU citizens no longer fall within the scope of Directive 2004/38. However, the Advocate General has argued that the EU citizen at issue had taken "her integration in the host Member State to its logical conclusion by requesting her naturalisation in accordance with the objective pursued by the Union legislature not only in Article 21(1) TFEU, but also in Directive 2004/38, recital 18 of which seeks to make the permanent residence permit a 'genuine vehicle for integration' for the person concerned into the society of the host Member State. Her residence pursuant to and in conformity with the conditions set out in Article 16 of the directive is clear evidence of genuine residence and goes hand in hand with creating and strengthening family life in that Member State. To deprive her henceforward of the rights to which she has till now been entitled in respect of the residence of her family members because, by being naturalised, she has sought to become more deeply integrated in the host Member State, would annihilate the effectiveness of the rights which she derives from Article 21(1) TFEU." (points 85 and 86). Because this solution is based on Article 21(1) TFEU, it may be arguably difficult to transpose to naturalized third country nationals with regard to the 'retention' of the rights awarded by EU migration directives.

[27] For such a situation, see ECJ, Case C-87/12, Ymeraga and Others, EU:C:2013:291, Judgment of May 8, 2013.

where they have exercised their EU law conferred right of residence may face losing the rights they previously enjoyed under EU law. [28]

Despite the marked separation of the legal frameworks governing citizens and foreigners, a dual approach to EU law from the citizens/foreigners divide does not accurately reflect the relationship of EU law with individuals. The bulk of EU law is applicable regardless of nationality: Consumer law, data protection, social policy or environmental policy, civil and criminal judicial cooperation, to name a few subject matters where a true civic citizenship emerges and where the rights and guarantees given by EU law apply notwithstanding nationality or legal status.[29]

In the same vein, the fundamental rights guaranteed by the EU legal order apply, with few exceptions, equally to EU nationals and EU foreigners: What generally triggers the protection of EU fundamental rights is the fact that the situation at issue is "covered" by EU law, and not nationality.[30] With regard to the specific field of legislation devoted to EU foreigners, protection of EU fundamental rights is not triggered by free movement, but by the exercise of the rights granted as an applicant for or a holder of one of the permits/statuses regulated under EU law.[31]

The structurally different approaches to EU citizenship and migration are of enormous relevance in two major fields: Residence/free movement rights—either in the EU as a whole or in a Member State *in concreto*—and equal treatment. It is essentially in those two fields where EU law takes different positions on EU citizens and EU foreigners—free movement and equality is where alienage makes a difference. In this regard, both free movement rights and the approach to equality are, as previously mentioned, reminiscent of an internationalist approach. EU free movement rights[32] as well as the principle of non-discrimination on

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[28] *See* Sara Iglesias Sánchez, *Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy*, *in* THE RECONCEPTUALIZATION OF EUROPEAN UNION CITIZENSHIP 65 (Elspeth Guild, Cristina Gortázar Rotaeche & Dora Kostakopoulou eds., 2014).

[29] *See, e.g.*, ECJ, Case C-415/11, Aziz, EU:C:2013:164, Judgment of March 14, 2013; ECJ, Case C-230/97, Awoyemi, EU:C:1998:521, Judgment of October 29, 1998; ECJ, Case C-311/13, Tümer, EU:C:2014:2337, Judgment of November 5, 2014.

[30] *See* Sara Iglesias Sanchez, *The Constitutional Status of Foreigners and EU Citizens Loopholes and Interactions in the Scope of Application of Fundamental Rights*, *in* QUESTIONING EU CITIZENSHIP: JUDGES AND THE LIMITS OF FREE MOVEMENT AND SOLIDARITY IN THE EU (Daniel Thym ed.) (forthcoming 2017).

[31] For a general overview, see Francesca Ippolito, *Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?*, 17 EUR. J. MIGRATION & L. 1 (2015).

[32] *See* ECJ, Case 238/83, Meade EU:C:1984:250, Judgment of July 5, 1984, para 7; ECJ, Case C-230/97 Awoyemi EU:C:1998:521, Judgment of October 29, 1998, para 29; ECJ, Case C-147/91 Ferrer Laderer EU:C:1992:278, Judgment of June 25, 1992, para 9.

grounds of nationality[33] are reserved to nationals of other Member States. This "international" reminiscence projects at this junction in the EU jargon, where EU foreigners are "third country nationals," reminding us that nationals of other Member States are not simply EU citizens, but "second country nationals."[34] This particularity has a very important consequence that will be explored in section C below. The construction of the equal treatment principle when applied to EU foreigners does not take as a point of reference the status of EU citizens but that of Member States' "national."

At this juncture, a fundamental issue arises when it comes to the determination of the constitutional status of EU foreigners. Equal treatment remains tied to the nationality of a Member State. As mentioned, the guiding principle in the sphere of the common migration policy appears to be that of "fair treatment," whose legal contours are undetermined. At the same time, however, equal treatment is a general principle of EU law and as a core right recognized by the EU Charter of Fundamental Rights; hence, it, becomes applicable to EU foreigners when their status is governed by EU law. This particular problem will be examined in section C of this article. Before undertaking such analysis it is necessary to address a debate which has become central in the field of EU foreigners law: That of identity and integration as potential core notions suitable to govern a differentiated approach towards equality.

B. Identity and Integration: A Mismatch?

Membership and inclusion are attributes that often accompany the notion of identity in writings devoted to the theoretical aspects of citizenship and migration.[35] Seen from that perspective, the enactment of a citizenship of the Union and the progressive development of an EU foreigner's law are likely to evoke the connection with the broader debate on European and national constitutional identity.

Admission, residence, status, and access to EU citizenship are all elements of a wider construction of membership—understood as full inclusion into the political community—where EU law has started to play a role in different ways. In this context, the idea of "integration," even if it is still greatly undetermined as of its legal content, has become central in EU foreigners law. When approaching the broader subject of the constitutional status of EU foreigners, however, the notions of integration and identity tend to blur and

[33] *See, e.g.*, Cases C-22/08 and C-23/08, Vatsouras and Koupatantze, EU:C:2009:344, Judgment of June 4, 2009.

[34] For the origin of the borrowed term, see Rainer Bauböck, *The Three Levels of Citizenship within the European Union*, 15 GERMAN L.J. 751, 758 (2014).

[35] *See, e.g.*, Y. N. SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS ON CONTEMPORARY MEMBERSHIP (2008); DORA KOSTAKOPOULOU CITIZENSHIP, IDENTITY AND IMMIGRATION IN THE EUROPEAN UNION (2001); E. GUILD, THE LEGAL ELEMENTS OF EUROPEAN IDENTITY: EU CITIZENSHIP AND MIGRATION LAW (2006).

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overlap in the collective imagination as potential justifications for a differentiated approach towards equal treatment. The following discussion will deal briefly with the EU law implications of national identity and integration.

I. Identity

Without this being the place to carry out an in-depth analysis of the concept of constitutional identity,[36] it may be inevitable to wonder about the role of EU law in the context of potential tensions between the constitutional identities of Member States and perceived cultural particularities of foreigners. The doctrine has elaborated distinct conceptual categories for the role of identity, differentiating national identity from constitutional identity and from the identity of constitutional subjects.[37] These different concepts are not always equivalent or interchangeable. Nevertheless, the fact that the concept of identity is one of diffuse legal contours may in this regard invite to adopt the notion of national identity in many different fields.[38] In particular, national constitutional identity and the identity of the people, or subjects, are difficult to disentangle in the citizenship/migration field.[39]

For what matters for the purposes of this article, it is to be noted that the notion of national identity as portrayed by Article 4(2) TUE seems to have a limited content. That provision contains a general mandate: The Union shall respect the national identities of the Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." This conception of national identity may be understood as narrowing down its content to fundamental or core elements of constitutional nature.[40] By underlining the constitutional nature of national identity, it seems that the Treaty refrains from a cultural or ethnic comprehension of national identity, adopting a "legal, civic or

[36] *See* FRANÇOIS-XAVIER MILLET, L'UNION EUROPEENNE ET L'IDENTITE CONSTITUTIONNELLE DES ETATS MEMBRES (2013) ; *see also* Polzin in this issue, 18 GERMAN L.J. (2017) ; Faraguna in this issue, 18 GERMAN L.J. (2017).

[37] *See, e.g.*, José Luis Martí, *Two different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, *in* NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 17 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

[38] For example, some studies adopt a broad approach including abortion, property acquisition, football, and alcohol control. *See* Chris Hilson, *The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity*, 14 EUR. L.J. 186 (2008).

[39] For an in-depth discussion, see MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT. SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY (2010). *See also* Strumia et al. in this issue, 18 GERMAN L.J. (2017).

[40] *See e.g.*, Case C-58/13 and C-59/13, Torresi, EU:C:2014:2088, Judgment of July 17, 2014, para. 58 (finding that in so far as a measure is not capable of affecting either the fundamental political and constitutional structures or the essential functions of the host Member State, it is not covered by the concept of national identity within the meaning of Article 4(2) TEU).

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institutionalist approach."[41] The EU Court of Justice' jurisprudence extends beyond constitutional considerations such as equality between citizens and abolition of nobility[42] or the internal allocation of competences.[43] The concept is acknowledged to cover also certain cultural elements such as language.[44]

In terms of its doctrinal functions, arguments based on or connected to national identity do not seem to have been regarded as valid limits for the operation of the primacy principle, but rather as legitimate objectives upon which derogations may be justified.[45] There is no reason why this should be different in the immigration law field, [46] where over-expansive "identitarian" approaches may not only bear the risk of fragmentation, but also lead to developments that contradict the core of EU values, enshrined in fundamental rights. Indeed, even in the most preserved core of membership—the rules on nationality, which fall exclusively within national competence—Member States shall act with due respect to EU law: deprivation of nationality intrinsically affects enjoyment of EU citizenship.[47]

At this point, it should be noted that the several rules of the EU migration policy, as a matter of fact, seem to go hand in hand with the mandate of Article 67 TFEU whereby the Union is due to have account of the different legal traditions. This might be not so much the result of a deliberate attempt at constitutional compliance as the result of cumbersome negotiations and complex decision-making processes, which has enabled Member States to introduce in EU legislation elements that preserve fundamental interests of their societies. National legal approaches—and even particularities that go well beyond of any conception of national

[41] FRANÇOIS-XAVIER MILLET, L'UNION EUROPEENNE ET L'IDENTITE CONSTITUTIONNELLE DES ETATS MEMBRES 164 (2013).

[42] *See* ECJ, Case C-208/09, Sayn-Wittgenstein, EU:C:2010:806, Judgment of December 20, 2010; ECJ, C-438/14, Bogendorff von Wolffersdorff, EU:C:2016:401, Judgment of June 2, 2016.

[43] *See* ECJ, Cases C-51/15, Remondis, EU:C:2016:985, Judgment of December 21, 2016, para. 40; ECJ, C-156/13, Digibet and Albers, EU:C:2014:1756, Judgment of June 12, 2014, para. 34.

[44] *See* ECJ, Cases C-391/09, Runevič-Vardyn and Wardyn, EU:C:2011:291, Judgment of May 11, 2011, para. 86; C-51/08, Commission v. Luxembourg, EU:C:2011:336, Judgment of May 24, 2011, para. 124; ECJ, C-473/93, Commission v. Luxembourg, EU:C:1996:263, Judgment of July 2, 1996, para. 35; ECJ, C-202/11, Las, EU:C:2013:239, Judgment of April 16, 2013, paras. 26, 27.

[45] For opposing views, see Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011); Monica Claes, *National Identity: Trump Card or Up for Negotiation*, *in* NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 109 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

[46] *See, e.g.*, Cases C-473/13 and C-514/13, Bero and Bouzalmate, EU:C:2014:2095, Judgment of July 17, 2014, para. 28 (declaring that the obligation, laid down in the first sentence of Article 16(1) of Directive 2008/115, requiring detention to take place as a rule in specialised detention facilities is imposed upon the Member States as such, and not upon the Member States according to their respective administrative or constitutional structures).

[47] *See* ECJ, Case C-135/08, Rottmann, EU:C:2010:104, Judgment of March 2, 2010.

constitutional identity—have permeated the first generation of EU migration rules, which has been marked by the unanimity rule that was applicable at the time of adoption. Moreover, the existing *acquis* of EU legal migration law gives expression to some shared concerns and constitutional values,[48] showing the "convergence" of national constitutional identities.[49] Indeed, what may be regarded as appertaining to the core of national identity is often reflected in EU law values.[50] In this regard, the limitative potential of identity, understood as linked to core values, may eventually find an avenue through the public order clauses which are omnipresent in migration instruments.

II. Integration

The most preeminent avenue for an identitarian approach is the notion of integration. Integration has many faces. When it comes to EU migration law, it is understood as social integration in the host Member State. From that point of view, specific EU competences in the field of integration are limited. EU law can only cover "measures to provide incentives

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[48] See, Recital 11 of the Family Reunification Directive (stating that

> [t]he right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.

See also Article 4(4) of the Family Reunification Directive ("In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.").

[49] The idea of convergence has been emphasized by Advocate General Cruz Villalón:

> the Union has . . . acquired the character, not just of a community governed by the rule of law, but also of a 'community imbued with a constitutional culture'. That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.

Opinion of Advocate General Cruz Villalón, C-62/14, Gauweiler and Others, EU:C:2015:7, para. 61. *See* however Kovacs in this issue, 18 GERMAN L.J. (2017) (on the lack of a generalized trend towards convergence).

[50] For an analysis of that EU constitutional values, see Daniel Sarmiento, *The EU's Constitutional Core*, *in* NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 177 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories." This competence excludes explicitly the possibility to adopt any harmonizing rules.[51]

The notion of integration is present in the two most central legislative instruments of the EU migration policy: The Family Reunification Directive and the Long-Term Residents Directive. Without being defined, it operates as an avenue for granting Member States the leeway to adopt additional conditions and measures for admission or acquisition of status, respectively.[52] The malleability of the concept of integration makes it particularly suitable to be used by Member States as a vehicle of their identitarian aspirations in the definition of alienage and citizenship policies.[53] The Court of Justice has, however, set clear limitations to the use of integration. First, it has confirmed that the fact that "the concept of integration is not defined cannot be interpreted as authorizing Member States to employ that concept in a manner contrary to general principles of [EU] law, in particular to fundamental rights."[54] Second, the measures and conditions of national law based on the "integration" clauses of EU directives ought not to undermine the effectiveness of those legal instruments.[55] After all, the main objective of both, the Long-Term Residents and the Family Reunification Directives, is that of facilitating integration through rights.[56]

Despite the lack of an EU definition of integration or harmonizing competences in this field, the Common Basic Principles on integration which were adopted by the Justice and Home Affairs Council in November 2004 provide for the main pillars upon which EU action in the sphere of integration has been inspired thereafter. That document has essentially laid down some basic premises of what is understood as "integration". First, integration has a core

[51] Article 79(4) TFEU.

[52] See *generally* Stefano Montaldo, *Integration Examinations for Regular Migrants: The Difficult Search for a Balance between National Competencies and Full Effectiveness of EU Law,* 2 UNIO—EU L.J. 39 (2016).

[53] For accounts on the difficulty to define the concept of integration and its functions, see, e.g., Kees Groenendijk, *Legal Concepts of Integration in EU Migration Law*, 6 EUR. J. MIGRATION & L. 111–26 (2004); Dora Kostakopoulou, Sergio Carrera & Moritz Jesse, *Doing and Deserving: Competing Frameworks of Integration in the EU*, *in* ILLIBERAL LIBERAL STATES: IMMIGRATION, CITIZENSHIP AND INTEGRATION IN THE EU 167 (Elspeth Guild, Kees Groenendijk & Sergio Carrera eds., 2009).

[54] ECJ, Case C-540/03, Parliament v. Council, EU:C:2006:429, Judgment of June 27, 2006, para. 70.

[55] *See* ECJ, Case C-579/13, P and S, EU:C:2015:369, Judgment of June 4, 2015; ECJ, Case C-153/14, K and A, EU:C:2015:453, Judgment of July 9, 2015.

[56] *See, e.g.*, Case C-558/14, Khachab, EU:C:2016:285, Judgment of April 21, 2016, para. 26; ECJ, C-540/03, Parliament v. Council, EU:C:2006:429, Judgment of June 27, 2006, para. 69. For sources in regard to the Long-term Residents Directive, see ECJ, C-309/14, CGIL et INCA, EU:C:2015:523, Judgment of September 2, 2015, para. 21; ECJ, C-508/10, Commission v. Netherlands, EU:C:2012:243, Judgment of April 26, 2012, para. 66. For a source on this debate, see Kees Groenendijk, *Legal Concepts of Integration in EU Migration Law*, 6 EUR. J. MIGRATION & L. 111–26 (2004).

content: it "implies respect for the basic values of the European Union." [57] This core element works in a twofold way: As a basic content of what is to be respected, which constitutes, at the same time, the essential guarantees to be enjoyed by EU foreigners themselves.

> The European Union is built on fundamental values including democracy, the rule of law, and the respect for fundamental rights. The Charter of Fundamental Rights of the European Union enshrines many rights of crucial importance to the integration process, including the freedoms of speech and religion, as well as the rights to equality and non-discrimination. Understanding and subscribing to these fundamental values is an essential element of living and participating in the host society. At the same time, these rights also protect the third country national and foster his or her inclusion into society.[58]

Second, integration covers a set of elementary tools that enable individuals to be part of the host society: "basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration."[59] In this connection, the Court of Justice has emphasized that

> it cannot be disputed that the acquisition of knowledge of the language and society of the host Member State greatly facilitates communication between third country nationals and nationals of the Member State concerned and, moreover, encourages interaction and the development of social relations between them. Nor can it be contested that the acquisition of knowledge of the language of the host Member State makes it less difficult for third country nationals to access the labour market and vocational training.[60]

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[57] *See* Council Document 14615/04 of 19 November 2004.

[58] Commission Communication, Action Plan on the Integration of Third Country Nationals, COM (2016) 377 final.

[59] *See* Council Document 14615/04 of 19 November 2004.

[60] ECJ, Case C-579/13, P and S, EU:C:2015:369, Judgment of April 26, 2012; ECJ, Case C-153/14, K and A, EU:C:2015:453, Judgment of July 9, 2015.

From this point of view, there are two important components of integration. A first one closely connected with the core constitutional values, which overlaps with constitutional identity conceptions at national and EU level. The second one, which prevails in the practice of Member States, sees integration in socio-cultural terms and is connected with elements of functional social inclusion. The role of national identity considerations in this second field as a legal argument to justify national integration measures and conditions may be however rather limited, as it may turn identity in a protectionist tool more likely to defeat the real purpose of integration than to foster it.

It is inescapable to note, at this juncture, that considerations of "social integration" in the field of EU citizenship law deploy different functions. Indeed, for EU citizens, cultural elements, of which maybe language is the only example, are requirements only applicable to access to specific professions, but never preconditions to gain access or statute.[61] Moreover, when it comes to the consideration of the limits of the equal treatment principle with regard to social assistance and benefits, integration is not considered from a socio-cultural point of view, but rather as a function of the economic contribution to society through the exercise of an economic activity[62] or integration merely presumed as a result of length of residence.[63] The outcome is that EU law has prevented the emergence of identity-

[61] *See, e.g.*, Art. 3(1) of Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers within the EU [2001] OJ L 141/1 (referring to "conditions relating to linguistic knowledge required by reason of the nature of the post to be filled"); *see also* ex- Art. 3(1) of Regulation 1612/68 [1968] OJ L257/475; Article 53 of Directive 2005/36, of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22 (noting that "persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.").

[62] For cases concerning jobseekers, where integration is phrased in terms of "a real link with the employment market," see, e.g., ECJ, Case C-367/11, Prete, EU:C:2012:668, Judgment of October 25, 2012, para. 33. With regard to workers, integration is "presumed" since they contribute to the host Member State's economy. *See* ECJ, Case C-542/09, Commission v. Netherlands, EU:C:2012:346, Judgment of June 14, 2012, para 65 (declaring that

> as regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages.)

The approach is different, however, with regard to border-workers—who do not work and reside in the same Member State. *See* ECJ, Case C-20/12, Giersh, EU:C:2013:411, Judgment of June 20, 2013, para. 65 (stating that "the frontier worker is not always integrated in the Member State of employment in the same way as the worker who is a resident in that State.").

[63] See, for example, residential requirements for students. *See* ECJ, Case C-209/03, Bidar, EU:C:2005:169, Judgment of March 15, 2005, para. 57 (declaring that "it is permissible for a MS to ensure that the grant of assistance to cover maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences fort the overall level of assistance."). This integration is established if the student has resided for a certain length of time. *See also* ECJ, Joined Cases C-11/06 and C-12/06, Morgan and Bucher, EU:C:2007:626,

based limitations to EU free movement and equality. EU citizenship, on its part, gives rise to a shield against protectionist arguments based on particularistic conceptions of national identities.

It is apparent that integration means different things for EU citizens than for EU foreigners. In the words of Bauböck:

> [T]here are now two strongly contrasting approaches to the integration of migrants in the EU. Member States and the EU itself promote active integration policies for [third country nationals] that combine sanctions and tests with affirmative measures, while for intra-EU migrants, a market citizenship logic dictates a *laissez-faire* approach assuming that unconstrained mobility and non-discrimination is all that is needed for social integration.[64]

One may wonder at this point what is the role of integration and identity when it comes to assess the relationship between the status of EU citizens and that of EU foreigners. As demonstrated in the previous lines, integration plays different roles when it comes to EU citizens and EU foreigners. How can be this difference justified?

C. Equal Treatment of EU Foreigners: the Integration Paradox

This Section uses the example of integration conditions and measures in EU foreigners' law as a test case to illustrate the problems that the equal treatment principle encounters in its application in the emergent EU foreigners' law. Because of the different functions of the notion of integration in the field of EU citizenship and migration law, the emphasis will be in the role of integration as a particular tool for justifying unequal treatment between EU foreigners and EU citizens, outside the explicit references to integration in EU legislation as a condition for residence or status. Before examining the particular role of integration in the application of EU migration law, some general considerations have to be made with regard to the status of the principles of equal treatment and non-discrimination in EU law.

Judgment of October 23, 2007, para. 43; ECJ, Case C-158/07, Förster, EU:C:2008:630, November 18, 2008. This is the approach later codified in Article 24 of Directive 2004/38. For the role of integration as a justification in EU free movement law, see Sara Iglesias Sánchez & Diego Acosta Arcarazo, *Social Justifications for Restrictions of the Right to Welfare Equality: Students and Beyond*, *in* EXCEPTIONS FROM EU FREE MOVEMENT LAW. DEROGATION, JUSTIFICATION AND PROPORTIONALITY 80 (Panos Koutrakos, Niamh Nic Shuibhne & Phil Syrpis eds., 2016).

[64] Rainer Bauböck, *The Three Levels of Citizenship within the European Union*, 15 GERMAN L.J. 751, 759 (2014).

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I. The Constitutional Framework: Equality and Non-Discrimination

Equal treatment and non-discrimination constitute the general constitutional principles of reference for any construction of an EU Foreigners law. The constitutional treatment of nationality as a suspect ground in the EU is, however, rather complex. Article 18 TFEU, which lays down the prohibition of discrimination on grounds of nationality, is not applicable to third country nationals, as consistently confirmed by the case law of the CJEU.[65] This approach has been reflected not only in equality legislation—which explicitly excludes nationality as a suspect ground[66]—but also in the Charter of Fundamental Rights, where Article 21 links the principle of non-discrimination on grounds of nationality to the conditions of the Treaty. As a consequence, the conception of nationality as suspect ground under EU free movement law—which prohibits differential treatment directly based on nationality unless covered by any explicit derogation—is not transposable to EU foreigners.

The application of the non-discrimination principle on grounds of nationality to third country nationals has been widely debated, most of all, with the introduction of the common migration policy.[67] The rejection of the extension of the EU equal treatment principle to EU foreigners could be again traced back to the international nature of the treaties, where equal treatment rights were mutually granted to the nationals of other state parties. The fact that reciprocity is not applicable between Member States as a matter of EU law has not been sufficient to do away with this reminiscent reciprocal approach to the non-discrimination principle: It still remains attached to status of national of one of the contracting parties. As a result, nationality is considered a suspect ground for Member State nationals only.

The limited scope of the prohibition of discrimination on grounds of nationality does not lessen the relevance of the equal treatment principle as the main constitutional instrument to construe the relationship between the status of EU citizens and that of EU foreigners.

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[65] *See* ECJ, Cases C-22/08 and C-23/08, Vatsouras and Koupatantze, EU:C:2009:344, Judgment of June 4, 2009, para 52; *see also* ECJ, Case C-45/93, Commission v. Spain, EU:C:1994:101, Judgment of March 15, 1994, para. 10; ECJ, Cases C-95/99 to C-98/99 and C-180/99, Khalil and Others, EU:C:2001:532, Judgment of October 11, 2001, para. 40; ECJ, Case C-45/12, Hadj Ahmed, EU:C:2013:390, Judgment of June 13, 2013, paras. 39–41.

[66] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] O.J. L 180, p. 22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, p. 16.

[67] For more on this debate, see Chloe Hublet, *The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last*, 12 EUR. L.J. 575 (2009); Elspeth Guild & Steve Peers, *Out of the Ghetto? The Personal Scope of EU Law*, *in* EU IMMIGRATION AND ASYLUM LAW: TEXT AND COMMENTARY 81 (S. Peers & N. Rogers eds., 1st ed. 2006); Evelien Brouwer & Karin de Vries, *Third-country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach*, *in* EQUALITY AND HUMAN RIGHTS: NOTHING BUT TROUBLE? LIBER AMICORUM TITIA LOENEN 123 (M. van den Brink, S. Burri & J. Goldschmidt eds., 2015).

First, according to the explanations to the Charter, Article 21, in so far as it corresponds to Article 14 of the ECHR "applies in compliance with it." Since Article 14 ECHR is tied to the exercise of other rights of freedoms of that Convention, it is to be expected that the conformity in the interpretation of Article 21 of the Charter and Article ECHR reaches situations where the unequal treatment affects other fundamental rights. In this regard, it ought to be noted that, when it comes to consider the specific situation of EU citizens, the ECtHR has considered that the specificity of the EU legal order made an EU foreigner non-comparable with EU citizens for the purposes of security of residence.[68] However, this approach has not spread to cases concerning discrimination unrelated to security of residence or access to the territory. Indeed, differential treatment on the basis of EU citizenship with regard to access to social benefits has been aligned with the treatment of the differences based on nationality,[69] were "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the grounds of nationality as compatible with the Convention."[70] As a consequence, the privileges of EU citizenship are not immune to judicial review.[71]

Second, nothing prevents the application of the more general equal treatment principle in the field of EU foreigners' law. Well to the contrary, where a situation falls within the scope of EU law, Article 20 of the Charter, which contains the general equal treatment principle, is

[68] Case of Moustaquim v. Belgium, judgment of February 18, 1991 (Application no. 12313/86) (finding no breach of Article 14 taken together with Article 8 ECHD because, first, "the applicant cannot be compared to Belgian juvenile delinquents [since the] latter have a right of abode in their own country and cannot be expelled from it" and that "the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order."). *See also* ECtHR, C. v. Belgium, 7 August 1996 (Appl.no. 21794/93).

[69] The Court. However, had recognized the margin of appreciation enjoyed by States and that a State may "in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union ... may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship." *See* ECtHR, Ponomaryovi v. Bulgaria, June 21, 2011 (Appl. no. 5335/05). However, that finding was not effectively applied in that case, due to the strict scrutiny attached to the importance of the right at issue—education. In its Judgment of April 8, 2014, Dhabhi v. Italy Appl. no. 17120/09, the ECtHR did not accept this argument in order to justify a different treatment between EU citizens and an EU foreigner with regard to welfare benefits.

[70] *See, e.g.*, ECtHR, Gaygusuz v. Austria, ECtHR Reports of Judgments and Decisions 1996 –IV; ECtHR, Koua Poirrez v. France, 30 September 2003 (Appl. No. 40892/98); ECtHR, Luczak v. Poland, 27 November 2007 (Appl. No. 77782/01); Andrejeva v Latvia Appl. No. 55707/00 ECtHR, 18 February 2009 ECtHR, Fawsie v. Greece, 28 October 2010 Appl. no. 40080/07; ECtHR, Saidoun v. Greece, 28 October 2010 (Appl. No. 40083/07). The Court has, however, emphasized the ide margin usually allowed to the State under the Convention when it comes to general measures of economic or social strategy in its judgment of September 15, 2016, case of British Gurkha Welfare Society and Others v. the United Kingdom, (Appl. no. 44818/11).

[71] For an extensive review of the ECtHR case law, see Brouwer & de Vries, supra note 67, at 123.

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bound to apply.[72] As a result, even if EU foreigners do not enjoy the protection of Article 18 TFEU, the application of the equal treatment principle requires in any case that "comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."[73] It is in this connection that the particular standard of "fair treatment" as phrased by Article 67 TFEU as the proper reference for the status of EU foreigners should be understood: in order for differential treatment to be "fair," it has to be objectively justified.[74] The equal treatment principle has, moreover, been inserted through EU legislation, subject to important limitations and derogations—that ought to be assessed in light of the general principle of equal treatment enshrined in the Charter for their interpretation,[75] and eventually, their validity.

At this point, integration considerations have proven to be of paramount importance to justify the different approaches to equal treatment for EU foreigners and EU citizens.

II, Equal Treatment and Integration

The principle of equal treatment has been explicitly included as the general guiding principle inspiring the basic status of EU foreigners in several equal treatment clauses contained in EU migration and asylum directives.[76] Those provisions include, within the scope of EU law, important aspects of the status of EU foreigners.[77] Two essential features characterize them. First, they are limited in scope and allow for dissimilar derogations by Member States.

[72] *See* Opinion of AG Bot, ECJ, Case C-311/13, Tümer, EU:C:2014:2337, para. 70 *et seq*. (considering that "making the right to the guaranteed settlement of pay claims conditional, in the case of an employee who is a third-country national, upon legal residence is not, to my way of thinking, consistent with the principle of equal treatment and non-discrimination' of Articles 21 and 20 of the Charter.").

[73] *See, e.g.*, ECJ, Case C-579/13, P and S, EU:C:2015:369, Judgment of June 4, 2015, para. 41.

[74] The fact that the notion of "fair treatment" is undetermined in the Treaty wording has led some commentators to point at the minimum "human rights" standard, being necessary legislative development to determine it further. *See* Daniel Thym, *EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook*, 50 COMMON MKT. L. REV. 709 (2013).

[75] For the interpretation of the scope of the equal treatment principle in the Long-term residents Directive in accordance with the Charter, see ECJ, Case C-571/10, Kamberaj, EU:C:2012:233, Judgment of April 24, 2012.

[76] *See* Kees Groenendijk, *Citizens and Third Country Nationals: Differential Treatment or Discrimination*, *in* THE FUTURE OF FREE MOVEMENT OF PERSONS IN THE EU 79 (Jean Yves Carlier & Elspeth Guild eds., 2006).

[77] *See* S. Morano-Foadi & K. de Vries, *The Equality Clauses in the EU Directives on Non-Discrimination and Migration/Asylum*, *in* INTEGRATION FOR THIRD COUNTRY NATIONALS: THE EQUALITY CHALLENGE 16 (S. Morano-Foadi & M. Malena eds., 2012).

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Second, they generally signal as the point of reference not the status of EU citizens, but that of nationals of the Member States, or other foreigners.[78]

Even within this limited contours, recent case law of the Court of Justice confirms that the equal treatment principle, when applied to third country nationals on the basis of EU legislation, may be generally subject to further limitations based on integration. The forceful effect of an argument based on discrimination has first been noticed in the field of the Ankara Agreement with Turkey. The Court has admitted that the standstill clause,[79] so far applied without possibility of derogation,[80] does not preclude new integration conditions. Integration has opened the field for justifications of new restrictions as overriding requirements of public policy. The Court has emphasized in this context the importance of the objective of "achieving successful integration," by recalling Article 79(4) TFEU "which refers as an action by the Member States to be encouraged and supported" and the Family Reunification and Long-Term Residents Directives, according to which "integration of third-country nationals is a key factor in promoting social and economic cohesion, a fundamental objective of the European Union set out in the Treaty."[81] However, the integration conditions so far examined by the Court have not passed the bar of justification either for not being appropriate[82] or for going beyond what was strictly necessary.[83]

Integration considerations have also deployed significant effects in the status of legal residents, long-term residents, and beneficiaries of international protection. Differently

[78] For example, in the case of the Family Reunification Directive, equal treatment applies with regard to the sponsor family member; the right of free movement in the qualification Directive takes as a point of resident other legally residing third country nationals.

[79] *See*, Article 13 of Decision 1/80 of the Association Council of 19 September 1980 on the development of the Association Agreement between the European Community and Turkey O.J. 1973 C 113, p. 1; Article 41(1) of the Additional Protocol annexed to that Agreement, O.J. 1977 L 361, p. 60 (regarding the provision of services).

[80] For the first time this possibility was admitted, see ECJ, Case C-225/12, Demir, EU:C:2013:725, Judgment of November 7, 2013.

[81] ECJ, Case C-561/14, Genc, EU:C:2016:247, Judgment of April 12, 2016, para 55.

[82] In Genc, the integration condition at issue required that, in order to benefit from family, a child, or be able to establish sufficient ties to Denmark to enable successful integration. That condition applied only if the application was made more than two years after the award of the resident permit to the parent. The Court considered that the integration condition at issue was unconnected with the likelihood of achieving integration. Since the condition was not justified, it was considered as a "new restriction" contrary to the stand still clause.

[83] *See* ECJ, Case C-138/13, Dogan, EU:C:2014:2066, Judgment of July 10, 2014. This case concerned the application of integration conditions in the form of language test prior to family reunification. The Court considered that even on the assumption that the grounds adduced related to the prevention of forced marriages and the promotion of integration could constitute overriding reasons in the public interest, it remains the case that national measures which automatically led to the dismissal of an application for family reunification due to lack of evidence of sufficient linguistic knowledge go beyond what is necessary to attain the objectives pursued (see para 38 of the judgment).

from the effects of integration expressly provided in legal migration directives—as the basis for conditions for admission or for access to status—arguments based on integration now seem to play a role as further possibilities to limit the application of the equal treatment principle.

The *P and S* case concerned the application of the Long-Term Residents Directive. The Netherlands applied an integration measure consisting in the obligation for long-term residents, already having obtained that status, to take a civic integration tests. Failure to comply with that obligation was sanctioned not with loss of status, but with a considerable fine. The Court, after recalling that Article 11(1) of the Directive established the equal treatment principle in certain fields, declared that the integration measure could not constitute an infringement of the equal treatment principle: nationals and foreigners are not comparable for integration purposes, since it could be presumed that nationals have the proficiency in language and the knowledge of Netherlands society that those tests were supposed to check. The Court, however, further examined the tests at issue from the point of view of the effectiveness of the Directive—integration measures and conditions shall not jeopardize integration itself—and left the final decision to the referring national court.

In a similar move, the Court considered in the *Alo and Osso* case that an obligation of residence in specific places imposed to the beneficiaries of subsidiary protection recipients of social assistance was not contrary to the equal treatment principle with regard to social welfare enshrined in the Qualification Directive concerning asylum in the EU.[84] It again considered that beneficiaries of subsidiary protection were not comparable with nationals so far as the objective of facilitating integration is concerned.[85]

It may be well that the specificities and contexts of both cases cannot lead to the generalization of integration as a trump card on equal treatment. The approach to the equal treatment principle in other cases does not seem to leave room for any justification outside the explicit derogations permitted by EU law.[86] Moreover, the application of proportionality considerations to integration measures in the majority of cases concerning integration

[84] Article 29 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, O.J. 1022 L 337, p. 9.

[85] ECJ, Joined Cases C-443/14 and C-444/14, Alo and Osso, EU:C:2016:127, para 59.

[86] *See* ECJ, Case C-571/10, Kamberaj, EU:C:2012:233, Judgment of April 24, 2012 (regarding the long-term residents directive); ECJ, Case C-449/16, Martinez Silva, EU:C:2017:485, Judgment of June 21, 2017 (regarding the Single Permit Directive).

requirements prevents us from arriving to such a conclusion.[87] However, *P and S* and *Alo and Osso* unveil the challenges posed integration-based arguments in legal reasoning for the purposes of the equal treatment principle in the emergent EU foreigners' law. The reintroduction of a "comparability" test in the application of specific equal treatment clauses contained in EU legislation—which explicitly identify the point of comparison as being Member State nationals—has been criticized by scholars.[88] After all, the equal treatment clauses contained in EU migration and asylum directives are equivalent to prohibitions of discrimination on *nationality* grounds. However, the anomaly of integration ought to be recognized—defined in linguistic, cultural or similar "identitarian" terms—it becomes self-referential to the point of breaching comparability. As a result, for integration purposes based on cultural elements such as language or societal knowledge, as nationals and EU foreigners will never be in a comparable situation opens the possibilities departing from the equal treatment principle in an over-extensive way.

The emergence of an EU Alienage Law which takes as a point of reference the status of EU citizenship may offer a more satisfactory approach. In this connection, one of the greatest limitations for that exercise is the fact that EU legislation ties the application of the equal treatment principle to the status of Member States nationals and not to the status of EU citizens. Indeed, EU law has a broad experience considering justification of differential treatment of EU citizens residing in a Member State where they are not nationals. Taking those EU citizens as a point of comparison would lead to a very different result, since comparability would not be excluded from the outset. For integration for EU citizens is measured not in terms of cultural or linguistic inclusion but in terms of length of residence or economic contribution, those different approaches would have to be rationalized through reasonable objectives and meet the requirements of the proportionality principle.

D. Conclusion

Both the status of EU citizenship and the EU migration policies are fraught with specificities, which trace back to the originality and particularity of the EU integration process. The emergence of a coherent constitutional status for EU foreigners and its relationship with EU citizenship is determined by this unique and complex legal scenario, where reminiscences of an internationalist approach to free movement and non-discrimination on grounds of nationality are still widely present.

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[87] *See* ECJ, Case C-138/13, Dogan, EU:C:2014:2066, Judgment of July 10, 2014; ECJ, C-561/14, Genc, EU:C:2016:247, Judgment of April 12, 2016; ECJ, Case C-579/13, P and S, EU:C:2015:369, Judgment of June 4, 2015; ECJ, Case C-153/14, K and A, EU:C:2015:453, Judgment of July 9, 2015.

[88] *See* Karin de Vries*, The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in EU Law?*, *in* QUESTIONING EU CITIZENSHIP: JUDGES AND THE LIMITS OF FREE MOVEMENT AND SOLIDARITY IN THE EU (Daniel Thym ed., forthcoming 2017).

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Against this background, this article has examined the challenges posed by the equal treatment principle as the most fundamental element that ought to govern the status of EU foreigners, as developed by EU legislation. In that connection, the rather undetermined notion of integration plays a multifaceted role when applied to EU foreigners, third country nationals. Even if not potentially deprived of a content connected with EU fundamental values, integration in the field of EU migration law is not so much related to the protection of national constitutional identity, but to the objective of social cohesion, as an objective recognized by the Union.

In this regard, the very different approaches to integration for EU citizens and EU foreigners mark an important challenge for the emergent EU Alienage law. The concept of integration as applied to EU foreigners does not operate for EU citizens—at most, language may justify restriction as a professional requirement. For the rest, integration as an objective ground for limitation of equal treatment—in access to social assistance—is connected with either economic contribution or durational residential requirements as a barrier to benefit tourism. At this point, one may doubt whether those totally differentiated conceptions of integration are the result of an extrapolation of the non-comparability of nationals and foreigners when it comes to integration: it seems that there is a presumption of equivalence of values that leads to waive any socio-cultural integration need with regard to EU citizens. However, EU citizens and EU foreigners may be usefully regarded as comparators when it comes to build a more coherent approach towards integration concepts; such a methodology would lead to an exercise of justification of the different approaches, more in line with the general operation of the equal treatment principle as a constitutional principle.

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