

# **Well-Being, Skills and Work in a Neorepublican EU: The Case of Third-Country Nationals**

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## Declaration

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

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Daire McCormack-George



## Summary

This is a work in special analytic jurisprudence and applied normative political theory. It applies neorepublican political theory to people at work in the EU, taking third-country nationals as a case study. Empirical data suggests that third-country nationals habitually experience inadequate skills' recognition and wrongful discrimination when seeking access to and participation in the Single Market. Their well-being is consequently negatively affected. Accordingly, the central research question which this thesis investigates is the extent to which the EU guarantees the well-being of third-country nationals in accessing work in the EU, with a particular focus on skills' recognition and freedom from discrimination as aspects of their well-being in accessing work. The answer to this question comes in two parts.

Part I grounds the thesis in a value theoretic concern for people's well-being in accessing work, focussing on their freedom to work through the exercise of their skills as an aspect thereof. It then provides a partial exposition and application of neorepublicanism to people at work in the EU, defending the possibility of a neorepublican justification of EU labour law. More specifically, it justifies two rights of relevance to the lived experience of third-country nationals, namely, the rights to work and to non-discrimination. In the light of a theoretical commitment to

neorepublicanism, Part I argues that third-country nationals should generally be entitled to equal treatment with member state nationals.

Part II applies the theoretical framework developed in Part I to third-country nationals' right to have their skills recognised when moving to and within the EU, a derivative right of the core right to work which is afforded to third-country nationals through treating them more or less equally with EU nationals. It critiques EU law and policy as it stands in the light of a neorepublican commitment to justice at work in the EU. It is suggested that EU law as it stands is deficient in numerous respects insofar as it fails to treat third-country nationals equally with EU nationals in respect of their right to have their skills recognised and related legal and policy entitlements, such as labour market integration measures and access to education and training. Some possible reforms are suggested to better cohere with the account of neorepublican justice at work in the EU advanced in Part I.

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I was lucky to present some early versions of this work elsewhere prior to its collation and substantial revision here. Accordingly, I am grateful to audiences, anonymous referees and publishers for commenting on and permitting me to include elements of same here. Chapters 2 and 3 originated in a similar analysis of Irish law published as 'The Right to Work in Irish Law' (2020) 42 DULJ 119. Chapter 4 is largely based on an argument made in 'Equal Treatment of Third-Country Nationals in the European Union: *Why Not?*' (2019) 21 EJML 53. Parts of chapters 5 and 6 are based on 'Trade in Services, Migration and Recognition of Professional Qualifications post-Brexit' in Simon Tans and Marc Veenbrink (eds), *Upgrading Trade in Services in EU and International Trade Law* (Wolf 2019). Chapter 7 substantially reproduces an updated version of 'Recognition of Professional Qualifications in the Single Market: A Recap' (2019) 30 EBLR 785.

I have endeavoured to state the law as of 22 August 2020.

D.A.J.L.M.-G.  
North County Dublin  
Queenship of Mary 2020



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## Table of Abbreviations

|  |               |
|--|---------------|
| Cambridge University Press   | CUP           |
| Cambridge Yearbook of European Legal Studies                             | CYELS         |
| Common Market Law Review   | CML Rev       |
| Current Legal Problems   | CLP           |
| Dublin University Law Journal  | DULJ          |
| European Business Law Review   | EBLR          |
| European Constitutional Law Review                                       | EUConst       |
| European Journal of Health Law   | EJHL          |
| European Journal of International Law                                    | EJIL          |
| European Journal of Migration and Law                                    | EJML          |
| European Journal of Political Theory                                     | EJPT          |
| European Journal of Social Security                                      | EJSS          |
| European Labour Law Journal  | ELLJ          |
| European Law Journal   | ELJ           |
| European Law Review  | EL Rev        |
| European Review of Contract Law  | ECRL          |
| Florida State University Law Review                                      | Fl St U L Rev |
| Harvard International Law Journal  | Harv Int'l LJ |
| Harvard University Press   | HUP           |
| Human Rights Law Review  | HRL Rev       |
| International and Comparative Law Quarterly                              | ICLQ          |
| International Journal of Comparative Labour Law and Industrial Relations | IJCLLIR       |
| International Journal of Constitutional Law                              | I•CON         |
| International Journal of Discrimination and the Law                      | IJDJL         |
| International Labour Review  | Int'l Lab Rev |

|  |              |
|--|--------------|
| Industrial Law Journal                             | ILJ          |
| International Migration Review                     | IMR          |
| International Migration                            | IM           |
| Irish Jurist (new series)                          | IJ (ns)      |
| Journal of Common Market Studies                   | JCMS         |
| Journal of European Public Policy                  | JEPP         |
| Journal of World Trade                             | JWT          |
| Legal Issues of Economic Integration               | LIEI         |
| Legal Studies                                      | LS           |
| Maastricht Journal of European and Comparative Law | MJ           |
| Modern Law Review                                  | MLR          |
| New Left Review                                    | NLR          |
| Oxford Journal of Legal Studies                    | OJLS         |
| Oxford University Press                            | OUP          |
| Philosophy & Public Affairs                        | Phil & Pub   |
| Aff  |              |
| Policy Studies Journal                             | PSJ          |
| Tilberg Law Review                                 | TLR          |
| Virginia Journal of International Law              | Va J Int'l L |
| Work, Employment and Society                       | WES          |

## Table of Cases

### Decisions of the Human Rights Committee

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*Gueye v France* (196/85)  
*Karakurt v Austria* (965/00)  
*Van Oord v The Netherlands* (658/1995)

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*Biao v Denmark* (2017) 64 EHRR 1  
*Campagnano v Italy* (2009) 48 EHRR 43  
*Denisov v Ukraine* [2018] ECHR 1061  
*Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014)  
*Fawsie v Greece* App no 40080/07 (ECtHR, 28 October 2010)  
*Gaygusuz v Austria* (1996) 23 EHRR 364  
*Hode and Ali v United Kingdom* (2013) 56 EHRR 27  
*James v United Kingdom* (1986) 8 EHRR 123  
*Jankauskas v Lithuania (No 2)* (2018) 66 EHRR 16  
*Lekavičienė v Lithuania* (2018) 67 EHRR 5  
*Moustaquim v Belgium* (1991) 13 EHRR 802  
*Nachova v Bulgaria* [2004] ECHR 90  
*National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 27

*Osungu and Lokongo v France* App nos 78860/11 and 51354/13 (ECtHR, 8 September 2015)  
*Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003)  
*Ponomaryovi v Bulgaria* (2014) 59 EHRR 20  
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Case 65/77 *Razanatsimba* [1977] ECR 2229  
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# Introduction

## Introduction

This is a work in special analytic jurisprudence and applied normative political theory. It applies neorepublican normative political theory to a practical problem facing the EU, which can be stated summarily as follows. Due to Europe's aging population and consequent decline in population size,<sup>1</sup> increased migration within and to the EU is key to securing the future of EU integration.<sup>2</sup> This thesis addresses the experience of one such category of migrants accessing work in the Single Market, namely, third-country nationals. While third-country nationals thus play an important role in the project of EU integration going forward by and through their work, they habitually experience inadequate skills' recognition and wrongful discrimination in accessing work, thereby inhibiting their well-being. Accordingly, this thesis applies neorepublican normative

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<sup>1</sup> Eurostat, Population and population change statistics' <[https://ec.europa.eu/eurostat/statistics-explained/index.php/Population\\_and\\_population\\_change\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics)> accessed 11 December 2018.

<sup>2</sup> European Commission, 'Regional Policy Inforegio' <[https://ec.europa.eu/regional\\_policy/sources/docoffic/official/reports/p142\\_en.htm](https://ec.europa.eu/regional_policy/sources/docoffic/official/reports/p142_en.htm)> accessed 11 December 2018.

political theory to third-country national's plight to understand, critique and resolve the problems they face.

This chapter is structured as follows. Section I outlines the problem this thesis addresses in greater detail by providing a background to and overview of relevant EU economic and social policies and empirical data which emphasises the need for third-country nationals to come to work in the EU and the problems they actually face. Building on the policy documents and data outlined in section I, section II identifies the central research question and contribution to scholarship which this thesis will make. Section III describes the interdisciplinary methodology this thesis develops and deploys. Section IV outlines the sources of law which this thesis draws on. Section V identifies a central theme which runs throughout this thesis, namely, that of governance. Before concluding, section VI provides an outline of the structure of the thesis, describing the contribution each chapter makes to the overall argument of the thesis.

## I. The Problem

### A. From the *Lisbon Strategy* to *Europe 2020*

#### 1. *The Lisbon Strategy*

On 23-24 March 2000, the European Council met in Lisbon, Portugal to agree on a new 'strategic goal' for the Union to 'strengthen employment, economic reform and social cohesion as part of a knowledge-based economy'.<sup>3</sup> The object of the so-called *Lisbon Strategy* was to transform Europe, with the aim of becoming 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'. The role which skills play in this process is emphasised throughout the strategy document: as '[p]eople are Europe's main asset (...) [i]nvesting in people (...) will be crucial (...) to Europe's place in the knowledge economy'.

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<sup>3</sup> European Council, *Lisbon Conclusions* (23 and 24 March 2000).

How does investment in people result in tangible economic benefits? The primary way is by regulating economic relations for competitiveness.<sup>4</sup> According to the *Lisbon Strategy*, harnessing people's innate capacities and developing those through continuous training and re-training provide the grounds for greater innovation, entrepreneurship and competitive performance in business. Not only are education and basic skills key to this, but greater flexibility on behalf of workers, through increased and improved training, recognition of qualifications and employability skills, also provides for a competitive edge in the labour market. The combination of these measures should result in the creation of conditions of full employment, avoiding social exclusion and poverty.

The central place occupied by skills in the agenda of the European Union was further consolidated in the mid-term review of the *Lisbon Strategy* in 2005.<sup>5</sup> In its relaunch of the Strategy in 2005, the Commission emphasised knowledge as a key factor in continued growth of the European economy. And knowledge is best developed through investment in education and skills. The use of skills is therefore viewed as central to harnessing economic growth and development in the European Union.

## **2. *Europe 2020***

The *Europe 2020* strategy is the successor to the *Lisbon Strategy*, and the role which skills play in it is even more evident.<sup>6</sup> Launched in 2010, the *Europe 2020* strategy is centred around three pillars or priorities, namely, 'smart growth, sustainable growth and inclusive growth'. It is the last of these which is most relevant for present purposes. 'Inclusive growth' entails a high-employment economy delivering economic, social and territorial cohesion. In expanding on the 'inclusive growth' dimension, the Commission begins by acknowledging that Europe's working population is shrinking and that

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<sup>4</sup> See generally Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 ILJ 17.

<sup>5</sup> Commission, 'Working together for jobs and growth: A new start for the Lisbon Strategy' (Communication) COM(2005) 24 final.

<sup>6</sup> Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth' (Communication) COM(2010) 2020.

people's skills are increasingly being made redundant due to ill educational attainment and technological change.<sup>7</sup>

Two aspects of the *Europe 2020* strategy stand out for my purposes. First, the Commission envisages an 'Agenda for new skills and jobs', which entails 'empowering people through the acquisition of new skills to enable our current and future workforce to adapt to new conditions and potential career shifts, reduce unemployment and raise labour productivity'. Second, the Commission aims to launch a 'European Platform against Poverty', part of which will 'design and implement programmes to promote social innovation for the most vulnerable, in particular by providing innovative education, training, and employment opportunities for deprived communities'.<sup>8</sup>

It is the former of these which is most prominent in the *Europe 2020* strategy, as evidenced in particular from the headline targets presented towards the end of the strategy document.<sup>9</sup> Two features of this envisaged initiative stand out. First, an object of the initiative is to facilitate greater intra-EU mobility, in particular through better matching of supply and demand. And second, member states will be required to implement the European Qualifications Framework ('EQF') through the establishment of national qualification frameworks which facilitate comparison across and between qualifications. The EQF will be discussed in full insofar as it is relevant to this thesis in chapter 6.II.

## **B. The EU in the Global Market**

*Global Europe*, launched in 2006, is the EU's external trade strategy. Launched shortly after the renewed *Lisbon Strategy*, the Commission there noted that the Single Market could not be completed successfully without complementary internal and external agendas. Accordingly, while the *Lisbon Strategy* directly states goals and objectives to be achieved within the EU, *Global Europe* relies on external relations and resources to ensure the achievement of these internal goals.<sup>10</sup> It is vital that the external dimension

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<sup>7</sup> See also Commission, 'Migration' (Communication) COM(2011) 248 final, 4.

<sup>8</sup> *ibid* 18.

<sup>9</sup> *ibid* 30.

<sup>10</sup> Commission, 'Global Europe: Competing in the World - A Contribution to the EU's Growth and Jobs Strategy' (Communication) COM(2006) 567 final, 2.

to the Union's action is viewed as a necessary corollary of the Union's internal action. As the Commission aptly notes, '[a]s globalisation collapses distinctions between domestic and international policies, our domestic policies will often have a determining influence on our external competitiveness and vice versa'.<sup>11</sup> There are thus two dimensions to securing the well-being of the peoples of Europe—internal and external—a distinction we shall return to in chapter 2.

According to the Commission, there are two areas which are vital to the success of the EU's economy: having the right internal policies in the Single Market and ensuring greater openness to and with other markets. And the primary way to achieve greater openness to and with other markets is through the negotiation of trade agreements to advance trade and progressive market access, non-discrimination and liberalisation.<sup>12</sup> Progressive trade liberalisation should increase competition in markets by facilitating greater openness, bringing benefits to consumers and businesses. But barriers to trade liberalisation, in the form of tariff and non-tariff barriers, remain. For my purposes, it is the latter of these which are most significant.<sup>13</sup> As the Commission notes,

"[i]nstruments such as mutual recognition agreements, international standardisation and regulatory dialogues, as well as technical assistance to third countries, will play an increasingly important role in promoting trade and preventing distorting rules and standards."<sup>14</sup>

Such obstacles apply not only to goods in the form of product, technical and phytosanitary standards, but also to services in the form of qualification requirements and other technical standards. And, crucially, as services 'are the cornerstone of the EU

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<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.* 5.

<sup>13</sup> This position has been empirically verified: see, eg, Commission, 'European Competitiveness Report 2008' (Communication) COM(2008) 774 final; Commission, 'On the External Dimension of the Lisbon Strategy for Growth and Jobs: Reporting on market access and setting the regulatory framework for more effective international regulatory cooperation' (Communication) COM(2008) 874 final, 3.

<sup>14</sup> 'Global Europe: Competing in the World - A Contribution to the EU's Growth and Jobs Strategy' (n 10) 5-6.

economy', it is these with which this study should be most concerned.<sup>15</sup> Indeed, in *Trade for All: Towards a more responsible trade and investment policy*, the Commission noted that 'trade increasingly involves moving people and information, not just goods, across borders. This intensifies the ways in which trade boosts the exchange of ideas, skills and innovation'.<sup>16</sup> The Commission also noted the growing need to improve the recognition of professional qualifications in its external trade relations with third-countries. Specifically, the Commission concluded that it would promote the recognition of qualifications in its trade agreements negotiated with third-countries so as to facilitate exports and bridge skills gaps,<sup>17</sup> an issue which shall be addressed in full in chapter 5.III.

Recent empirical data has confirmed the significance of qualification recognition in intra-EU professional services trade. In general, this research concludes that there is a positive correlation between trade in professional services and the recognition of qualifications. Furthermore, the more one member state recognises the qualifications of another, the greater the chance of increased labour migration and service provision to that same member state.<sup>18</sup> The same should apply, *mutatis mutandis*, to external trade in services.

## C. The EU and Global Migration

### 1. *The Global Approach to Migration and Mobility ('GAMM')*

The *GAMM*<sup>19</sup> constitutes the EU's external policy on migration and is the culmination of years of work under the auspices of the Global Approach to Migration.<sup>20</sup> Originally

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<sup>15</sup> *ibid* 6; Commission, 'Trade for All: Towards a more responsible trade and investment policy' (Communication) COM(2015) 497 final, 6.

<sup>16</sup> 'Trade for All: Towards a more responsible trade and investment policy' (n 15) 3.

<sup>17</sup> *ibid* 7, 8.

<sup>18</sup> Hildegunn Kyvik Nordås, 'Does Mutual Recognition of Professional Qualifications Stimulate Service Trade? The Case of the European Union' (2016) 48 *Applied Economics* 1852; and Stella Capuano and Silvia Migali, 'The Migration of Professionals within the EU: Any Barriers Left?' (2017) 25 *Review of International Economics* 760.

<sup>19</sup> Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final. The *GAMM* was endorsed by the Council of the European Union on 29 May 2012.

<sup>20</sup> European Council Conclusions (19 December 2005).



designed as a 'balanced, global and coherent approach, covering policies to combat illegal migration and, in cooperation with third countries, harnessing the benefits of legal migration', the *Global Approach to Migration* has since become the EU's major policy in the context of external migration. Initially reviewed annually by the Commission, it was acknowledged in 2008, some three years after its launch, that '[a] more highly developed common European immigration policy will need to give more thought to ways of matching jobseekers to vacancies and to allowing for more flexible access for labour migrants'.<sup>21</sup> It is also important to recall the need to better match supply and demand, noted in section I.A.2 above. This echoes earlier observations of the Commission in several communications, where it noted that, in respect of third-country nationals, 'labour-matching'<sup>22</sup> tools should be developed, and, furthermore "identifying [labour market] needs is not enough. Supply and demand have to match (...) [m]utual recognition of qualifications and skills by the EU and non-member countries will also be important for this."<sup>23</sup>

In order to benefit from such measures, the Commission reissued and renewed the *Global Approach to Migration* as the *GAMM* in 2011, after consultation and recommendations from the European Council. Defined as the 'overarching framework of EU external migration policy', the Commission acknowledges that 'migration and mobility in the context of the Europe 2020 strategy aim to contribute to the vitality and competitiveness of the EU'.<sup>24</sup> It is thus vital to understand migration from this economic perspective. In the policies of the European Union, third-country nationals are considered economic actors contributing directly to EU integration through their

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<sup>21</sup> Commission, 'Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies' (Communication) COM(2008) 611 final, 4.

<sup>22</sup> *ibid.*

<sup>23</sup> Commission, 'An Area of Freedom, Security and Justice serving the Citizen' (Communication) COM(2009) 262 final, 25.

<sup>24</sup> 'The Global Approach to Migration and Mobility' (n 18) 4. This theme is later echoed in a follow-up report, Commission, 'Report on the implementation of the Global Approach to Migration and Mobility' COM(2014) 96 final, 15 wherein it is observed that

"[f]urther efforts should be made to better organise labour migration to the EU and to coordinate [member state] actions, ie, to progressively find a better balance between national competences (...) and the necessity of building an increasingly integrated EU labour market, which corresponds to the increasingly integrated Single Market."

participation in and contribution to its labour and service markets.<sup>25</sup> The *GAMM* has four 'pillars' around which policy actions should operate, namely,

- (a) Organising and facilitating legal migration and mobility;
- (b) Preventing and reducing irregular migration and trafficking in human beings;
- (c) Promoting international protection and enhancing the external dimension of asylum policy; and
- (d) Maximising the development impact of migration and mobility.<sup>26</sup>

It is the first of these—organising and facilitating legal migration and mobility—which is most relevant for the purposes of this thesis. Once again, there is a particularly strong focus on competitiveness, skills and labour market integration. Integration in and through the labour market is viewed as the primary vector of integration because it is 'key to ensuring that both migrants and receiving societies can benefit from the potential of migration';<sup>27</sup> and a 'particular emphasis is placed on strengthening the Union's capacity to anticipate labour market and skills needs'.<sup>28</sup> This latter aspect is considered a priority under the first pillar, as is broader cooperation between EU and third-country education and training institutions to ensure aligned curricula and qualifications, an issue which shall be addressed in chapter 6.<sup>29</sup>

One might wonder whether the focus in the *GAMM* is exclusively on regular migration and partnership agreements with third-countries. The answer is no. The Commission does envisage the possibility of mobilising existing talent and skills of those third-country nationals already resident in the European Union, particularly those who are overqualified.<sup>30</sup> However, it must be admitted that the primary focus in the *GAMM* and other policy documents here reviewed is on regular migrants to the EU, not on third-country nationals currently resident therein nor on those who are likely

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<sup>25</sup> Cf later comments at 6: 'The *GAMM* should also be migrant-centred. In essence, migration governance is not about 'flows', 'stocks' and 'routes', it is about people'.

<sup>26</sup> *ibid* 7.

<sup>27</sup> *ibid* 13.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid* 15.

<sup>30</sup> *ibid* 13.

most vulnerable and in need of migration, namely forced migrants. As the reader shall see in chapter 5.V, however, at least some policies are directed towards these categories of migrant.

## **2. A European Agenda on Migration**

Recent statistics confirm the view that external trade in services continues to provide reciprocal economic benefits to the EU and its international trading partners and that trade in services constitutes an increasingly larger proportion of total EU external trade in goods and services.<sup>31</sup> These statistics differentiate reasonably clearly between trade in different types of services which is helpful for the purposes of assessing the link between service trade and migration. While the statistics do not give details of the numbers of service providers involved, in practice these areas generally involve the (temporary) migration of persons for the supply of services. As the Eurostat report notes,

“The provision of services contributes a substantial share of the EU’s economic wealth and accounts for more than 50% of GDP in each of the EU Member States. Nevertheless, the value of exports and imports of goods is generally two to three times higher than that of services. Part of this imbalance may be due to the nature of some services, for example, professional services that are bound by distinct national legislation. Another difference between goods and services concerns the immediacy of the relationship between supplier and consumer: many services are non-transportable, in other words they require the physical proximity of the service provider and consumer, which implies that many services transactions involve factor mobility. For international trade in non-transportable services to take place, either the consumer must go to the service provider or the service provider must go to the consumer.”<sup>32</sup>

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<sup>31</sup> Eurostat, ‘Statistics Explained: International Trade in Services’ <[https://ec.europa.eu/eurostat/statistics-explained/index.php/International\\_trade\\_in\\_services](https://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade_in_services)> (accessed 21 December 2018).

<sup>32</sup> *ibid.*

The failure to further liberalise service regulation is therefore acknowledged as an obstacle to an increase in trade in services. The impact that this has on migration, temporary or otherwise, is also acknowledged. The link between service provision and migration has also been recognised and emphasised in a recent communication of the European Commission, *A European Agenda on Migration*.<sup>33</sup> According to the Commission, not only does the EU need to devise an attractive legal migration scheme for highly-skilled workers, '[t]he services sector includes well-trained, highly-skilled foreign professionals who need to travel to the EU for short periods in order to provide services'.<sup>34</sup>

Evidence of the need to better achieve the goals of improved trade in services and satisfy European labour market demands is not only to be found in this and other communications of the European Commission.<sup>35</sup> The conclusions of the European Council in 2010,<sup>36</sup> 2011,<sup>37</sup> 2014,<sup>38</sup> 2015<sup>39</sup> 2016,<sup>40</sup> and 2018<sup>41</sup> also evince a concern for the need to improve migration management in the EU's external relations and thereby contribute to meeting European labour and service market demands. Furthermore, the on-going reform of the Blue Card Directive to better attract global talent to the EU provides further consistency with this view.<sup>42</sup>

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<sup>33</sup> European Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final. See Simon Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalisation and Their Impact on Dutch and UK Immigration Rules* (Brill/Nijhoff 2017) and my review thereof in (2018) 9 ELLJ 218.

<sup>34</sup> 'A European Agenda on Migration' (n 33) 15.

<sup>35</sup> Other relevant communications are European Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM(2010) 2020; and European Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final, 4.

<sup>36</sup> European Council Conclusions (16 September 2010) 9.

<sup>37</sup> European Council Conclusions (11 March 2011) 4; and European Council Conclusions (23-24 June 2011) 10-11.

<sup>38</sup> European Council Conclusions (26-27 June 2014) 19.

<sup>39</sup> European Council Conclusions (25-26 June 2015) 1.

<sup>40</sup> European Council Conclusions (20-21 October 2016) 5.

<sup>41</sup> European Council Conclusions (28 June 2018) 1.

<sup>42</sup> Commission, 'Revision of the EU Blue Card Directive' <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160607/factsheet\\_revision\\_eu\\_blue\\_card\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160607/factsheet_revision_eu_blue_card_en.pdf)> (accessed 21 February 2019).

## D. The EU and the Future: Skills<sup>43</sup>

“Skills are a pathway to employability and prosperity. With the right skills, people are equipped for good-quality jobs and can fulfil their potential as confident, active citizens. In a fast-changing global economy, skills will to a great extent determine competitiveness and the capacity to drive innovation. They are a pull factor for investment and a catalyst in the virtuous circle of job creation and growth. They are key to social cohesion.”<sup>44</sup>

Thus begins the Commission’s communication on *A New Skills Agenda for Europe*. This introductory paragraph highlights two important dimensions of skills. First, skills are linked to economic and social goals. The economic goals include employability and economic development, while the social goals extend to social inclusion and cohesion. Second, skills are seen as the aspect of people’s abilities which can be mobilised for the purposes of value creation in a market society. This places skills at the heart of economic development in the EU.

The *New Skills Agenda* has three facets or ‘strands’: improving the quality and relevance of skills formation; making skills and qualifications more visible and comparable; and improving skills intelligence and information for better career choices.<sup>45</sup> For present purposes, the second of these is most relevant. Accordingly, the Commission notes the need to ‘improve transparency and comparability of qualifications’, particularly through the EQF.<sup>46</sup> The Commission further acknowledges that several third-countries ‘have expressed interest in the EQF to enable their qualifications to be compared with European ones’.<sup>47</sup> It recognises that such an approach would help attract highly-skilled researchers and professionals from outside

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<sup>43</sup> Commission, ‘New Skills for New Jobs’ (Communication) COM(2008) 868 final and Commission, ‘An Agenda for new skills and jobs: A European contribution towards full employment’ (Communication) COM(2010) 682 final; and Commission, ‘Rethinking Education: Investing in skills for better socio-economic outcomes’ (Communication) COM(2012) 669 final.

<sup>44</sup> Commission, ‘A New Skills Agenda for Europe: Working together to strengthen human capital, employability and competitiveness’ (Communication) COM(2016) 381 final, 1.

<sup>45</sup> *ibid* 3.

<sup>46</sup> *ibid* 9.

<sup>47</sup> *ibid*.

the EU, and would be consistent with the ambition to improve the Union's migration policy.<sup>48</sup>

## E. The Experience of Third-Country Nationals to Date

It is by now clear that, as a matter of policy, third-country nationals are envisaged as playing at least some part in the widening and deepening of the project of EU integration by participating in the Single Market: third-country nationals may be relied upon to fill gaps in the EU's labour market. But what has their experience of doing so been to date?

Several sources help to explain and expand upon third-country nationals' experience to date. A first is the European Migration Network's ('EMN') study on *Intra-EU Mobility of Third-Country Nationals* where it is observed that third-country nationals are even more likely to be mobile in the Single Market than member state nationals. However, the report also notes that the recognition of qualifications of third-country nationals is a significant obstacle to their mobility, particularly its cost, duration and documentation requirements.<sup>49</sup> This point is supported in subsequent research. The ECORYS/European Commission *Study on Obstacles to Recognition of Skills and Qualifications* notes that third-country nationals habitually experience inadequate qualification recognition which leads to inefficiencies between the level of qualifications obtained and labour market participation. In other words, third-country nationals often take up jobs they are overqualified to do. In most EU member states, the majority of resident non-citizens are third-country nationals and of those third-country nationals who come to the EU to work, 95% have a third-level qualification.<sup>50</sup> A joint OECD/EU report also discloses similar data. According to that report, almost every EU labour market does not value third-country qualifications as highly as native

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<sup>48</sup> *ibid.*

<sup>49</sup> European Migration Network Synthesis Report, *Intra-EU Mobility of Third-Country Nationals* (European Commission 2013) 5.

<sup>50</sup> Vicky Donlevy, Mauriz Curtarelli, Andrew McCoshan and Anja Meierkord, *Study on Obstacles to Recognition of Skills and Qualifications: Final Report* (ECORYS/European Commission 2016).

ones. As a result, the employment rate of third-country nationals is significantly lower than that of member state nationals.<sup>51</sup> As the latest Eurostat figures make clear,

“Migrant workers from countries outside the EU tend to occupy low-skilled and insecure jobs with temporary contracts and poorer working conditions. Migrants are also among the first to lose their jobs during economic setbacks. Much lower employment rates are consequently reported for this group than for EU-born workers. In 2018, the employment rate of people born outside the EU aged 20 to 64 was 8.7 percentage points below the total employment rate. Additionally, their employment rate has so far not recovered from the setback caused by the economic crisis, with the 2018 rate being still lower than the levels recorded in 2008.”<sup>52</sup>

One of the main reasons third-country nationals occupy such low-skilled and insecure jobs is that their qualifications are undervalued. Third-country nationals are consequently forced to take up employment in jobs for which they are over-qualified. It should come as no wonder, then, that the rate of over-qualification is higher amongst third-country nationals in all EU member states. The same is not the case for those third-country nationals who come to the EU for education, however. For those third-country nationals, it is much easier to get a job commensurate with their qualifications.

Obstacles to integration and labour market participation do not solely arise from inadequate qualification recognition, however. Almost 20% of third-country nationals in the EU feel that they belong to a group which is discriminated against on the grounds of ethnicity, nationality or race. Perceived discrimination is most common amongst African nationals resident in the EU. Furthermore, a recent EMN study of the labour market integration and participation of third-country nationals provides further information which may help to explain these statistics. According to that study, the main reasons that first-generation third-country nationals come to the EU are for

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<sup>51</sup> OECD/European Union, *Settling In 2018: Indicators of Immigrant Integration* (OECD Publishing 2018).

<sup>52</sup> Eurostat, 'Europe 2020 indicators—employment' (August 2019) <[https://ec.europa.eu/eurostat/statistics-explained/index.php/Europe\\_2020\\_indicators\\_-\\_employment](https://ec.europa.eu/eurostat/statistics-explained/index.php/Europe_2020_indicators_-_employment)> (accessed 27 April 2020).

family reasons (44%), followed by work (33%), education (8%), asylum (6%) and other reasons (5%). The main challenges for third-country nationals participating in the labour market involved, inter alia, a lack of adequate language skills; the recognition and validation of qualifications and the consequent skills mismatch which comes therewith; and discrimination in recruitment processes or in the working environment, problems which are more pronounced when dealing with women or vulnerable groups. As to the recognition of qualifications, problems arose in certain member states such as the lack of any mechanism to evaluate the skills of third-country nationals, the length of accreditation procedures in Belgium and Spain, or the general incompatibility of qualifications in Finland. As to the discrimination experienced by third-country nationals, data from Ireland suggested that Sub-Saharan Africans were more likely to experience discrimination when looking for work. Third-country nationals were also discriminated against on account of their lack of knowledge of their labour rights, with some, especially in Greece and Lithuania, being exploited as a result.<sup>53</sup>

Of further assistance and guidance in this respect is the recent 'EU-MIDIS II' Survey conducted by the EU's Fundamental Rights Agency.<sup>54</sup> EU-MIDIS II is based on a sample of over 25,000 randomly selected respondents with different ethnic minority and immigrant backgrounds across all EU member states. In each member state, certain immigrant and ethnic minority groups were chosen for the purposes of the survey. In the main, immigrants and the descendants of immigrants from Turkey and Sub-Saharan Africa were chosen across the member states. That survey confirms the persistency of discrimination against immigrants, descendants of immigrants and minority ethnic groups across the EU, observing that 'a failure to deliver effective protection from discrimination and hate crime can undermine integration and social inclusion policies, affecting the social cohesion of our societies'.<sup>55</sup> For example, nearly a quarter of respondents felt discriminated against because of their ethnic or immigrant background in the last twelve months, with that figure rising to nearly 40% of respondents when expanded to take into account the past five years. Of particular

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<sup>53</sup> European Migration Network, *Labour Market Integration of Third-Country Nationals in EU Member States: Synthesis Report for the EMN Study* (2019).

<sup>54</sup> Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey: Main Results* (Publications Office of the European Union 2017).

<sup>55</sup> *ibid* 13.



relevance to this project is the affirmation that most discrimination is experienced in employment and when accessing public and private services. And while a majority of respondents know that such discrimination is prohibited, many are reluctant to report it because they do not feel anything will change.

It therefore seems that inadequate qualification recognition and wrongful discrimination—issues which affect third-country nationals' well-being at work—are the key problems to focus on in securing the role of third-country nationals in the process of EU integration.

## **F. Synthesis**

The following picture emerges from this brief overview of EU economic and social policy and empirical data concerning the experiences of third-country nationals accessing work in the EU. First, skills are the ground upon which further development and growth shall emerge in the EU in the future; and the skills necessary to provide such growth are often in short supply. Second, this leads us to consider where to find new sources of skills. The answer lies, at least in part, in third-country nationals. But while third-country nationals provide new sources of human capital, particularly in the context of falling fertility rates across the EU, empirical research suggests that such third-country nationals habitually experience discrimination in recruitment processes and inadequate qualification recognition. Moreover, it is an overarching goal of the EU to improve the matching of supply with demand and enabling the recognition of qualifications will be particularly important for this.

## **G. Limitations and Criticisms**

It is important to reflect on what might be described as the 'technocratic' nature of the approach evinced, primarily by the European Commission, in the above-discussed economic and social policy documents. While the Commission's case for the use of and reliance on the skills of third-country nationals is probably economically compelling, it is nonetheless difficult to reconcile its approach with the significant backlash in recent

years against migration generally in the EU, and especially against the immigration of third-country nationals in particular. In sum, the obvious economic case for migration needs to be accompanied by a compelling social case which renders migration satisfactory and acceptable to all. In the view of the Commission, the social case is to be provided primarily through economic reform: as noted in section I.C.1 above, integration is to occur in and through the labour market. By joining and participating in the labour market, migrants should not be viewed as a drain on society and are instead understood as contributors in and to their community by and through their work. Participation in the good of work is likely to secure the well-being of all members of the EU's polis.

It is clear, however, that there is not a consensus on such a position at EU level. The European migration crisis triggered the suspension of the Schengen area, resulting in country after country shutting its borders as each found its migration systems overwhelmed by refugees flooding in from the Middle East.<sup>56</sup> One of the key arguments in the Brexit campaign involved the claim that migration was undermining the well-being of the peoples of the United Kingdom.<sup>57</sup> Meanwhile, resistance to migration in eastern Europe, in particular, remains high.<sup>58</sup> Given that there is a lack of consensus on the viability of the Commission's plans in this respect, it merits noting, both here and throughout this thesis, that the proposed reforms made herein may be controversial and require a significant change in culture. They may require that the EU and its member states take more seriously not only the well-being of third-country nationals but of their own citizens too.

A second concern arises from a challenge to the economic case advanced by the Commission itself. While labour migration may benefit the EU economically, a question arises as to whether and to what extent such labour migration may benefit the countries of origin of migrants. While, as noted in section I.C.2 above, the Commission suggests that external trade in services serves the interests of both the EU and its

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<sup>56</sup> Michela Ceccorulli, 'Back to Schengen: the collective securitisation of the EU free-border area' (2019) 42 *West European Politics* 302.

<sup>57</sup> Jonathan Portes and Giuseppe Forte, 'The economic impact of Brexit-induced reductions in migration' (2017) 33 *Oxford Review of Economic Policy* S31; James Dennison and Andrew Geddes, 'Brexit and the perils of 'Europeanised' migration' (2018) 25 *JEPP* 1137; Catherine Barnard and Sarah Fraser Butlin, 'Free Movement v Fair Movement: Brexit and Managed Migration' (2018) 25 *CML Rev* 203.

<sup>58</sup> Ivan Krastev, 'Eastern Europe's Illiberal Revolution' (2018) 97 *Foreign Affairs* 49.

trading partners, this argument needs to be tested. Could such migration have a detrimental impact on the economies and societies of the countries of origin? It is possible that non-circular migration could result in a so-called 'brain drain', permanently draining developing countries of their most valued human resources, an issue that will be addressed in chapter 6.I.

## **II. Central Research Questions**

### **A. Questions and Sub-Questions**

In the light of the policy background provided thus far and the empirical data available concerning the experiences of third-country nationals participating in the Single Market to date, the central research question of this thesis is the extent to which the EU guarantees the well-being of third-country nationals in accessing work in the EU, with a particular focus on qualification recognition and freedom from discrimination as aspects of their well-being in accessing work.

This question entails two sub-questions. First, according to what theory shall the well-being of third-country nationals at work in the EU be assessed? The answer to this question, provided in Part I of this thesis, is logically prior to all other questions for, assuming that inadequate skills' recognition and wrongful discrimination affect third-country nationals' well-being in accessing work, it is necessary to outline a theory according to which we can assess how and why their well-being in accessing work is negatively affected. This sub-question itself entails several further questions. These questions are answered in each of the chapters of Part I of this thesis. The first question concerns the meaning of well-being, skills and work. For to discuss the well-being of third-country nationals at work, we need to know what well-being is and how people use their skills to undertake their work. This question is answered in chapter 1 by providing a value theoretic analysis of the concepts of well-being, skills and work. The second question entails a consideration of how to guarantee the well-being of people accessing work in the EU generally. Building on the value theoretic definition of well-being, skills and work outlined in chapter 1, chapter 2 provides a partial outline

of one contemporary version of neorepublican normative political theory which explains how to secure people's well-being at work in the EU. The final issue Part I investigates is the core rights necessary to guarantee third-country nationals' well-being in accessing work in the EU, justified by neorepublicanism as outlined in chapter 2, namely, the rights to work and to be free from discrimination.

The second overarching sub-question this thesis investigates is, what is the relationship between theory and praxis in this area? Specifically, what are the current measures of the European Union in this area which seek to alleviate the inadequate skills' recognition and wrongful discrimination third-country nationals experience; how, and to what extent, are these measures consistent with the theoretical underpinnings of this area; and what reforms, if any, are required for the current practice to better cohere with the theoretical underpinnings in this area? The response to this question constitutes Part II (chapters 5-7) of this thesis, where I shall analyse and critique existing law and policy in the light of the theoretical framework developed in Part I (chapters 1-4).

## **B. Contribution to Scholarship and Originality**

### **1. Philosophical Foundations of EU Labour Law**

This thesis first makes several minor contributions to the philosophical foundations of EU labour law. Existing scholarship on the philosophy of labour law generally is broad and deep.<sup>59</sup> The contribution of this thesis to this area of scholarship is threefold. It begins with what an exploration of several value theoretic concepts. The first is well-being; that is, people's quality of life. The second is people's skills. As I argue in chapter 1.II, we use our skills to choose and instantiate the options available to us, which constitute our well-being. The third is work. There are at least two conceptions of work

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<sup>59</sup> See, inter alia, Mark Freedland, *The Personal Employment Contract* (OUP 2003); Horacio Spector, 'Philosophical Foundations of Labour Law' (2006) 33 *Fl St U L Rev* 1119; Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Mark Freedland and Nicola Countouris, *The Legal Construction of Personal Work Relations* (OUP 2011); Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014); Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016); Alan Bogg, 'Labour, Love and Futility: Philosophical Reflections on Labour Law' (2017) 33 *IJCLLR* 7; and Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

prevalent in labour law scholarship. One is, perhaps obviously, that of paid work—the predominant focus of labour law scholarship. The other is that of unpaid work. This thesis proposes a unitary concept of work, defined as ‘the productive use of one’s skills’. This concept of work is broad and is dependent on an account of what skilled activity is, as defined in chapter 1.II. Given that work involves the use of one’s skills and can be a means and/or an end to achieving one’s choices, work is constitutive of people’s well-being.

The final contribution to this area of scholarship is as follows. Given that well-being has traditionally been secured in political communities subject to political authorities, it is necessary to investigate how to ensure people’s well-being at work in the EU. The manner of doing so relied on in this thesis is through a partial application of neorepublican normative political theory to people at work in the EU. Accordingly, chapter 2 provides an exposition and application of neorepublican normative political theory to people at work in the EU with a view to defending the possibility of the regulation of work in the EU as a subsidiary requirement of an overarching theoretical commitment to neorepublican justice at work. Chapter 3 then focusses on a specific fundamental labour right which may be justified on this basis, namely, the right to work. In sum, the modest aim of this thesis is to provide an outline of the beginning of a partial theoretical justification for some labour laws in the EU through a novel but incomplete application of one version of contemporary neorepublicanism to the EU and EU labour law.

## **2. EU Equality, Migration and External Relations Law**

This thesis also responds to several gaps in the literature at the intersection of EU equality, migration and external relations law. The first contribution this thesis makes to these areas is the development of a nuanced focus and understanding of the role which equal treatment guarantees play in enabling migrants to bear rights and access opportunities when entering and moving within the EU. Two existing texts are helpful in this respect. The first is Katharina Eisele’s doctoral dissertation on the external

dimension of the EU's migration policy.<sup>60</sup> Her text examines the historical development of the EU's policies in this area, as well as the legal bases on which third-country nationals enter the EU. Important in this respect are entry schemes for regular migrants, as well as their entitlements to participate in the labour markets, social security systems and other entitlements of member state nationals. The second is Bjarney Friðriksdóttir's text concerning the construction of the equal treatment guarantee in the EU's migration acquis.<sup>61</sup> What emerges from Friðriksdóttir's text is that a close analysis of the equal treatment guarantees found in the EU's external labour migration acquis plays a vital part in analysing the place and treatment of third-country nationals in and under EU law. The scope of the equal treatment guarantee is often a threshold issue for the recognition of third-country nationals' skills in the EU. Moreover, as it stands, nationality discrimination is not prohibited as a matter of EU anti-discrimination law. Accordingly, chapter 4 argues that nationality should become a prohibited ground of discrimination to better tackle the discrimination which third-country nationals habitually face.

The second contribution which this thesis makes to these intersecting areas of scholarship, which results from this thesis' theoretical focus on skills, concerns the recognition of professional qualifications in the Single Market. Most existing legal scholarship at the intersection of these areas has focused either solely or mainly on the experiences of third-country nationals who are generally low-skilled, particularly those who undertake seasonal work,<sup>62</sup> enter the EU on so-called 'guestworker' schemes,<sup>63</sup> undertake 'precarious work'<sup>64</sup> or are irregular migrants undertaking work.<sup>65</sup> There is also an emerging body of work on highly qualified migrants, particularly as found in the

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<sup>60</sup> Katharina Eisele, *The External Dimension of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill/Nijhoff 2014).

<sup>61</sup> Bjarney Friðriksdóttir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill/Nijhoff 2017).

<sup>62</sup> Judy Fudge and Petra Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Control Meets Labour Rights' (2014) 16 EJML 439.

<sup>63</sup> Stephen Castles, 'Guestworkers in Europe: A Resurrection?' (2007) 40 IMR 741; and Martin Ruhs and Philip Martin, 'Numbers vs Rights: Trade-Offs and Guest Worker Programs' (2008) 41 IMR 249.

<sup>64</sup> Bridget Anderson, 'Migration, immigration controls and the fashioning of precarious workers' (2010) 24 WES 300.

<sup>65</sup> Georg Menz, 'Employers and Migrant Legality: Liberalisation of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market' in Mark Freedland and Cathryn Costello (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

scholarship of Lucie Cerna, who, alone<sup>66</sup> and in partnership with other academics,<sup>67</sup> has conducted extensive research into the EU and member states' high skilled labour migration regimes. But Cerna and others' research does not generally consider the experiences of highly qualified third-country nationals in the EU; rather, her and others' work largely concerns the design of immigration norms and policies to best attract highly skilled third-country nationals to the EU. The contribution which this thesis makes, by contrast, is to address the real problems which third-country nationals, be they low, middle or high skilled, coming to or arriving in the EU habitually experience, viz inadequate skills' recognition and wrongful discrimination.

One important study in relation to the recognition of qualifications is Micheline van Riemsdijk's analysis of the experiences of certain accession state nationals.<sup>68</sup> While

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<sup>66</sup> Lucie Cerna, 'Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card Directive' (2013) 34 *Policy Studies* 180; Lucie Cerna, 'The EU Blue Card: Preferences, Policies and Negotiations between Member States' (2014) 2 *Migration Studies* 73; Lucie Cerna, 'Attracting High-Skilled Immigrants: Policies in Comparative Perspective' (2014) 52 *IM* 69; Lucie Cerna, *Immigration Policies and the Global Competition for Talent* (Palgrave Macmillan 2016); Lucie Cerna, 'The crisis as an opportunity for change? High-skilled immigration policies across Europe' (2016) 42 *Journal of Ethnic and Migration Studies* 1610; and Lucie Cerna, 'European High-Skilled Migration Policy: Trends and Challenges' in Mathias Czaika (ed), *High-Skilled Migration: Drivers and Policies* (OUP 2018).

<sup>67</sup> Alexander Betts and Lucie Cerna, 'High-Skilled Labour Migration' in Alexander Betts (ed), *Global Migration Governance* (OUP 2011); Lucie Cerna and Meng-Hsuan Chou, 'The regional dimension in the global competition for talent: Lessons from framing the European Scientific Visa and Blue Card' (2013) 21 *JEPP* 76; Lucie Cerna, James Hollifield and William Hynes, 'Trade, Migration and the Crisis of Globalisation' in Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (eds), *The Palgrave Handbook of International Labour Migration* (Palgrave 2015); Lucia Cerna and Mathias Czaika, 'European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policies' in Anna Triandafyllidou and Irina Isaakyan (eds), *High Skill Migration and Recession: Gendered Perspectives* (Palgrave Macmillan 2015); and Lucie Cerna and Meng-Hsuan Chou, 'Defining 'Talent': Insights from Management and Migration Literatures for Policy Design' (2019) 47 *PSJ* 819.

<sup>68</sup> Micheline van Riemsdijk, 'Obstacles to the Free Movement of Professionals: Mutual Recognition of Professional Qualifications in the European Union' (2013) 15 *EJML* 47; and Micheline van Riemsdijk, 'Politics of Free Movement in the European Union: Recognition and Transfer of Professional Qualifications' in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Brill 2013). On the recognition of qualifications in the EU generally, see Rolf Waegenbaur, 'Free Movement in the Professions: The New EEC Proposal on Professional Qualifications' (1986) 23 *CML Rev* 91; Julian Lonbay, 'Free Movement of Persons, Recognition of Qualifications and Working Conditions' (1989) 38 *ICLQ* 211; Malcom Ross, 'Freedom of Establishment and Freedom to Provide Services' (1989) 14 *EL Rev* 162; Julia Laslett, 'The Mutual Recognition of Diplomas, Certificates and other Evidence of Formal Qualifications in the European Community' (1990) 17 *LIEI* 1; Julian Lonbay, 'Free Movement of Persons, Recognition of Qualifications and Working Conditions' (1994) 43 *ICLQ* 217; Miek Peeters, 'Free Movement of Medical Doctors: The New Directive 2005/36/EC on Recognition of Professional Qualifications' (2005) 11 *EJHL* 373; Sacha Garben, 'On Recognition of Qualifications for Academic and Professional Purposes' (2011) 16 *TLR* 127; and Silvo Adamo and Tom Binder, 'Union citizens and the recognition of professional qualifications: where do we go from here?' in Sybe de Vries, Elena Ioriatti, Paulo Guarda and Elisabetta Pulice (eds), *EU Citizens Economic Rights in Action: Re-Thinking Legal and Factual Barriers in the Internal Market* (Edward Elgar 2018).

not dealing with third-country nationals, her study is nonetheless a helpful starting point in recognising the significance of existing skills in providing access to and participation in the labour market. Moreover, while the studies noted thus far have focused on different categories of skilled workers—ie, low skilled, middle skilled and high skilled (or perhaps 'differently skilled')—they have not always done so in a skills-conscious manner. That is, these studies have not always located such workers within a broader paradigm or model of work as skilled activity which contributes to people's well-being, nor have they noted the stratified and discriminatory nature of the EU's labour migration acquis on the ground of skills.<sup>69</sup>

As is by now clear from the analysis of the EU's economic and social policies in section I, the recognition of qualifications plays an important role in facilitating labour mobility and boosting trade in services both within the EU and between the EU and third-countries. Further evidence of this is provided by Simon Tans' text linking service provision and migration.<sup>70</sup> For while migrants contribute to the satisfaction of demand in labour markets by and through their work, they can also contribute to service markets insofar as they provide, by means of their skills, valuable services which are in demand. The contribution to the study of qualification recognition this thesis makes has two dimensions, external and internal. The external dimension concerns the circumstances in which third-country nationals can have their qualifications recognised when coming to the EU for the first time. Again: in what circumstances, if any, can third-country nationals have their qualifications recognised when moving to the EU? The response to this question is provided in chapter 5. By contrast, the internal dimension concerns the recognition of professional qualifications within the Single Market. In what circumstances, if any, can third-country nationals have their qualifications recognised when moving within the Single Market? The response to this question is provided in chapter 7. Both of these dimensions are imbued with and logically follow from the analysis of equal treatment in chapter 4.

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<sup>69</sup> See my review of *What Happened to Equality?* (n 61) in (2018) 55 CML Rev 1647 and chapter 4.I.A of this thesis.

<sup>70</sup> *Service Provision and Migration: EU and WTO Service Trade Liberalisation and Their Impact on Dutch and UK Immigration Rules* (n 33).



There is a final element of this thesis' contribution to research on qualification recognition. That is an attempt to understand what makes qualification recognition work well. There is some evidence to suggest that prior coordination of education and training facilitates qualification recognition. If this is the case, then, for the sake of completeness, it is worth considering the extent to which the EU already does this with third-countries, something I investigate in full in chapter 6.

### **III. Methodology and Scope**

#### **A. Methodologies**

This thesis is literature-based. In compiling and collating the data presented here, I have not conducted any empirical research, although some empirical evidence is relied on to make certain claims. The thesis adopts a mixed methodology throughout. That is, different methodological lenses are deployed at different stages of the thesis. Thus, in Part I, the primary methodology adopted is a law and philosophy one. For example, chapter 1 and 2 rely on and develop concepts from contemporary analytical legal and political philosophy. Specifically, chapter 1 relies on elements of value theory (well-being, skills and work) which are presupposed by the normative neorepublican political theory developed in chapter 2. In chapters 3 and 4, a mixed law and philosophy and legal doctrinal approach is largely adopted. Specifically, reliance is placed on neorepublican political philosophy in analysing EU constitutional law and case law in relation to the rights to work and equal treatment.

In Part II of the thesis, the primary methodology adopted is a mixed law and philosophy and legal doctrinal one. EU law and policy is subjected to critique from the perspective of the interdisciplinary concept of skills, the concept of work and neorepublican political theory as outlined in Part I of the thesis. At times, the approach also varies in this Part. For example, a functional comparative analysis<sup>71</sup> is adopted in chapter 6, where certain rules in Ireland and the UK concerning the regulation of the

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<sup>71</sup> Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2007).

medical profession are studied to extrapolate the effects of those rules. A functional comparative approach focuses not only on legal rules but on their effects. This effects-based reasoning is key to the operation of the comparative analysis undertaken in chapter 6 and will be expanded on further there. On the whole, therefore, the methodology adopted in this thesis is interdisciplinary.<sup>72</sup> While the project as a whole constitutes one thesis, each chapter makes independent arguments all of which form separate constituent parts of the thesis.

## **B. Scope of Enquiry**

A legitimate question arises as to why the focus of this thesis is on third-country nationals rather than EU nationals. Surely the focus should be on member state nationals as they are the primary subjects and actors in the process of EU integration. However, my focus is primarily on the peripheral case—third-country nationals—to ensure that the central case—EU nationals—is strengthened.<sup>73</sup> That is, by focussing on those who are most vulnerable, most open to exploitation and who clearly experience significant problems which member state nationals do not to the same extent, renewed insight can be gained on those who are least vulnerable, thus strengthening our understanding and approach to the process of EU integration as a whole. While the situation of EU nationals is not formally part of my research question, the thesis will have implications for the treatment of the EU's own nationals, some of which will be spelled out while others will remain largely unmentioned.

## **C. Limitations**

Every research methodology has limitations: a literature-based thesis is no exception to this. To the extent that this thesis speaks to the lived experiences of third-country nationals in and outside the EU, it draws on existing empirical research. In general,

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<sup>72</sup> Paul Roberts, 'Interdisciplinarity in Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).

<sup>73</sup> For a helpful overview of the central case method, see John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) ch 1.

given the availability of sources in this respect, the author found it unnecessary to conduct empirical research to disclose the experiences of third-country nationals. Choosing not to conduct empirical research does constrain the claims a thesis can make, however, often limiting the researcher to suggesting further research agendas and areas which require further empirical research to later draw on for theoretical and doctrinal purposes. This thesis is no exception in this respect. As will become obvious, especially in Part II of the thesis, there are numerous areas of law and policy which require further and closer empirical scrutiny and the author takes no shame in pointing these out.

Being able to identify and define such research areas is a strength of a literature-based thesis because it necessarily takes something of a birds-eye view of a field. Nonetheless, this author's capacity to make concrete recommendations for legal and policy reforms is constrained by the lack of empirical data in some areas. But because of the breadth of empirical data required to fully substantiate all the claims discussed and made in this thesis, the empirical research required to be undertaken for the purposes of a doctoral thesis would not have been sufficient to meet this author's needs. To put it another way, no single thesis could have provided, comprehensively, the empirical data required to substantiate all theoretical and doctrinal claims made in a literature-based thesis such as this one. Accordingly, while not without its problems, such an approach is, in this student's view, the best one to achieve the contribution to scholarship which this author seeks to make.

#### **IV. Sources**

While this thesis concerns certain aspects of the well-being of third-country nationals in accessing work in the EU, it is not concerned solely with the manner in which EU law secures their well-being. There are at least two other sources of transnational legal regulation which bind and influence the EU and its member states, namely, various forms of international law (international human rights, labour and economic law), on the one hand, and European human rights and labour law as found in the measures of

the Council of Europe, on the other hand.<sup>74</sup> Why take these into account? For one, some of these sources of law are binding either on the EU, its member states or both. The EU and its member states also participate, to various degrees, in the workings of the various international and European institutions associated with these sources of law. Finally, and crucially, EU and member states' courts occasionally take these sources of law into account in deciding cases in a manner which has been described by Virginia Mantouvalou in her pioneering work as an 'integrated approach' to legal interpretation: that is, an approach to interpreting a provision of law which takes into account international and European human rights obligations relevant to the provision in question.<sup>75</sup> The EU and its member states, therefore, not only have an interest in securing the well-being of third-country nationals for purely self-interested reasons (as suggested in section I above) but also because and insofar as it does or should adopt an integrated approach to interpreting and applying EU law and policy.

## V. Governance

### A. Overview

There is an important theme underlying the competing modes and levels of governance just noted. That is the theme of governance itself. Governance is the setting of standards—the establishment of norms which guide people's behaviour and enable them to live their lives. A leading scholar on regulation is Gunther Teubner<sup>76</sup> and his work has spawned much further work.<sup>77</sup> Teubner distinguishes between formal legal

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<sup>74</sup> A helpful overview is provided by Bernard Ryan and Virginia Mantouvalou, 'The Labour and Social Rights of Migrants in International Law' in Ruth Rubio Martin (ed), *Human Rights and Immigration* (OUP 2014). See further Edoardo Ales, Mark Bell, Olaf Deinert and Sophie Robin-Olivier (eds), *International and European Labour Law: A Commentary* (Nomos/Hart 2018).

<sup>75</sup> Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRL Rev 529.

<sup>76</sup> Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law and Society Review 239.

<sup>77</sup> Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 MLR 24; Hugh Collins, *Regulating Contracts* (OUP 1999); Julia Black, 'Proceduralising Regulation, Part II' (2001) 21 OJLS 33; and Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) ch 6. I draw heavily on Fredman in this section.

rules and substantive legal rules. Formal legal rules are designed to protect a sphere of private or personal autonomy. By contrast, substantive legal rules require that specific action be taken to achieve a goal; they are goal-oriented. Substantive legal rules are, however, weak because law operates in one of numerous discrete heterarchical social systems. To put it another way, goal-oriented legal regulation cannot successfully govern society in a 'top-down' fashion. Because society is not hierarchically ordered, law cannot impose on and achieve goals in society in a 'command-and-control' fashion. Rather, often, each social system or 'sub-system'—eg, law, politics, religion, etc—speaks past each other, using and adopting its own language and internal logic. Acts of communication between sub-systems are then translated and re-translated in and according to each sub-system's own internal logic and language.<sup>78</sup>

How, then, can law come to govern other sub-systems? How can we ensure that the goals we pursue through legal regulation are achieved? Ultimately, what is required is change from within: law must adjust itself in a manner which has come to be described as 'reflexive law'. 'Reflexive law' suggests a need for a multiplicity of modes of governance, not simply adopting a single, traditional model of governance but rather accepting the different languages and internal logics of separate social systems, synthesising them and responding to them in their own language. Only in this way can law come to govern other social systems—often by assimilating and, to some extent, ameliorating its goals and ambitions to suit those of other social systems. And the primary way of doing this is through adopting diverse modes and means of governance, ranging from adopting modes of governance which have varying legal force or weight to those which facilitate decentralised deliberation and decision-making through local organisations and committees.

In EU law specifically, the theme of governance has attracted a great deal of critical attention.<sup>79</sup> In a well-known paper, Joanne Scott and David Trubek provide a

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<sup>78</sup> Juergen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1997) section 2.1.

<sup>79</sup> A good starting point is Joanne Scott and David Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 ELJ 1 and the other articles in that special issue. See also Olivier de Schutter and Simon Deakin, 'Reflexive Governance and the Dilemmas of Social Regulation' in Olivier de Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Europe?* (Bruylant 2005); Gráinne de Búrca and Joanne Scott

helpful overview of different modes of governance operating in the EU. According to Scott and Trubek, the starting point for any analysis of regulation in the EU should be the 'classic Community Method', namely, the (almost) exclusive right of legislative initiative of the European Commission, as well as the legislative powers of the European Parliament and the Council. Such a traditional approach to regulation as top-down or 'command-and-control' is consonant with conventional views of legal regulation more generally. However, it is by now clear that the EU adopts many and varied modes of governance to achieve its various legal and policy goals. Examples of such varied models of governance include the social dialogue, the Open Method of Coordination and what is now the cornerstone of new governance in the EU, the European Semester, and the coordination of economic and employment policies on the basis of arts 121, 136 and 146 TFEU.<sup>80</sup>

According to Scott and Trubek, these and other forms of governance share a number of important features. They include participation and power-sharing; multi-level integration of modes of governance; accepting diversity and decentralisation in modes of governance; facilitating deliberation; permitting flexibility and revisability of measures; and permitting experimentation and knowledge creation.<sup>81</sup> Soft law can be given effect in a number of ways. Trubek, Patrick Cottrell and Mark Nance identify several: shaming; diffusion through mimesis; diffusion through discourse; networking; deliberation; and peer learning.<sup>82</sup>

The European Semester itself is a good example of this. The successor to the Open Method of Coordination, the European Semester requires that country-specific recommendations are made, while national performance is benchmarked and compared across a number of indicators.<sup>83</sup> And given the flexibility of such modes of

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(eds), *Law and New Governance in the EU and the US* (Hart 2006); Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (CUP 2011); and Mark Dawson, 'New governance and the displacement of Social Europe: the case of the European Semester' (2018) 14 *EUConst* 191.

<sup>80</sup> 'New governance and the displacement of Social Europe: the case of the European Semester' (n 79).

<sup>81</sup> 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *ELJ* 1 (n 79) 5-6.

<sup>82</sup> David Trubek, Patrick Cottrell and Mark Nance, 'Soft Law', 'Hard Law' and EU Integration' in de Búrca and Scott (n 79) 79.

<sup>83</sup> 'New governance and the displacement of Social Europe: the case of the European Semester' (n 79) 197.

governance, the goals of legal regulation can adapt over time, constantly readjusting in the light of the capacity of the particular mode of governance to achieve new goals and ensure compliance. Such modes of governance can even consist of multiple levels of compliance, mandating strict compliance with those goals most imminently necessary and lower levels of compliance for less important goals. Once again, the European Semester serves as a good example of this: with the possibility of imposing financial sanctions on member states for consistent failure to adhere to recommendations, states are incentivised to comply early in the process.<sup>84</sup>

## **B. Regulating Well-Being in accessing Work**

This thesis is primarily concerned with the 'hard' law regulation of certain aspects of third-country nationals' well-being at work, viz wrongful discrimination and inadequate skills' recognition. However, that is not to say that it is solely concerned with traditional 'command-and-control' methods of regulation. Several other forms of regulation are considered. As should be evident from the above-discussed sources in section V, much international legal regulation which is discussed and relied upon in this thesis is—in substance, if not in principle—a form of soft law. Furthermore, when it comes to the measures which the EU adopts in areas which it shares competence with the member states, these generally constitute more timid forms of regulation but are, in practice, often very effective. One prominent example of this has already been mentioned and shall be addressed in full detail in chapter 6, namely, the EQF. Other regulatory approaches, such as the adoption and provision of supportive, non-binding tools by the European Commission will also be addressed in chapter 5.

## **VI. Structure**

Part I constitutes the theoretical foundation of the thesis. Chapter 1 commences my response to the first sub-question, viz, according to what theory shall the well-being of third-country nationals accessing work in the EU be assessed? It provides

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<sup>84</sup> Parliament and Council Regulation 1303/2013/EU on Structural Funding [2013] OJ L 347/320, Annex 1.

definitions of three value theoretic concepts presupposed throughout the thesis. The first is well-being because I am ultimately concerned with the quality of people's lives. The second is skills, which play an important role in constituting people's capacity for well-being and one way people use their skills is by working. The third is work which, by definition, contributes to the quality of people's lives. Chapter 2 considers how to guarantee people's well-being at work in the EU. It does so by providing a partial outline of contemporary neorepublican political theory. Chapters 3 and 4 expand on the foundational legal rights necessary to guarantee people's well-being. Chapter 3 makes the link between well-being, work and neorepublicanism concrete through an analysis of the right to work in the EU. The net point which emerges from chapter 3 is that the right to work and certain derivative rights therefrom is central in facilitating people's access to work, thereby securing people's well-being in accessing work in the EU. Chapter 4 completes the theoretical foundations of the thesis by reflecting on the equal treatment of third-country nationals in the European Union. It, firstly, outlines the link between neorepublicanism and equality. It then makes the legal doctrinal case for the equal treatment of third-country nationals in the European Union, before turning to several other perspectives, political, conceptual and sociological. In sum, the answer to the first series of sub-questions provided in Part I of this thesis is that the well-being of third-country nationals accessing work in the EU is to be assessed in the light of a perfectionist conception of well-being, namely, the ideal of freedom as non-domination; and the core rights at play are the rights to work and to equal treatment.

Part II constitutes the practical application of the theoretical insights developed in Part I. Part II addresses the question, what are the current measures of the European Union in this area; and to what extent are these measures consistent with the theoretical underpinnings of this area? Chapter 5 considers the external dimension of the relationship between neorepublicanism, work and EU law through an analysis of the recognition of qualifications when third-country nationals first move to the Single Market. It does so by analysing the EU's external relations: its migration and asylum law, its external relations law and measures specifically targeted at third-country nationals to facilitate their integration into the EU. Chapter 6 considers one way to improve the recognition of qualifications when third-country nationals first come to the EU through an analysis of the operation and workings of qualification recognition in the medical



profession in Ireland and the UK. Finally, chapter 7 considers the circumstances in which third-country nationals can have their qualifications recognised when moving within the EU. In the light of this analysis, my response to the second sub-question is that there is a gap, neither hugely substantial nor entirely inconsequential, between theory and practice; much remains to be achieved.

The concluding chapter reflects on and critiques the theoretical claims relied on in this thesis and identifies some potential future research agendas necessary to concretise the conclusions made herein.

## **Conclusion**

This chapter has highlighted the increasingly prominent role which skills play in the policies of the European Union, particularly as they relate to third-country nationals, and some empirical evidence identifying some of the problems third-country nationals habitually experience in accessing the EU's labour market. On the basis of this background, the central research question which this thesis investigates has been outlined. That question, as stated in section II.A, is the extent to which the EU guarantees the well-being of third-country nationals accessing work in the EU, with a particular focus on skills' recognition and freedom from discrimination as aspects of their well-being in accessing work in the EU. In the light of this question, this chapter outlined the various contributions to scholarship which this thesis shall make. The remainder of this thesis constitutes these contributions. This chapter has also highlighted the diverse sources of regulation which shall be drawn on in this thesis. It has discussed the importance of governance as a theme concerning the recognition of the skills of third-country nationals in the EU. It outlined the structure of the thesis to guide the reader in what is to come. Accordingly, it is now time to commence the response to the questions which this thesis seeks to answer.

## PART I: THEORETICAL FOUNDATIONS

This thesis is ultimately concerned with people's well-being. The hallmark of well-being is freedom of choice. People use their skills to freely make choices which affect their well-being. One such choice is to work. Work therefore contributes to the quality of peoples' lives.

There is a particular aspect of well-being which has attracted significant attention in recent years. It is the neorepublican ideal of freedom as non-domination which emphasises freedom of choice in the absence of arbitrary power through ensuring that society is comprehensively justice, namely, that a political community is socially just and politically legitimate. Given that work does contribute to people's well-being, the regulation of work may be possible in the light of a commitment to justice. In other words, it ought to be possible to provide a neorepublican justification of at least part of labour law.

People's well-being has traditionally been guaranteed in political communities. The relevant political community this thesis is concerned with is the EU. The EU is not a political community in the traditional sense insofar as it is not a state. But, given that the EU is somewhat state-like and aspires, to some extent, to be like a traditional political community, it is possible to theorise and critique it in the light of a model of

statehood. Applying contemporary neorepublican political theory to the EU suggests that while the regulation of employment and labour relations is underway, same is only partially justified given that the EU does not currently secure socially just relations for its citizens. Nonetheless, it is possible to justify at least some employment and labour laws, such as the right to work.

The right to work is recognised as a fundamental right in international, European and EU law. One of the most important dimensions of the right to work is its facilitation of access to work. It should therefore be understood as being of foundational significance for third-country nationals seeking to access work in the EU. However, crucially, their right to work is generally contingent on their right to equal treatment or non-discrimination with member state nationals on the ground of nationality.

Given the domination third-country nationals experience in the form of discrimination, third-country nationals should generally be entitled to equal treatment with member state nationals on the ground of nationality. This theoretical view generally finds support in international and European law. EU law does not currently cohere with the requirements of international and European law in this respect. There are some good reasons—legal doctrinal, neorepublican, conceptual and sociological—which suggest a change is necessary. In other words, third-country nationals should generally be entitled to equal treatment with member state nationals as a matter of EU law.

# **1. Well-Being, Skills and Work**

## **Introduction**

This chapter commences the answer to the first sub-question which this thesis addresses, viz, according to what theory shall the well-being of third-country nationals accessing work in the EU be assessed? Specifically, this chapter addresses the meaning of well-being, skills and work. It does so by outlining certain elements of value theory presupposed by one version of contemporary neorepublican normative political theory. It is necessary to outline what is meant by 'value theory' and 'normative theory' in this context. There are many ways to categorise the constituent elements of practical philosophy. One way is to distinguish between the sort of practical problems to be analysed, namely: value theory, which is concerned with what is good or bad for people; normative theory, which is concerned with what people ought to do and presupposes some elements of value theory; and ascriptive theory, which is concerned with the conditions in which blame or guilt can be ascribed

to people.<sup>1</sup> For the purposes of this thesis, only elements of the former two shall be considered.

This chapter is structured as follows. It first analyses, in outline, the nature of well-being. The point to be made is that this thesis is ultimately concerned with the quality of people's lives (section I.A). It then considers a particular aspect of the concept of well-being already delineated, namely, that of freedom of choice (section I.B). The net point to be made is that freedom of choice is an important aspect of well-being and the primary dimension of well-being which this thesis focuses on. The chapter then considers how people exercise their freedom of choice by analysing one part of their capacity for freedom of choice, namely, their skills (section II). The discussion of skills is interdisciplinary but remains partial; a full and completely interdisciplinary discussion of the concept of skills across the social and natural sciences requires further analysis. Nonetheless, it is possible to say that by using one's skills, one constitutes one's autonomy in both economic and philosophical terms: philosophically, because we use our skills in carving out our own conception of the good life; and economically, because skills ground productive activity. Finally, this chapter considers the link between well-being, skills and work (section III). For if work requires the use of our skills and thereby constitutes an exercise of people's freedom of choice, then neorepublican normative political theory may presuppose the value of work and require the regulation thereof to secure people's well-being. A short conclusion follows.

## I. Well-Being

### A. What is Well-Being?

In practical thought, we are often concerned with the quality of people's lives, people's welfare or how well people's lives goes. Well-being is the measure of the success of a person's life and as a theorist this is the author's ultimate concern. When we determine

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<sup>1</sup> Joseph Raz, *Practical Reason and Norms* (Revised edition, OUP 1999) 11-12. On the distinction between value theory and normative theory, see further Michael Zimmerman, 'Value and Normativity' in Iwao Hirose and Jonas Olson (eds), *The Oxford Handbook of Value Theory* (OUP 2015).

a person's well-being, we determine how successful their life, in whole or in part, is, has been or will be. There are many different concepts of well-being—philosophical, economical, psychological and so on.<sup>2</sup> The focus of this thesis is on one philosophical concept of well-being.<sup>3</sup> Within the philosophy of well-being, there are, once again, numerous measures of the quality of people's lives. The standard taxonomy of such philosophical measures is provided by the philosopher Derek Parfit:

“On *Hedonistic Theories*, what would be best for someone is what would make his life happiest. On *Desire-Fulfilment Theories*, what would be best for someone is what, throughout his life, would best fulfil his desires. On *Objective List Theories*, certain things are good or bad for us, whether or not we want to have the good things, or to avoid the bad things.”<sup>4</sup>

Of these possible philosophical measures of well-being, this thesis develops an objective list theory. Objective list theories are also known as perfectionist theories of well-being: they rely on an account of human flourishing which is based on an objective account of the human good.<sup>5</sup> More specifically, this thesis will focus on one good amongst a range of goods which makes up a broader list of objective or basic goods constitutive of well-being, namely that of work. What follows in this chapter should accordingly be read as being very narrowly concerned with only one good amongst a much wider range of objective goods constitutive of people's well-being.

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<sup>2</sup> A helpful overview is provided in Matthew Adler and Marc Fleurbaey (eds), *The Oxford Handbook of Well-Being and Public Policy* (OUP 2016) part III and Kathleen Galvin (ed), *The Routledge Handbook of Well-Being* (Routledge 2018).

<sup>3</sup> There is a vast literature on the philosophy of well-being more generally: see, inter alia, James Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (OUP 1988); Richard Kraut, *What is Good and Why: The Ethics of Well-Being* (HUP 2009); Guy Fletcher, *The Philosophy of Well-Being: An Introduction* (Routledge 2016); and Guy Fletcher (ed), *The Routledge Handbook of Philosophy of Well-Being* (Routledge 2016).

<sup>4</sup> Derek Parfit, *Reasons and Persons* (OUP 1984) Appendix I (emphasis as original). Cf Samuel Clark, 'Philosophical Taxonomies of Well-Being' in *The Routledge Handbook of Well-Being* (n 2).

<sup>5</sup> Thomas Hurka, *Perfectionism* (OUP 1993); *The Philosophy of Well-Being: An Introduction* (n 3) ch 4; and Gwen Bradford, 'Perfectionism' in *The Routledge Handbook of Philosophy of Well-Being* (n 3).

## B. An Important Element of Well-Being: Freedom of Choice

While our well-being is determined by our participation in a range of objective goods or options, there is a particular aspect of the concept of well-being already delineated which stands out, namely that of free choice of options. According to this aspect of the concept of well-being outlined, the autonomous or free person is (part) author of their own life. Autonomy or freedom (for the purposes of this narrow point, the two are interchangeable) is an ideal of self-creation. In aiming at the good, pursuing goals, relationships and activities which contribute to one's own conception of the good life, '[o]ne creates values, generates, through one's developing commitments and pursuits, reasons which transcend the reasons one had for undertaking one's commitments and pursuits. In that way a person's life is (in part) of his own making'.<sup>6</sup> In other words, being able to freely make choices from a range of options is an important constituent element of personal well-being. That is not to say that assessing the extent to which a person's freedom of choice over a range of options is guaranteed is the sole measure of well-being, but it is one of the most important elements of the assessment of a person's quality of life and, for the purposes of this thesis, freedom of choice in and through one's work is the aspect of well-being which will be focused on hereinafter.

There are many conceptions of freedom of choice as an aspect of well-being and much of the history of normative political theory has been concerned with identifying the circumstances in which a person's freedom of choice was hindered and their well-being, consequently, negatively affected. Given that this chapter's focus is on value theory rather than normative theory, it is unnecessary and even confusing to dwell on this point for too long. It nonetheless merits noting summarily that neorepublicans advocate a broad conception of freedom of choice, that of republican freedom or 'freedom as non-domination'. What makes freedom as non-domination so valuable is that merely being subject to the will of another—another person's arbitrary power of interference—is sufficient to constitute a hindrance to one's freedom of choice. The threshold definition of a hindrance is, therefore, very low, meaning that

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<sup>6</sup> Joseph Raz, *The Morality of Freedom* (OUOP 1986) 387. Cf Ruth Chang, 'Voluntarist Reasons and the Sources of Normativity' in David Sobel and Steven Wall (eds), *Practical Reason* (CUP 2009) 247.

one's freedom of choice must be guaranteed to a high degree.

Now, it is important to recall that the conception of well-being relied on in this thesis is a perfectionist one: it holds that the quality of a person's life must be assessed from an objective viewpoint. But this perfectionist account is not an unconstrained one. For one, it recognises that an important element of this concept of well-being is freedom of choice. The account accordingly holds that the objective good is itself pluralistic. While this does not mean that a person may make choices in a completely unconstrained manner, what it does mean is that people should be able to avail of a wide range of valuable options which exemplify different virtues and are themselves incommensurably good. Given that this thesis advances an objective list theory of well-being, it acknowledges that there are a range of incommensurable objective goods participation in which constitutes one's well-being,<sup>7</sup> work being merely one such good. Finally, it is necessary to clarify that not all of conceptions of freedom of choice are themselves perfectionistic. However, as it happens, the ideal of freedom as non-domination, the conception of freedom relied on in this thesis, is indeed perfectionistic.<sup>8</sup>

How, then, do we exercise our freedom of choice over a range of options? How do we make choices that affect our well-being? How do we choose and pursue objective goods? Simply put, we must exercise our capacity for choice; and skills form part of our capacity for choice.<sup>9</sup>

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<sup>7</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 93-95 raises similar points about the perfectionism of an autonomy-based conception of well-being.

<sup>8</sup> The justification of this understanding of neorepublican freedom is provided by Frank Lovett and Greg Whitfield, 'Republicanism, Perfectionism and Neutrality' (2016) 24 *Journal of Political Philosophy* 120.

<sup>9</sup> In *The Morality of Freedom* (n 6) 408, Raz notes that 'health, physical abilities and skills' are among the conditions necessary for the realisation of autonomy in one's life.



## II. Skills

### A. Competing Conceptions of Skills

Skills have been conceptualised in the disciplines of economics, sociology and psychology in the following manner.<sup>10</sup>

#### 1. Economics

The classical understanding of skills in economics views them as a key part of human capital. The notion of human capital should evoke two ideas: that

“the capabilities of the workers are critical inputs into production, and that resources spent on education, training, team-building and other forms of ‘human capital investment’ can be analysed and understood in a way similar to the way economists and social scientists understand investments in physical capital, such as factories and equipment.”<sup>11</sup>

According to this perspective, skills are viewed as a ground of exploitation for the purposes of maximising productive efficiency in the market. This approach views skills and humans as no more than factors of production or commodities, to be developed and exchanged on the market. Indeed, on this view, only those skills which are capable of exploitation for the purposes of productive efficiency are of value, thus diminishing the ostensible value of other skills which may be less productive, or less socially valuable.

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<sup>10</sup> Stephen Peter Vallas, ‘The Concept of Skill: A Critical Review’ (1990) 17 *Work and Occupations* 379; Kenneth Spenner, ‘Skill: Meaning, Methods and Measures’ (1990) 17 *Work and Occupations* 399; Paul Attewell, ‘What is Skill?’ (1990) 17 *Work and Occupations* 422; Francis Green, *Skills and Skilled Work: An Economic and Social Analysis* (OUP 2013); and Francis Green, ‘What is Skill? An Inter-Disciplinary Synthesis’ (LLAKES Research Paper 20).

<sup>11</sup> Margaret Blair, ‘An Economic Perspective on the Notion of ‘Human Capital’ in Alan Burton-Jones and J-C Spender (eds), *The Oxford Handbook of Human Capital* (OUP 2011) 49. See further Garry Becker, *Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education* (Columbia University Press 1964).

## 2. Sociology

Sociologists consider skills as part of the labour process arising from job complexity. On this view, the more complex the task, the greater the skill involved. In general, the sociological understanding emphasises the socially constructed nature of skills in and through the workplace. In his review of different sociological approaches to skill, Paul Attewell considers four approaches: positivism; ethnomethodological; Weberian; and Marxist.<sup>12</sup> The first of these, positivism, understands skills as an objective attribute of jobs rather than of persons that can be measured and quantified. This approach is most similar to the economic approach noted above but is not necessarily limited to those skills which are developed for market exchange. One example of the way in which such skills can be measured is provided by the US Department of Labour's Dictionary of Occupational Titles ('DOT'),<sup>13</sup> which assesses the complexity of jobs through rating dozens of attributes of jobs. This approach, however, is not without problems. The use of the DOT has resulted in unsystematic and unreliable skill ratings, primarily due to a lack of resources. Moreover, rendering many different types of qualitatively different tasks commensurable may not be possible, because some tasks are simply incommensurable or, even if commensurable in principle, require the use of highly abstract categorisations.<sup>14</sup>

Ethnomethodological approaches suggest that all human activity is quite complex and necessarily involves a high degree of skill. Even the most basic motor tasks, such as walking and carrying out a conversation, are considered skilful accomplishments. This approach has perhaps the closest link with a biological approach to skills and is thus, to a significant extent, based on a concern with a person's actual mental or physical capacities.<sup>15</sup> On this perspective, for an activity to be skilled, it needs to be something which we have not done before or involves a challenge to our

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<sup>12</sup> 'What is Skill?' (n 10).

<sup>13</sup> US Department of Labour, 'Dictionary of Occupational Titles' <<https://occupationalinfo.org>> (accessed 9 January 2019).

<sup>14</sup> 'What is Skill?' (n 10).

<sup>15</sup> See, eg, Thomas Boraud, Arthur Leblois and Nicolas Rougier, 'A Natural History of Skills' (2018) 171 *Progress in Neurobiology* 114; W Joel Schneider and Daniel A Newman, 'Intelligence is multidimensional: Theoretical review and implications of specific cognitive abilities' (2015) 25 *Human Resource Management Review* 12.

capacities. Unskilled tasks are, by contrast, those which have become routine to us.

The third, Weberian approach understands skills as largely socially constructed notions, not necessarily involving greater effort or skill but, rather, attracting a certain level of social value. Examples of skilled tasks may therefore be the self-regulated professions. As Attewell notes, some occupations remove themselves from conventional market forces through 'social closure' by restricting access to and exercise of a profession to a limited number of people. Finally, the Marxist approach also focuses, to a large extent, on the social construction of skill. One commentator, for example, identified several factors by which 'labour aristocrats' (often, members of the self-regulated professions) maintain their 'skilled' status: (a) control over the work process; (b) skill in the sense of qualification for work that could only be acquired by long training; (c) demand and supply of labour; and (d) bargaining strength and solidarity.<sup>16</sup>

One difference, however, between the Weberian and Marxist approaches is the role which 'deskilling' or alienation plays in Marxist and neo-Marxist analyses. Perhaps the most famous neo-Marxist account of 'deskilling' is that of Harry Braverman.<sup>17</sup> According to Braverman, contrary to the conventional economic approach, educational attainment tells one little about the skill demands of work. For Braverman, skilled work was paradigmatically captured in that of craft work<sup>18</sup> which was largely displaced during the industrial revolution. What largely replaced craft work and guilds were a combination of self-regulated professions and mass labour involved in largely low-skilled work in factories. For both Karl Marx and Braverman, loss of control over one's work was central to this process. A craft worker has significant control over the organisation and nature of his work; by contrast, factory workers and machine operators are forced to adopt programmatic procedures to operate their machines and become little more than appendages to their machines.<sup>19</sup>

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<sup>16</sup> Eric Hobsbawm, *Workers: Worlds of Labour* (Pantheon 1984) ch 13.

<sup>17</sup> Harry Braverman, *Labour and Monopoly Capital* (Monthly Review Press 1974). Most helpful is Peter Sawchuk, 'Use-Value' and the Re-thinking of Skills, Learning and the Labour Process' (2006) 48 *Journal of Industrial Relations* 593.

<sup>18</sup> DJ Lee, 'Skill, Craft and Class: A Theoretical Critique and a Critical Case' (1981) 15 *Sociology* 56.

<sup>19</sup> See, eg, Paul Adler, 'Marx, Machines and Skill' (1990) 31 *Technology and Culture* 780.

### 3. Psychology

Finally, the psychological approach to skills emphasises the nature of learning in the skills process. In contemporary occupational psychology, the equivalent notion is that of 'competency'. A competency is the ability to successfully perform a range of tasks to a high level of performance. While the psychological approach does take into account the socially constructed nature of skills, unlike sociological approaches, the focus is not on job- or task-complexity. Rather, what is important is the development of an inherent ability of competence in a social environment. Learning theory is a necessary complement to the psychological approach, which seeks to understand and improve learning so that people can become skilled.<sup>20</sup>

#### B. The Concept of Skills

Reflecting on these contrasting approaches, economist Francis Green advocates the following functional concept of skill. Drawing on aspects of all three approaches, Green advocates what he calls the 'PES' approach to skills, namely,

Productive: using skills at work are productive of value;

Expandable: skills are enhanced by training and development; and

Social: skills are socially determined.<sup>21</sup>

As Green notes, not all qualities are included by this concept. For example, the focus on productive activity at work suggests that only those skills which are most amenable to economic development are relevant, excluding other qualities such as domestic work or leisure time.<sup>22</sup> Two other aspects stand out. First, skills are only those qualities which can be enhanced. This need not be a conscious effort, but the quality in question must be amenable to improvement in some way. Second, the social

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<sup>20</sup> Jane Bryson, 'Disciplinary Perspectives on Skill' in Christ Warhurst, Ken Mayhew, David Finegold and John Buchanan (eds), *The Oxford Handbook of Skills and Training* (OUP 2017) 30.

<sup>21</sup> *Skills and Skilled Work* (n 10) 10-11; and 'What is Skill? An Inter-Disciplinary Synthesis' (n 10).

<sup>22</sup> *Skills and Skilled Work* (n 10) 11.

determination of skills draws on the sociological and psychological approaches noted above. The benefits of this approach are clear enough: it provides a general account of skills at an abstract level and synthesises the key elements of the dominant accounts in economics, sociology and psychology, adopting those parts which seem most accurate and jettisoning those which do not appeal to our intuitions.

However, Green's approach could be improved in two ways. First, it is unclear why he does not incorporate activities which are not 'productive at work'. For there are many activities one undertakes outside of the workplace which are skilled and which merit analysis as skilled activities. Most oddly, Green expressly excludes perhaps the most obvious of these: domestic work, care work and voluntary work. Such forms of work are all forms of labour that create value which, although not always commodified, are nonetheless of great social value and often of significant, albeit indirect, economic value.<sup>23</sup> A second criticism is Green's suggestion that skills are socially determined. While it is clear that at least part, if not the major part, of skills are socially determined, there is a vital element of skills which are not. Drawing on the psychological approach, that is the inherent or intrinsic element of a skill—the capacity which is to be developed. Each person's mental and physical capacities differ significantly and while each is in part amenable to social determination, a significant aspect of each is determined solely by the limits of each person's own abilities. The person who is unable to walk cannot (yet) walk by social construction, but the way that person's capacity to walk is construed, and the extent to which any such inhibition to that capacity affects that person's goals, ambitions and pursuits—their well-being—is largely socially constructed.<sup>24</sup>

Accordingly, some revisions to Green's approach are necessary. The revisions suggested distinguish between two elements of skills. The first is the internal dimension—that inherent capacity a person has. The second part is the external dimension—the part which is developed and determined socially. I, therefore, define 'skills' as any (internal) capacity capable of (external) development and enhancement. The implications of this approach are borne out in some examples. A good operatic

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<sup>23</sup> Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000) ch 1 and 3.

<sup>24</sup> Cf the approach in disability studies: Tom Shakespeare, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014) ch 2.

soprano not only has innate physical characteristics which are amenable to singing at certain tones, hitting certain notes, etc; the soprano is also a good student of music, able to learn and internalise, whether consciously or not, the norms appropriate to their discipline and has the opportunities to do so. The good orator, too, shall have not only the (largely) natural capacity to speak clearly and eloquently, but has also learned and internalised, through socialisation, the norms appropriate to being a good public speaker. The use of one's skills involves adoption of correlative goals, pursuits and activities which involve the use of such skills and thereby contributes to one's well-being.

The advantages of this approach are several. First, it appeals to our intuitions about skills by striking a middle path between approaches which suggest that skills are entirely biologically constructed and those which hold that skills are solely socially constructed. Second, unlike Green's approach, it is broad enough to encompass all forms of skill, whether they are currently valued in money or not. Third, it permits and provides for different valuable forms of life.<sup>25</sup> 'Valuable' here is important. One may be an excellent gambler or murderer, and while that would be skilled, it would not be constitutive of a person's well-being. One's autonomy is only valuable if it is used for valuable ends;<sup>26</sup> so too with one's capacity for autonomy. Fourth, the fact that the list is open rather than closed also permits for evolution. It recognises that some skills will go in and out of fashion, some forms and ways of life and human flourishing will last; others will not.<sup>27</sup> Finally, it is necessary to reiterate that the concept of skills as here delineated is partial and incomplete; a completely interdisciplinary analysis, which also takes into account conceptions of skills in the natural sciences, remains to be completed.

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<sup>25</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Revised edition, OUP 1994) ch 1.

<sup>26</sup> *The Morality of Freedom* (n 6) 390-395.

<sup>27</sup> In *The Morality of Freedom* (n 6) 369-370, Raz observes that the ideal of personal autonomy is well-suited to our age, where we need 'an ability to cope with changing technological, economic and social conditions, for an ability to adjust, to acquire new skills, to move from one subculture to another, to come to terms with new scientific and moral views'.

## III. Work

### A. Overview

It was earlier noted that freedom of choice over a range of objective goods is the hallmark of well-being. This thesis' primary focus is on work as an objective human good which is constitutive of people's well-being. Accordingly, it is necessary to define work and to identify how and to what extent it contributes to our well-being.

### B. Two Concepts of Work

Defining work is a Herculean task and certainly cannot be adequately or fully addressed in a short section of a doctoral thesis.<sup>28</sup> But some rudimentary remarks for the purposes of the argument here developed can be made. A first point to note is that seeking to define what work is by conceptual stipulation would probably be otiose in this context.<sup>29</sup> It is better to define work by reference to existing cultural understandings, allowing for development and change in our understanding of the concept. The legal and political philosopher James Nickel offers two such definitions, one broad and one narrow.<sup>30</sup> According to the former, work is 'productive activity requiring effort'.<sup>31</sup> Nickel suggests that this could involve almost anything, from the work of householders and family members, to growing one's vegetables in a garden allotment or even more conventional forms of paid labour. By contrast, on the latter account, work occurs within, 'some organised form of production [which is] oriented towards generating income and making a living'.<sup>32</sup> Both the broad and narrow accounts of work have their

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<sup>28</sup> On the philosophy of work generally, see, inter alia, Henri Arvon, *La philosophie du travail* (Presses universitaires de France 1961); Lars Svendsen, *Work* (2nd edn, Routledge 2016); and the articles in (2016) 70 *Revue Internationale de Philosophie* 429-534.

<sup>29</sup> Take the example of Herbert Applebaum, who merely enumerates a series of examples of what 'productivity' involves: Herbert Applebaum, *The Concept of Work: Ancient, Medieval and Modern* (SUNY Press 1992) ch 20.

<sup>30</sup> James Nickel, 'Is there a Human Right to Employment?' (1978-1979) 10 *Philosophical Forum* 149, 158-159; and James Nickel, 'Giving up on the Human Right to Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014) 138.

<sup>31</sup> 'Giving up on the Human Right to Work' (n 33) 138.

<sup>32</sup> *ibid.*

own problems. On the broad account, we may have trouble finding reasons to reject certain categories of work as worthy of social, moral or legal protection and recognition; while, on the narrow account, we might find its categorisation discriminatory as against other legitimate forms of labour. Perhaps most significantly, care work could not easily be included on the narrow account.<sup>33</sup> Both definitions, then, have their problems; so, which one should we adopt?

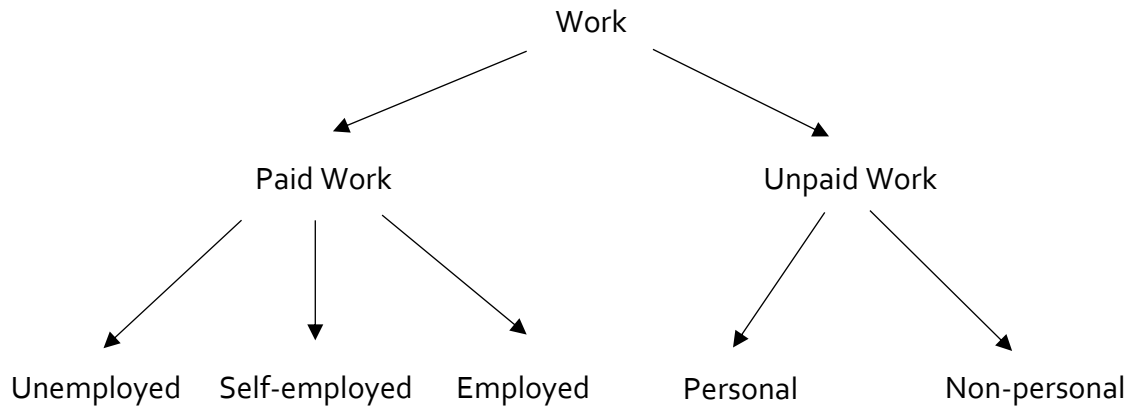
### **C. The Concept of Work**

In my view, Nickel's broad definition of work is a helpful starting point for several reasons. First, productivity is an activity we frequently engage in; it is perhaps the primary way of pursuing and achieving our goals; and it is an important way of using our skills, as defined in the previous section. Work, in other words, entails using our skills for productive activity. It need not be economically valuable although, even if presently unpaid, it often is of significant, albeit indirect, economic value. Second, the broad definition logically entails the narrow. By adopting the broad definition, then, we can avoid excluding forms of work which we may want to protect. As noted in the opening chapter of this thesis (section I.E), given that third-country nationals mainly come to the EU for family reasons, it is important to take into account the possibility of care work in our definition. A final and related point to note is the vagueness of the definition. I am here articulating one particular goal of labour law, namely the regulation of the activity of work, at an exceptionally abstract level. The definition of work is, therefore, going to be very vague. However, this vagueness can be alleviated in two ways. First, by referring to an existing cultural understanding of productivity, we can debate the contours of what is or should count as work and whether certain forms of work should or should not be paid. Second, I propose that we adopt the following distinctions as helpful heuristics for the purposes of this thesis to provide some greater clarity in distinguishing different types of work.

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<sup>33</sup> Nicola Busby, *A Right to Care? Unpaid Work in European Employment Law* (OUP 2011).





Some explanation of these distinctions is warranted. Paid work primarily entails the narrow definition of work, namely working for a living. Paid work thus appeals to our contemporary understanding of work in the paid labour market. Within the paid labour market, we can broadly distinguish between those who are self-employed, those who are employed, and those who are unemployed. I include those who are unemployed because, in most cases, unemployed people are now commonly assumed to be (paid) 'job-seekers' and may have certain social welfare entitlements which provide them with the most basic means for survival.<sup>34</sup> There may be some overlap between the unemployed and those undertaking unpaid work but I do not explore that here. These distinctions may seem sharp and clear-cut as stated here. However, there is a rich literature on further distinctions which can be drawn between, for example, full-time and part-time workers, the extent to which personal service is required of the individual, the precariousness of the relationship and the extent of economic dependency on another (eg, an employer). Accordingly, I defer to the academic authorities on those matters.<sup>35</sup>

The distinction drawn in respect of unpaid work correlates with that of paid work, namely, work which is not remunerated.<sup>36</sup> I further distinguish between personal and non-personal unpaid work to refine Nickel's broad conception. Accordingly,

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<sup>34</sup> Tom Boland, 'Seeking a Role: Disciplining Jobseekers as Actors in the Labour Market' (2017) 30 WES 334.

<sup>35</sup> Paul Davies and Mark Freedland, 'Employees, Workers and the Autonomy of Labour Law' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000); Mark Freedland, *The Personal Employment Contract* (OUP 2003); Mark Freedland and Nicola Countouris, *The Legal Construction of Personal Work Relations* (OUP 2011); and Jeremias Prassl, *The Concept of the Employer* (OUP 2016).

<sup>36</sup> For a helpful overview, see Stephen Edgell, Heidi Gottfried and Edward Granter (eds), *The SAGE Handbook of the Sociology of Work and Employment* (SAGE Publications 2016) part V.

personal unpaid work includes, as Nickel suggests, an arduous afternoon cultivating one's flowerbeds.<sup>37</sup> By contrast, non-personal unpaid work includes work which is, factually, for the benefit of another.<sup>38</sup> This would, obviously, capture much unpaid care work, but it would also include much volunteer work and so-called 'unfree' labour, such as forms of modern slavery.

Another question concerns the utility of the distinctions drawn between paid and unpaid work. Is it implicit in these distinctions that unpaid work should be converted into paid work? In general, the answer is no. However, the broad unitary concept of work does have two dimensions of relevance to that question. It is, firstly, descriptive in the sense that it attempts to provide an overarching and general definition—the productive use of one's skills—which accurately reflects and responds to our intuitions about work in the real world. Second, it may have normative implications for the organisation and regulation of work. Drawing and using these distinctions may provide some people with grounds for claiming that their work should be protected differently. For example, in respect of unpaid work in general, as economic and social historian Andrea Komlosy notes, whether it should or could be commodified, ie, converted into paid work, is very much open to question.<sup>39</sup>

#### **D. The Good of Work and the Need for Labour Law**

It is fair to say that paid work has been the primary concern of labour law academics to date. Furthermore, their focus has not so much been on the activity of work but rather on the relational nature of that activity. In their leading contribution to employment law scholarship, for example, Mark Freedland and Nicola Countouris begin by seeking to first 'identify a domain or sphere of operation for labour law (...) and regulate the relations which exist within that domain'.<sup>40</sup> Given their focus on the relational nature of

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<sup>37</sup> See also *The Concept of Work* (n 33) ch 20 who offers ironing as a candidate for work.

<sup>38</sup> I add the caveat 'factually' because, normatively and psychologically, the unpaid non-personal worker may, to the extent measurable, benefit greatly from the work, perhaps more so than the person for whom the unpaid non-personal work is undertaken.

<sup>39</sup> Andrea Komlosy, *Work: The Last 1,000 Years* (Verso Books 2018) ch 4 distinguishes between work frameworks, conceptually paid categories of labour relations, grey areas at the intersection of work and non-work and work across regions and categories.

<sup>40</sup> *The Legal Construction of Personal Work Relations* (n 39) 11.

work, Freedland and Countouris accordingly go on to hold that a dictionary definition of work should suffice to justify what they describe as the 'legal construction of personal work relations'.<sup>41</sup> Similarly, Alan Bogg argues that viewing work as an activity or 'basic good' is deficient because it overlooks the relational nature of labour law.<sup>42</sup>

These reflections by some of the field's leading labour law scholars at first glance seem very fair. However, from the perspective of this thesis, they are somewhat objectionable. First, as was made clear in the opening chapter of this thesis, third-country nationals face serious obstacles to their flourishing, primarily in the form of wrongful discrimination in recruitment processes and inadequate skills' recognition. These wrongs affect their ability to access or participate in the activity of work. To put the point another way, these wrongs are temporally and logically prior to wrongs which occur within the employment relationship. The remedial response to these wrongs, therefore, requires the articulation of the goals of labour law at a more abstract level than is usually the case because I am here primarily concerned with hindrances to people's access to the activity of work rather than problems arising within relationships once people have access to work.<sup>43</sup>

Second and relatedly, given that I am ultimately concerned with people's well-being at work and the problems which third-country nationals habitually face in relation thereto, it is appropriate that I consider work qua activity, which may be constitutive of people's well-being. But does work contribute to people's well-being? Definitionally, it must: work involves the productive use of our skills—the use of our capacity for freedom of choice. An exercise of one's autonomy must, by definition, contribute to our well-being. Moreover, in contemporary capitalist culture work is increasingly viewed as a facilitator and source of autonomy, innovation and creativity.<sup>44</sup> But what more can we say of the relationship between work and well-

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<sup>41</sup> *ibid* 32.

<sup>42</sup> Alan Bogg, 'Labour, Love and Futility: Philosophical Reflections on Labour Law' (2017) 33 *IJLLIR* 7.

<sup>43</sup> Cf Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) ch 4 who identifies the goals of democracy, redistribution, human rights/dignity, social inclusion/citizenship, stability/security, efficiency, human freedom and capabilities and emancipation/social equality as some of the goals of labour law.

<sup>44</sup> This point is well made by Robert Salais, 'Freedom in Work and the Capability Approach: Towards a Politics of Freedom for Labour?' in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 319-324 and Antonio Aloisi and Valerio de Stefano, 'Regulation and the Future of Work: The Employment Relationship as an Innovation Facilitator' (2020) 150 *Int'l Lab Rev* 47.

being? As Hugh Collins notes, 'work (...) provides people with a principal source of meaning in their lives. A job usually occupies a large proportion of the day. Through their work people seek personal fulfilment, and through participation in a workplace they obtain entry into a social community'.<sup>45</sup> Indeed, work is generally a means and/or an end to well-being.<sup>46</sup> For some people, undertaking paid work provides them with the means for their survival and facilitates their flourishing. Work is, in other words, nothing more than a means to an end. For example, I do not enjoy teaching, but it does provide me with the means to purchase and read additional books, a goal in the form of a pastime which is constitutive of my well-being. Others often achieve their goals in and through their work. For them, work is an end in itself. For example, I am writing this chapter as part of a thesis because it will help me to obtain a doctorate, which forms part of my career goals that are of central importance to my own understanding of how well my life goes.

Third and finally, if work does contribute to people's quality of life, as I have just suggested it does, then it may be possible to provide at least a partial theoretical justification for the regulation of the activity of work in virtue of the fact that neorepublican normative political theory entails a commitment to social justice and political legitimacy. Accordingly, it is to this possibility I now turn in my application of neorepublican political theory to people at work in the EU.

## Conclusion

This short chapter has addressed the first sub-question which constitutes part of the answer to my central research question, viz, according to what theory shall the well-

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<sup>45</sup> Hugh Collins, *Employment Law* (2nd edn, OUP 2010) 4. On meaningful work, see, inter alia, Adina Schwartz, 'Meaningful Work' (1982) 92 *Ethics* 634; Richard Arneson, 'Meaningful Work and Market Socialism' (1987) 97 *Ethics* 517; John Rawls, *A Theory of Justice* (Revised edition, HUP 1999) 257, 258, 373 and 464; Beate Roessler, 'Meaningful Work: Arguments from Autonomy' (2012) 20 *Journal of Political Philosophy* 71; Ruth Yeoman, *Meaningful Work and Workplace Democracy: A Philosophy of Work and a Politics of Meaningfulness* (Palgrave Macmillan 2014); *Work* (n 38) ch 2; Anca Gheaus and Lisa Herzog, 'The Goods of Work (Other Than Money!)' (2016) 47 *Journal of Social Philosophy* 70; Andrea Veltman, *Meaningful Work* (OUP 2016); and Ruth Yeoman, Catherine Bailey, Adrian Madden and Marc Thompson (eds), *The Oxford Handbook of Meaningful Work* (OUP 2019).

<sup>46</sup> This point is well made by Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 175.

being of third-country nationals be assessed? In responding to this question, my analysis of well-being, skills and work has led to a number of important conclusions.

First, I grounded the thesis in a perfectionist account well-being. The hallmark of that concept of well-being is freedom of choice over a range of options. I then acknowledged that skills contribute to people's capacity for autonomy. The use of people's skills contributes to their ability to carve out their own conception of the good. Third and finally, I made the link between well-being, skills and work. For if work, by definition, involves the use of one's skills, work is therefore an aspect of one's well-being. If that is true—if work is a basic good—then it may be possible to justify the regulation of work—ie, labour law—through a more general exploration of how to guarantee people's well-being in society. It is, accordingly, now necessary to consider how well-being may be guaranteed in society through a partial analysis of the application of neorepublican normative political theory to people at work in the EU.

## 2. Neorepublicanism, Work and the EU

### Introduction

The previous chapter outlined some of the value theoretic presuppositions of neorepublican normative political theory. In particular, it concluded by identifying work as a central aspect of people's well-being—a way of using one's skills to carve out one's own conception of the good. This chapter addresses the second sub-question this Part of the thesis investigates, namely, how to secure certain aspects of third-country nationals well-being in accessing work in the EU. Accordingly, this chapter undertakes a partial application of one version of neorepublican normative political theory of the EU, with a particular focus on access to work therein. The chapter is structured as follows.

Section I outlines part of one contemporary neorepublican theory. It begins by outlining a popular neorepublican aspect of well-being, namely that of freedom as non-domination. It then demonstrates, very much in part, how that ideal of freedom can be guaranteed in society through a neorepublican commitment to social justice. Section II explores the link between neorepublicanism and work with a view to providing at least

a partial neorepublican justification for the regulation of work. Section III then seeks to apply, in part, neorepublican political theory to the EU by considering the degree of fit between neorepublican political theory and the EU and pointing out some suggested future reforms. Finally, building on the links made between neorepublican political theory, work and the EU, section IV provides an outline of a partial neorepublican justification for some fundamental labour rights in the EU. A short conclusion follows.

## I. Neorepublicanism

### A. The Ideal of Freedom as Non-Domination

In the previous chapter, it was noted that freedom of choice over a range of objective goods is an important constituent element of the good life. For neorepublicans, there is a particular ideal of autonomous agency or freedom which should be guaranteed in society. It is the ideal of freedom as non-domination. Freedom as non-domination, 'neorepublican freedom' or 'republican freedom' is distinctive both historically and theoretically for a number of reasons, perhaps most importantly due to its focus on non-domination and communitarian social justice.<sup>1</sup> And there is one contemporary neorepublican political theorist, Philip Pettit, who has developed a rich vision of the demands of freedom as non-domination.<sup>2</sup> Throughout this thesis, I rely on Pettit's

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<sup>1</sup> The literature on neorepublicanism is broad and deep. See, inter alia, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997); Quentin Skinner, *Liberty Before Liberalism* (CUP 1998); Iseult Honohan, *Civic Republicanism* (Routledge 2002); Iseult Honohan and Jeremy Jennings (eds), *Republicanism in Theory and Practice* (Routledge 2006); Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2007); Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (OUP 2009); Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012); Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton and Co 2014); Barbara Buckinx, Jonathan Trejo-Mathys and Timothy Waligore (eds), *Domination and Global Political Justice: Conceptual, Historical, and Institutional Perspectives* (Routledge 2015); and Iseult Honohan and Marit Hovdal-Moan (eds), *Domination, Migration and Non-Citizens* (Routledge 2015).

<sup>2</sup> This section draws on Philip Pettit, 'Negative Liberty, Liberal and Republican' (1993) 1 *European Journal of Philosophy* 15; Philip Pettit, 'Liberalism and Republicanism' (1993) 28 *Australian Journal of Political Science* 162; Philip Pettit, 'Freedom as Antipower' (1996) 106 *Ethics* 576; *Republicanism* (n 1); Philip Pettit, 'Republican Political Theory' in Andrew Vincent (ed), *Political Theory: Tradition and Diversity* (CUP 1997); Philip Pettit, 'Free Persons and Free Choices' (2006) 28 *History of Political Thought* 709; Philip Pettit, 'The Determinacy of Republican Policy: A Reply to McMahon' (2006) 34 *Phil & Pub Aff* 275; Philip

neorepublicanism because, as will become clear presently, it is the most developed and comprehensive form of neorepublicanism to date. Furthermore, it is hoped that by relying on one theorist, a consistent neorepublican critique can be developed throughout the thesis, rather than simply drawing on different theorists as and when it suits. Finally, it should be made clear at the outset that Pettit's neorepublicanism spans across almost 30 years of scholarship. It would be pompous to think that a short chapter in a doctoral thesis could do full justice to Pettit's neorepublican canon. Accordingly, what follows is a very partial attempt to synthesise and consolidate the key elements of Pettit's neorepublicanism as relevant to ensuring aspects of justice for people accessing work in the EU.

In elaborating on the ideal of freedom as non-domination, Pettit first outlines what it is to have freedom of choice over a range of options, the sine qua non of people's well-being. According to Pettit, freedom of choice over a range of options necessitates objective and cognitive conditions: objective, in that it is objectively possible to make the choice; and cognitive, in that, according to one's own perceptions, it is possible to make the choice.<sup>3</sup> He then considers the types of restrictions on the options open to a person. Any factor that can reduce your freedom of choice is a hindrance to your freedom of choice. And there are two kinds of hindrances: generic/vitiative and specific/invasive. Generic/vitiative hindrances restrict your freedom in a choice generally; by contrast, specific/invasive hindrances restrict your freedom in a choice only in respect of the specific purpose of satisfying your will. Vitiating hindrances are therefore characterised by any factors 'that deprive you of resources required for freedom in [a] choice, or that limit the use to which you can put those resources, without imposing the will of another'.<sup>4</sup> Such resources may be personal (eg, illness,

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Pettit, 'Republican Freedom: Three Axioms, Four Theorems' in *Republicanism and Political Theory* (n 1); Philip Pettit, 'Freedom' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012); *On the People's Terms* (n 1); *Just Freedom* (n 1); Philip Pettit, 'On the People's Terms: A Reply to Four Critiques' (2015) 5 *Philosophy and Public Issues* (ns) 79; Philip Pettit, 'On the People's Terms: A reply to five critiques' (2015) 18 *Critical Review of International Social and Political Philosophy* 687; and Philip Pettit, 'On the People's Terms: A Reply to Bellamy, Levy and Lovett' (2016) 44 *Political Theory* 697. Specifically, this section draws heavily on the account provided in *On the People's Terms* given that it is the most detailed and most recent restatement of Pettit's freedom as non-domination.

<sup>3</sup> *On the People's Terms* (n 1) 26.

<sup>4</sup> *ibid* 39.



disability or lack of skills), natural (eg, environmental) or social (eg, aggregate consequences of independently motivated actions by others).

Specific/invasive hindrances, by contrast, constitute the imposition of the will of another; they 'compete with your will for control of what you do'.<sup>5</sup> Invasive hindrances are therefore considered to be particularly objectionable and significant because it 'is to be denied the very condition by which freedom is identified: to be thwarted in making the choice according to your will'.<sup>6</sup> Indeed, it is one thing to be subjected to the will of one's employer as mediated by and through employment law; it is quite another to be subject to the will of one's employer without limitation to their discretionary power. This is a point which the republican doctrine of freedom as non-domination highlights very well. The distinction and difference between vitiative and invasive hindrances is not, however, a rigid one. As Pettit notes,

"the way things are organised in a society may not be the work of will in a relevant sense and may not invade people's choices as such – it may be the unintended, aggregate consequences of how people are independently motivated to act – but it can impact on free choice in a way that is closely connected to invasion. It may constitute a structure or pattern that facilitates the invasion by some people of the choices available to others. It may amount to an indirect, structural form of invasion, we might even say, as distinct from the direct, personal form of invasion that it occasions."<sup>7</sup>

The two types of hindrances Pettit discusses correspond to two dimensions to freedom of choice: first, 'the freedom that goes with the unvitiative range of choices available'—what Pettit calls freedom of opportunity; and, second, 'the freedom that goes with not being invaded by others in the exercise of those choices'—the freedom of exercise or control.<sup>8</sup> To ensure freedom of choice over a range of options, both of these need to be secured; and invasive hindrances are particularly morally significant.

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<sup>5</sup> *ibid* 38-39.

<sup>6</sup> *ibid* 43.

<sup>7</sup> *ibid* 44.

<sup>8</sup> *ibid* 45.

Invasive hindrances come in two forms: they can be dominating or interfering. Interferences to one's freedom of choice come in a variety of kinds: they may involve the removal, replacement or misrepresentation (in the form of deception or manipulation) of one or more options which would otherwise be available to us.<sup>9</sup> To be dominated, however, merely involves being subjected to the will of another: it requires nothing more than that. It does not require interference; rather, it may simply involve invigilation or intimidation.<sup>10</sup> To give an example, while it may be more morally objectionable to be subject to a harsh master, a slave with a kind master nonetheless remains a slave, which is morally objectionable in and of itself and constitutes a paradigm form of domination.

Freedom, on Pettit's terms, is therefore very broad, transcending some traditional liberal positions on freedom, such as freedom as non-frustration as reflected in the work of Thomas Hobbes<sup>11</sup> and freedom as non-interference as reflected in the work of Isaiah Berlin.<sup>12</sup> It identifies issues which are consistent with a concern for freedom of choice through its identification of personal, social and environmental barriers to one's capacity for choice, the ability to exercise one's capacity for freedom of choice, the need for a range of options and the consequent freedom that comes with that same range.

So much for the particular ideal of freedom that should be secured in society; but how should it be secured? For Pettit, there are two dimensions to people's freedom as non-domination which political authorities governing political communities should develop.<sup>13</sup> The first, which shall be called the 'internal dimension', consists of a comprehensively just society—that is, a society which is socially just and politically legitimate.<sup>14</sup> Such comprehensive justice is a matter for the domestic affairs of a given

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<sup>9</sup> *ibid* 50-56.

<sup>10</sup> *ibid* 60-64.

<sup>11</sup> Thomas Hobbes, *Leviathan* (Hackett 1994) section 2.1.

<sup>12</sup> Isaiah Berlin, *Liberty* (OUP 1969).

<sup>13</sup> 'Freedom as non-domination matters, not just in the mutual relations of individuals, but in their relation to the state. And that freedom requires both the internal and external freedom of the people': Philip Pettit, 'The Globalised Republican Ideal' (2016) 9 *Global Justice* 47, 67.

<sup>14</sup> On comprehensive justice, see John Rawls, *A Theory of Justice* (HUP 1971); Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 *CLP* 59; and Philip Pettit, 'Justice: Social and Political' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy: Volume 1* (OUP 2015).

society. For present purposes, only the former element—the neorepublican requirements of social justice—shall be explored here. The second, which shall be called the ‘external dimension’, concerns the relationships between political communities—in other words, states’ foreign and international relations. This chapter now explores both of these.

## B. The Internal Dimension

Accepting that people freely making choices from the options available to them and thereby pursuing their own conception of the good may entail moral conflict and serious disparities in social, economic and cultural power between persons, Pettit develops a doctrine of social justice which responds to such distributive inequalities between persons. For Pettit, neorepublican social justice has essentially two separate but complementary strands: first, an account of the options which must be made available to everyone in society; and second, the method by and manner in which these options are to be made available.

Accordingly, what range of options need to be guaranteed for a person to be free? For Pettit, the basic liberties—a range of options which must be guaranteed and entrenched in any given society—are those choices which are both co-satisfiable and co-exercisable. That is, exercise of such choices must be capable of being equally exercisable by all persons in a given society at any given time, and of satisfying all persons in a given society at any given time.<sup>15</sup> Thus for example, the collective aspect of the co-satisfaction requirement mandates that candidate choices for entrenchment as basic liberties are not harmful or ‘over-empowering’, such as choices which might allow a person to ‘gain such economic power that they are bound to dominate others in certain contexts’.<sup>16</sup> However, given that these are basic or fundamental liberties, the state need only entrench those basic or fundamental choices which are ‘the more distal and general’, ie, the most abstract expression of the given choice.<sup>17</sup> Moreover, such

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<sup>15</sup> *On the People’s Terms* (n 1) ch 2. See further Philip Pettit, ‘The Basic Liberties’ in Matthew Kramer, Claire Grant, Ben Colburn and Antony Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political and Moral Theory* (OUP 2008).

<sup>16</sup> *ibid* 99.

<sup>17</sup> *ibid* 102.

basic liberties are likely to vary, depending on the culture, customs and conventions of a given society, and its development over time. As Pettit notes, the basic liberties are 'deeply dependent on interpretative rules'.<sup>18</sup> Among the basic liberties, Pettit includes the 'freedom to associate with those willing to associate with you' and 'the freedom to change occupation and employment'.<sup>19</sup> According to Pettit, 'let the state entrench them and it will automatically entrench all the other choices too'.<sup>20</sup>

Several points merit noting. First, it is clear from the above that Pettit does not choose to entrench an abstract freedom to work tout court, which would be somewhat broader than a mere freedom to change occupation and employment. There are, however, at least three reasons favouring the entrenchment of an abstract freedom to work tout court. First, it may simply be that Pettit, like other scholars, would accept the existence of an abstract freedom to work but does not make this acceptance explicit.<sup>21</sup> Second, and in the light of the distinctions drawn in chapter 1.III.C earlier, the freedom to work tout court logically implies further derivative freedoms and guarantees beyond employment or paid work, and extends into the (generally) private sphere of unpaid work. If the abstract freedom to work tout court is the basic liberty to be entrenched, then further derivative freedoms should also be entrenched automatically. Such freedoms may involve additional rights or protections for those who are most vulnerable in society, and restrictions on those most able to exploit others. The possibility of special protection for disabled persons, women and children, ethnic minorities, the elderly and other groups which habitually experience social exclusion is also provided for by entrenching the more abstract basic liberty to work. Indeed, in the aspiring 'highly competitive social market economy' aiming to achieve full employment that is the European Union, which primarily and increasingly expresses the value of all kinds of work (paid and unpaid) through the commodification of work,<sup>22</sup> providing vulnerable groups with opportunities to commodify their work is critical to

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<sup>18</sup> *ibid* 107.

<sup>19</sup> *ibid* 103.

<sup>20</sup> *ibid* 102.

<sup>21</sup> JJM van der Ven, 'The Right to Work as a Human Right' (1965) 11 *Howard LJ* 397, 400.

<sup>22</sup> Ian Greer, 'Welfare Reform, Precarity and the Re-Commodification of Labour' (2016) 30 *WES* 162.

the recognition, validation and survival of such groups' forms and ways of life and social inclusion.<sup>23</sup>

Third, entrenching a freedom to work tout court would make work equivalent to some of the other basic liberties Pettit mentions, such as 'the freedom to think what you like'. The appropriate analogy in the context of work is a freedom to work tout court; otherwise, the relevant basic liberty would not be the freedom to think what you like but merely the freedom to change your thoughts. It is therefore suggested that an abstract freedom to work is the appropriate abstraction of the relevant basic liberty to be entrenched in this area, thereby establishing and entrenching the good of work.

How are the basic liberties to be entrenched? Fundamentally, 'the state should entrench people's [basic] liberties, on the basis of public laws and norms, to the point where each is able to pass the eyeball test', namely, to 'the point at which each person can look at one another in society without fear'.<sup>24</sup> More specifically, the level of entrenchment to be secured to meet the eyeball test requires that each be provided 'with a [sufficient] threshold benefit in the currency of free or undominated choice'.<sup>25</sup> The level of entrenchment required is therefore sufficientarian in that it requires each to be provided with sufficient resources and opportunities to exercise their freedom of choice over the basic liberties.<sup>26</sup> Thus, for example, people must be provided with sufficient resources and opportunities to exercise their freedom of choice to work. While this sufficientarianism is consistent with widespread material and social inequalities, same are significantly tempered by an overarching commitment to freedom as non-domination, requiring that both direct or personal and indirect or structural invasions to people's freedom of choice be eliminated. In other words, while people are only required to have sufficient resources and opportunities to exercise their freedom of choice over the basic liberties, meaning that some may have more choice than others, the standard of sufficiency is itself quite demanding. As Pettit notes, '[a]lthough it constitutes a sufficientarianism in the currency of free or undominated

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<sup>23</sup> Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16.

<sup>24</sup> *On the People's Terms* (n 1) 87.

<sup>25</sup> *ibid* 88.

<sup>26</sup> *ibid* 80-81, 87-88, citing Harry Frankfurt, 'Equality as a Moral Ideal' (1987) 98 *Ethics* 21. See also Rudolf Schuessler, 'Sufficientarianism and the Measurement of Inequality' (2019) 6 *Moral Philosophy and Politics* 147.

choice, the republican theory of justice supports a substantive egalitarianism in the currency of free or undominated status'.<sup>27</sup> In a lengthy but crucially important passage, Pettit clarifies what he means by this as follows:

"The level of resources and protections required for undominated status—the threshold of provision necessary—is determined on a basis that takes into account the resources and protections available to others. If the state allows excessive disparities between the endowments of different people, then the less well off are unlikely to be able to attain that threshold. It is true that equality in status freedom—equality, as we may say, in freedom as non-domination—is consistent with differences of private wealth and power and with corresponding differences in resources and protections. But still the ideal imposes severe constraints on how large or pervasive those differences can be allowed to be."<sup>28</sup>

In addition, Pettit suggests three methods for entrenchment: infrastructural programmes, insurance programmes and insulation programmes. Pettit envisages infrastructural programmes of three kinds: investing in education to develop people's skills; establishing a functioning institutionalised normative order (ie, a legal system consisting of, inter alia, the law of torts, contract and criminal law); and developing economic and social policies which are ecologically sustainable.<sup>29</sup> In respect of insurance programmes, people should benefit from 'social security, medical security and judicial security, whether by means of a system of social insurance, national health and legal assistance, or by any of a number of alternatives'.<sup>30</sup> Finally, according to Pettit, insulation programmes should protect those in positions of vulnerability in society, such as a person in an abusive relationship, or an employee in her relationship with her employer. Insulation initiatives which are likely to be necessary in such situations to counterbalance the obvious imbalance of power in an employment

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<sup>27</sup> *On the People's Terms* (n 1) 88.

<sup>28</sup> *ibid* 90. Pettit has confirmed the accuracy of this account in correspondence with the author (on file).

<sup>29</sup> *ibid* 110-112.

<sup>30</sup> *ibid* 112.

context include unionisation, the right to strike, and, more generally, the 'supportive norms of civil society'.<sup>31</sup>

This last point raises, quite directly, the theme of governance outlined in chapter 1. Pettit places great emphasis on law as the primary mode of governance in entrenching the basic liberties. Is there reason to question this in the light of the analysis, in chapter 1, of some of the deficiencies of legal regulation? Pettit's views on this issue are both vital and insightful. For Pettit relies not merely on law but on law and norms. What, one might ask, are norms? According to Pettit, norms are 'regularities of behaviour such that, as a matter of public awareness, most members conform to them, most expect others to approve of conformity or disapprove of non-conformity and most are policed into conformity by this expectation about what will attract approval and disapproval'.<sup>32</sup> For Pettit, it is a combination of norms of different degrees of importance and significance—social, moral and legal—which together constitute regulation. Thus, for him,

"[t]he secret strength of law is that if it is well shaped and well supported—if it is relatively just and legitimate—then it can recruit (...) beneficial, communal norms to the cause of its enforcement. Properly promulgated and defended (...) it can also reshape any existing norms that do not serve the cause of justice. Once law gains normative reinforcement it no longer has to rely on the strength of the public sword, in the old metaphor, for winning compliance amongst the citizenry."<sup>33</sup>

Pettit's view is thus a powerful one. It recognises that the law may need to adjust and be reflexive in the very manner envisaged by Gunther Teubner to achieve and entrench common goals in a community. It recognises that the law can absorb, subsume and consolidate existing norms and normative structures in society—existing

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<sup>31</sup> *ibid* 115.

<sup>32</sup> *ibid* 83-84.

<sup>33</sup> *ibid* 128-129 (references omitted). See further Philip Pettit, *Rules, Reasons and Norms: Selected Essays* (OUP 2002) part III and Philip Pettit, 'Law and Liberty' in *Legal Republicanism: National and International Perspectives* (n 1). More generally, see MNS Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Palgrave Macmillan 2003).

regularities of behaviour, standards and rules—giving them shape, opening them up to public contestation and challenge and legitimising them: in sum, juridifying and institutionalising them. Accordingly, we should expect that EU law adopts various modes and means of governance for the purposes of achieving socially approved goals.

So much for republican social justice in general; how does it specifically relate to the good of work? As Pettit puts it, 'in a well-functioning labour market (...) no one would depend on any particular master and so no one would be at the mercy of a master: he or she could move on to employment elsewhere in the event of suffering arbitrary interference'.<sup>34</sup> However, for Pettit, a well-functioning labour market is characterised by a number of important assumptions: imbalances of property and power do not permit domination in market exchanges; market exchanges are subject to anti-discrimination norms; and market exchanges in which a person accepts or risks domination are prohibited. These assumptions suggest that labour markets in the republic will only be permitted where they are subject to quite a significant degree of regulation designed to minimise actual or potential domination. Whether such regulation will be by law or collective agreement is left undetermined at this point. Furthermore, Pettit goes so far as to suggest that there should be a right to a basic income, reasoning therefor as follows. First, '[i]f I am not assured a basic income, there will be many areas where the wealthier could interfere with me at tolerable cost, without their being confronted by legal prevention of that interference'.<sup>35</sup> Second, in conditions of severe economic scarcity, when workers may struggle to demand a decent wage, 'one's ability to leave employment and fall back on a basic wage available unconditionally from the state' would provide proof against the arbitrary will of employers.<sup>36</sup> Pettit therefore envisages strong state intervention as necessary to guard against the evil of domination.

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<sup>34</sup> Philip Pettit, 'Freedom in the Market' (2006) 5 *Politics, Philosophy and Economics* 131, 142.

<sup>35</sup> Philip Pettit, 'A Republican Right to a Basic Income?' (2007) 2 *Basic Income Studies* 1, 5.

<sup>36</sup> *ibid.*



## C. The External Dimension

So much for the internal dimension of a commitment to neorepublican freedom; but what does neorepublicanism require on a global scale? According to Pettit, a very similar analysis operates on a global level.<sup>37</sup> Freedom as non-domination between states requires that 'sovereign liberties'—the correlative of basic liberties within a state—be drawn up by the international community. Pettit does not offer a list of these as he does for the basic liberties but acknowledges that they will likely include norms on issues of shared concern, such as international trade. And such sovereign liberties must be entrenched to the point where each can pass the 'straight talk test', namely where each state 'ought to be able to address other peoples (...) as an equal among equals'.<sup>38</sup> The sovereign liberties should be entrenched through international fora, preferably through the emergence of social norms at a global level. Such norms can be 'greatly strengthened' if they are made binding but this is not a prerequisite of their entrenchment. And it is 'crucial' that the sovereign liberties be entrenched on the basis of an international rule of law, ensuring that none occupies a special or privileged place.<sup>39</sup>

Accordingly, for Pettit, the ideal situation is a 'republican law of peoples'—a world which consists of separate but equal states which hold each other in relations of non-domination. And for Pettit, the preconditions for such a relation surpass traditional perspectives on international relations requiring merely non-interference between states. The external dimension of the ideal of freedom as non-domination demands that states be adequately resourced and not subject to the arbitrary will of other states or regional or international institutions. The ideal of global freedom as non-domination is therefore rich but different from that which applies nationally—hence the 'straight

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<sup>37</sup> Philip Pettit, 'A Republican Law of Peoples' (2010) 9 EJPT 70; *Just Freedom* (n 1) ch 6; Philip Pettit, 'The Republican Law of Peoples: A Restatement' in *Domination and Global Political Justice: Conceptual, Historical and Institutional Perspectives* (n 1); and 'The Globalised Republican Ideal' (n 13). See also Cécile Laborde, 'Republicanism and Global Justice: A Sketch' (2010) 9 EJPT 48; Julian Culp, Tamara Jugov, Miriam Ronzoni and Laura Valentini, 'Global Justice and Non-Domination' (2016) 9 Global Justice i; and Cécile Laborde and Miriam Ronzoni, 'What is a Free State? Republican Internationalism and Globalisation' (2016) 64 Political Studies 279.

<sup>38</sup> *Just Freedom* (n 1) 182.

<sup>39</sup> *ibid* 185.

talk test' rather than the 'eyeball test'. As Pettit notes, it is not so idealistic or utopian as some cosmopolitan accounts of global justice which hold that states owe each other precisely the same obligations which they owe their own citizens.<sup>40</sup> The external dimension of freedom as non-domination does not entail, for example, obligations of global justice.<sup>41</sup> Indeed, Pettit expressly acknowledges that 'states depend for their finances and capacities on the coercive taxation of their citizens and it is not obvious that they should be permitted, let alone obliged, to use those resources for any old cause, however meritorious'.<sup>42</sup>

That is not to say that states owe each other nothing; it merely means that states do not owe each other obligations of justice. Pettit is ready to acknowledge that states can and should assist other states which are poor or oppressed. While he avoids prescribing a concrete list of obligations which states have in respect of other states, he does acknowledge that states 'ought to support global arrangements for promoting public goods as well as avoiding public bads, whether in regard to community health, crime prevention, commercial regulation, or simply the promotion of mutual understanding'.<sup>43</sup> So global freedom as non-domination by default imposes a minimum of humanitarian obligations in relations between states. However, that is not to say that political communities' humanitarian obligations will necessarily be less onerous than their obligations of justice. Indeed, in some circumstances their humanitarian obligations may be more onerous than their obligations of justice would otherwise be. An obvious example would be the humanitarian obligations which political communities owe refugees which are at least equal to if not greater than their obligations of justice towards their own citizens and to the citizens of other political communities.

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<sup>40</sup> Cf Thomas Pogge, 'An Egalitarian Law of Peoples' (1993) 23 *Phil & Pub Aff* 195.

<sup>41</sup> See Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Phil & Pub Aff* 113.

<sup>42</sup> *Just Freedom* (n 1) 175. Pettit occasionally equivocates in his language between social justice and 'international justice' but his citation of Nagel's work suggests that his conception of international justice is equivalent to Nagel's understanding of humanitarianism or human rights.

<sup>43</sup> *ibid* 186.

## II. Neorepublicanism and Work

### A. Overview

Various strands of neorepublicanism have recently attracted the attention of a significant number of leading labour law scholars in the English-speaking world. Specifically, neorepublicanism has been offered as a justification for collective labour law generally,<sup>44</sup> freedom of association,<sup>45</sup> the right to strike,<sup>46</sup> the right to private and family life as it relates to work,<sup>47</sup> the right to be free from forced labour<sup>48</sup> and as a general justification for employment and labour law as a whole.<sup>49</sup> It is therefore appropriate to provide some general reflections on the relationship between Pettit's neorepublicanism and work and to consider some of these scholars' reflections and criticisms of neorepublican political theory as it applies to labour law. These scholars consider various strands of neorepublican political theory, some of which are cited at footnote 1 above. Given this thesis' reliance on the neorepublican political philosophy of Pettit, my comments shall be on those reflections and criticisms which address his theory as explained thus far and neorepublican political theory generally rather than on other specific theorists.

This section is structured as follows. It first considers whether the ideal of freedom as non-domination is an illuminating ideal for labour law generally by considering the extent to which people freely choose to work. Determining that at least some people are forced to work and are therefore dominated, it goes on to identify the submission and subordination of the worker to the employer's authority as a form of

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<sup>44</sup> Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009) ch 4.

<sup>45</sup> Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in Alan Bogg and Tonia Novitz (ed) *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

<sup>46</sup> Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

<sup>47</sup> Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912.

<sup>48</sup> Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (OUP 2015).

<sup>49</sup> See the articles in the special edition on freedom, non-domination and subordination in (2017) 33 IJLLIR 331-439; and David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in *Philosophical Foundations of Labour Law* (n 46).

domination. It then explains how guaranteeing the basic liberties of work in a sovereign republic may provide a justification for labour law, thereby alleviating the domination workers would otherwise face.

## **B. Unfreedom and Work**

The first point to consider concerns the ideal of freedom as non-domination as an illuminating ideal for employment and labour law generally. For present purposes, the ideal can be divided into two parts: freedom of choice generally and non-domination as a facet thereof. As to freedom of choice, it was suggested in chapter 1.III.D that work is perhaps the primary way in which people exercise their freedom of choice to pursue their conception of the good life. People make different choices about the kind of work they do, the hours they are willing to work and the amount they want to get paid on the basis of their comprehensive conceptions of the good life. Given that Pettit's neorepublicanism envisages the entrenchment of a freedom to work and the establishment of contract law to entrench that and other basic liberties, one might reasonably envisage certain fundamental labour rights as necessary to guarantee people's freedom of choice. As to non-domination, at a broad and abstract level, the ideal 'converges with the ideas put forward by Kahn-Freund', namely, that the employee's freedom is enhanced by default rules restraining the market and bureaucratic power of the employer.<sup>59</sup> Indeed, if employees are to have real freedom in their lives and in the workplace, measures must be put in place to reduce domination as a hindrance to their freedom of choice.

The problem with this very superficial analysis of freedom as non-domination at work is that some people do not freely choose to work in general, to work a certain number of hours or to get paid a certain amount. Some people are just forced—not metaphysically but by virtue of their circumstances—to work. The classic statement of this riposte is made by the analytical Marxist GA Cohen who argues that some people are forced to work because they do not have access to or control over the means of production. While Cohen concedes that most people are not forced to work, such as

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<sup>59</sup> Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33 IJCLLIR 365, 379.

capitalists and proletarians who do have access to the means of production, some nonetheless remain collectively unfree to do so: some people are collectively forced to work by virtue of the scarcity of opportunities to leave the working classes and the impossibility of all simultaneously co-exercising and co-satisfying their freedom to escape the need to work.<sup>51</sup>

Now, the first question which naturally arises in the light of this objection is whether being forced to work is conceptually equivalent to being dominated. Is collective unfreedom equivalent to domination? It does not seem that Cohen's characterisation of being forced to work is equivalent to what Pettit describes as direct/personal domination: Cohen is not concerned with people being individually forced to work by specific employers. Indeed, this is an account Cohen rejects: some people are not individually forced to work but are rather unfree as a group. But it does seem that to be collectively unfree is equivalent to a form of indirect/structural domination. Recall that Pettit considers vitiating hindrances to our freedom of choice as 'a structure or pattern that facilitates the invasion by some people of the choices available to others'. The existing or prior distributive pattern of resources and opportunities, such that some lack adequate means to survive without being required to sell their labour power, is just such a structure.

Having determined that those who are forced to work are dominated, notice that, according to the terms of Cohen's objection, most people do freely choose to work. Allow me to explain. If most people are not forced to work, then those people simply freely choose to work. I am thinking in particular of owners of capital and those, who Cohen himself suggests, poor immigrants who enter the state, save up a capital sum, invest it and live off the returns. These people and others are not forced to work by virtue of their economic dependence on their employer or on terms dictated to them by employers; rather, they can reject these terms and simply choose not to work, live off their capital sum or set up their own business and hire workers. Accordingly, if most people are not forced to work and instead freely choose to do so, how can labour law be justified in the light of the ideal of freedom as non-domination?

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<sup>51</sup> GA Cohen, *History, Labour and Freedom: Themes from Marx* (OUP 1988) ch 13.

In an intriguing analysis of a rival theoretical justification for labour law, namely, the Capabilities Approach,<sup>52</sup> Hugh Collins makes some comments of relevance to this very issue. Collins suggests that placing an emphasis on freedom in justifying labour law 'renders it hard to justify detailed mandatory laws. The whole emphasis on freedom (...) suggests that everyone should have the opportunity to enter markets on the terms that they choose without paternalist controls'.<sup>53</sup> This concern is closely linked to a second, namely that of justice and institutions. According to Collins, theories which put the good prior to the right—the valuable prior to the normative, as republicanism appears to according to this paper—cannot provide a justification for labour law: 'justifications for labour law need to recognise the importance of the priority of the right over the good'.<sup>54</sup>

The relevance of these points to this section can be stated as follows. Republicanism requires that each person in a given political community enjoy their freedom as non-domination to a sufficient degree. It does so by prioritising the good over the right—by defining what is right in terms of an independently established conception of the good. Such theories as republicanism are generally considered telic, as opposed to those which are deontic. In some such telic theories, as Collins rightly notes, laws and norms are valued only for their instrumental contribution to freedom. Thus, it could be argued that a theory which prioritises the good over the right in furtherance of people's freedom supports a form of freedom which, rather than advocating protective measures as much of labour law currently is, rejects those where they are no longer needed. By contrast, at least some deontic theories, in defining the right prior to the good, value laws and norms intrinsically regardless of their actual or empirical contribution to people's freedom.

Now, there are many problems with this analysis which shall not detain us here.<sup>55</sup> For present purposes, what the above boils down to is this: should worker-protective measures be maintained when they are, empirically speaking, not

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<sup>52</sup> See generally Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019).

<sup>53</sup> Hugh Collins, 'What Can Sen's Capability Approach Offer to Labour Law' in *The Capability Approach to Labour Law* (n 52) 28.

<sup>54</sup> *ibid* 34.

<sup>55</sup> A helpful analysis of these issues is provided in Joseph Raz, *The Morality of Freedom* (OUP 1986) ch 5-6.

necessary—when, as was suggested above, some people freely choose to work and therefore are not forced to do so? It is an implication of prioritising the good over the right that those measures should not be maintained insofar as they are not needed. Where workers are not empirically-speaking forced to work and are therefore free, republicanism does not demand that they benefit from traditional labour-protective standards. If people are free from domination either in accessing work or in the workplace even in the absence of labour law, then the justification therefor falls away. Determining whether the employment relationship necessarily involves domination is therefore crucial in assessing whether people really enjoy freedom as non-domination at work.

Returning to those people who are forced to work and therefore dominated, what use is the ideal of freedom as non-domination to them? How can it account for such people's unfreedom? The response comes in two parts. First, it should be noted that the ideal of freedom as non-domination is secured through ensuring that society is comprehensively just—that is, that society is socially just and politically legitimate. As Pettit puts it, the ideal of freedom as non-domination 'is a return derived from the required pattern of resourcing and protecting choice'.<sup>56</sup> And given that republican social justice simply requires that people be entrenched in respect of the basic liberties to a sufficient degree, the ideal of freedom as non-domination is consistent with some being more or less free in some respects than others. Second, however, and relatedly, the ideal is not consistent with some having no freedom of choice at all: everyone must be ensured at least a modicum of free choice in respect of the basic liberties. In the context of the basic liberty to work, such freedom of choice implies two contexts of choice: the choice to work in general and choices made within work. Thus, for example, the ideal of freedom as non-domination demands that people are not forced to work and instead have other options through which to pursue their own conception of the good. One instance of this may be the provision of a basic income which, as Pettit suggests, may provide people with the freedom to pursue the good outside of work. When it comes to people exercising their freedom of choice in and through their work, the ideal of freedom as non-domination may require that people have a range of

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<sup>56</sup> *On the People's Terms* (n 1) 88.

options to choose from when accessing work, rather than being confined to one job or, more richly, just one area of work; that the options to work available are morally valuable; the options to work available secure further freedom of choice in and through work; and/or that derivative choices with the options to work available are themselves morally valuable.

### C. Non-Domination and Work

As noted above, one of the most important links between the ideal of freedom as non-domination and work is to assess whether the employment relationship is inherently dominating. This is a crucial step in the argument in favour of a general republican justification of labour law. The employment relationship is the gateway to the protective measures offered by labour law. If those who either freely choose to or are forced to work are dominated in the employment relationship, then it is possible that republicanism can justify the entirety of labour law. Naturally, labour law scholars disagree on this point. David Cabrelli and Rebecca Zahn, for example, confidently declare that the employment relationship 'can undoubtedly be cast as one that is tainted by 'domination''.<sup>57</sup> While this seems like an intuitively attractive viewpoint, the traditional concern of labour lawyers is with the submission and subordination<sup>58</sup> of the employee to the employer's market and bureaucratic power<sup>59</sup> and so the question becomes, are submission and subordination conceptually equivalent to domination?

Two scholars have engaged with this question, Guy Davidov and Hugh Collins. For Davidov, Pettit's ideal of freedom as non-domination is both too broad and too narrow: too broad in the sense that 'every market exchange involves domination [and s]uch a broad definition cannot help us understand, explain or justify the need for special regulations to protect employees'; and too narrow in the sense that 'the vulnerability captured by the concept of subordination still exists' even where

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<sup>57</sup> David Cabrelli and Rebecca Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33 IJCLLR 339, 345.

<sup>58</sup> The famous words of Sir Otto Kahn-Freund in Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 18.

<sup>59</sup> Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment' (1986) 15 ILJ 1.



domination has been eliminated.<sup>60</sup> With respect to Davidov, these criticisms are unfounded. For, as noted earlier, it is not clear that domination is evident in all market transactions if they are appropriately regulated and even if Davidov is right and all market transactions involve domination, the republican project would nevertheless 'balk at accepting any degree of subjection to another'.<sup>61</sup> As to the residual vulnerability of subordination remaining extant, Davidov argues as follows:

"Imagine that before every decision, an employer (as the power holder) must ask its employees about their opinion and take their views and interests into consideration. Or, to put it otherwise, employees can effectively contest the employer's decisions. According to Pettit this will not be a relationship of domination. But the vulnerability captured by the concept of subordination still exists. Although democratic deficits are lower when employees get a chance to voice their opinions, at the end of the day the decision is still taken by the employer; they do not get to vote on the decision or to choose the managers who make the decisions."<sup>62</sup>

The point Davidov is trying to make is that if workers have control over their employer, then there is no subordination; but such control, according to Davidov, is not required by Pettit's republicanism. However, Davidov's example does not establish the point. Davidov commences by suggesting that mandating worker voice and consultation is sufficient to eliminate domination. But if the employer retains veto power, as Davidov goes on to suggest, then there nonetheless remains a residual power of discretion which could possibly be exercised in disregard of the views of workers and the needs of the business—in other words, arbitrarily. Accordingly, domination has not been eliminated and the ideal of freedom as non-domination would therefore capture the residual subordination extant in the employment relationship.

Collins makes a much more complex argument which merits reflection. He suggests that insofar as the contract of employment sets up an institutionalised form

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<sup>60</sup> 'Subordination vs Domination: Exploring the Differences' (n 50) 376-377.

<sup>61</sup> *Republicanism* (n 1) 86.

<sup>62</sup> 'Subordination vs Domination: Exploring the Differences' (n 50) 376-377.

of practical authority,<sup>63</sup> the employment relationship is not one of domination because there is no arbitrary power being exercised by the employer:

“the institution of practical authority relies on rules to constitute it and to place constraints on its abuse (...) [i]f that is correct, exponents of the republican political theory of freedom and domination make a mistake when they equate managerial discretion with arbitrary powers (...) If [the] analysis of the concept of subordination in terms of practical authority is correct, it is in effect analogous to constitutional government not arbitrary dictatorships, so there is no necessary inconsistency with the (...) value of republican freedom, but merely a contingent risk, albeit a serious one.”<sup>64</sup>

This is a very powerful objection. While it must be conceded that the laws entrenching the institution of employment go very far in reducing the domination which workers may face, notice that Collins does acknowledge that, even with such laws in place, there is a serious contingent risk of domination. As he notes, the general justification of the employer’s authority ‘is consistent with the possibility that particular instructions issued by managers may fall outside the power conferred by the rules or represent a misuse of their authority’.<sup>65</sup> Moreover, if such laws were not consensually adopted in a politically legitimate manner as required by the internal dimension of Pettit’s republicanism, then the employment relationship would be one of domination insofar as that relationship would involve being subjected to the uncontrolled will of another. Accordingly, in the absence of labour law—a system of consensually-established rules governing the workplace—workers would generally be dominated in the employment relationship. To put the point another way, but for labour law, the employment relationship would be one based on domination because the worker would be subject to the potentially arbitrary will of the employer. Republicanism can therefore provide a default but contingent justification for labour law: if those who

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<sup>63</sup> On institutionalised practical authority, see Andrei Marmor, ‘An Institutional Conception of Authority’ (2011) 39 *Phil & Pub Aff* 238.

<sup>64</sup> Hugh Collins, ‘Is the Contract of Employment Illiberal?’ in *Philosophical Foundations of Labour Law* (n 46) 60.

<sup>65</sup> *ibid* 55.

enter into a relationship of employment are dominated at work or at risk thereof, then republicanism demands worker-protective norms; and contrastively, if they are not so dominated or at risk thereof, then republicanism rejects those very rules as themselves dominating.

#### **D. Neorepublicanism and Labour Law: Critical Reflections**

Cabrelli and Zahn identify a number of other strengths of republican political theory as it may apply to labour law.<sup>66</sup> First is its promotion of substantive and procedural fairness. Republican political theory emphasises social justice and political legitimacy, requiring that each has a fair balance of resources and opportunities and that the political process be legitimate; in other words, that the state be comprehensively just.<sup>67</sup> Accordingly, Pettit's requirement that the basic liberties, such as the freedom to work and the freedom of association, be entrenched in society through insulation, infrastructure and insurance programmes in the laws and norms of the state suggests that his republicanism could justify the regulation of work vertically and horizontally—that is, work relations between individuals and the state, on the one hand, and work relations between individuals, on the other hand.<sup>68</sup> This means that the full score of labour protection can be justified in the light of republican political theory, including, in particular, certain constitutional guarantees of rights at work.<sup>69</sup>

Cabrelli and Zahn also point out that republicanism helps to elucidate the 'normative scope and relational coverage' of labour law, justifying restrictions on employers' powers and rights in the name of the reduction of their ability to arbitrarily

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<sup>66</sup> David Cabrelli and Rebecca Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (n 57); and 'Civic Republican Political Theory and Labour Law' in *Philosophical Foundations of Labour Law* (n 46).

<sup>67</sup> On the relationship between justice and work, see further Guy Davidov, 'Distributive Justice and Labour Law' in *Philosophical Foundations of Labour Law* (n 46). On the relationship between distributive justice and the law of contract generally, see, inter alia, Hugh Collins, 'Distributive Justice through Contracts' (1992) 45 CLP 49; and Aditi Bagchi, 'Distributive Justice and Contract' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

<sup>68</sup> On the vertical/horizontal application of (in)directly effective (human) rights in private law, see Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalisation of European Private Law* (OUP 2014).

<sup>69</sup> On constitutional employment and labour law, see Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014).

exercise their will over their employees.<sup>70</sup> This 'normative scope and relational coverage' implies not only that it can justify the inclusion of and discrimination between workers of different categories—from fully dependent workers to independent contractors—within labour law, but that it can also be used to explain and justify the substantive parts of labour law, such as minimum wage, unfair dismissal, working time and collective bargaining norms, as well as implied terms in the contract of employment.<sup>71</sup> In other words, some of the most important aspects of labour law can plausibly be justified in the light of republicanism. While Cabrelli and Zahn have accordingly begun analysing how and to what extent republicanism is descriptively accurate in terms of labour law as it is presently constituted, a comprehensive analysis of the normative implications of republicanism for labour law remains to be completed.<sup>72</sup> This will likely involve, inter alia, widely interdisciplinary analyses of the extent to which present and future labour standards actually minimise domination and the risk thereof in the lives of workers. The difficulty of this task should not be underestimated: republicanism will only legitimise worker-protective laws and norms when an all-things-considered assessment of the relevant reasons at play justify same. This implies that an assessment must be made of all of the possible sources of domination either way, namely, domination which affects workers individually and systemically as well as the potential domination which employers may face from overregulation. This will likely be an exceptionally complex task relying on economic, sociological and psychological data. All that can be achieved in this thesis is to outline some of the pro tanto reasons in favour of a republican justification for labour law which need to be assessed in an all-things-considered judgment in the future.

However, Cabrelli and Zahn's praise is not complete; republicanism does have its limitations. They raise four objections, namely, that it is too individualistic and relational; too selective as a general justification; that it creates an illusion of free consent; and that it may not be possible to 'transplant' the concerns of political

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<sup>70</sup> 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (n 57) 350-352.

<sup>71</sup> 'Civic Republican Political Theory and Labour Law' in *Philosophical Foundations of Labour Law* (n 46) 116-121.

<sup>72</sup> On the understanding of normative theorisation as a branch of special jurisprudence implicitly relied on here, see Tarunabh Khaitan and Sandy Steel, 'Theorising Areas of Law' (SSRN Paper, 15 October 2019) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3464432&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3464432&download=yes)> (accessed 24 March 2020).

philosophers to meet the needs of labour lawyers. Only the first three will be outlined and responded to here. Accordingly, as for the first objection, the authors suggest that it may not sufficiently justify collective rights such as those which form key parts of labour law.<sup>73</sup> There are two reasons to believe that this line of criticism is a weak one. First, the republicanism is often very abstract and significant interpretations of social and cultural practice may be necessary to apply it to real life situations. Most political theories leave a great deal of what can be described as 'interpretive space' within which to consider and apply their principles to real-life situations. Republican political philosophy is no different from any other in this respect. Moreover, the fact that republican political philosophy focuses so centrally on the reduction of arbitrary power suggests an approach based on reason. Normative, reason-based arguments can therefore be made within this interpretive space to develop and design more specific normative responses to real-life problems, an approach which much of this thesis adopts. Second and as will be explored more fully below, collective rights are indeed possible within a theory of rights consistent with republicanism.

A second criticism of Cabrelli and Zahn is that the ideal of freedom as non-domination is too selective as a general justification for labour law: 'the adoption of selective goals for labour laws such as 'domination' has the potential to craft a rigid justificatory pillar for the discipline which is unresponsive to changes in underlying social, economic and political conditions'.<sup>74</sup> Recall, however, the distinction drawn between theories which prioritise the good over the right and those which prioritise the right over the good. It was suggested that the former theories maintain a degree of flexibility which the latter do not have. Thus, it was said, the justification of labour law offered by Pettit's republicanism is contingent on the existence of domination in the employment relation. If there is domination, then labour law is justified; if there is no domination, then there is no need for labour law. It was suggested that there is an inherent risk of domination in the employment relationship and, accordingly, labour law can be justified by republicanism. The point that needs to be emphasised at this

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<sup>73</sup> 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (n 57) 360.

<sup>74</sup> *ibid* 361.

stage is that republicanism demands the reduction of domination whatever its form; contra Cabrelli and Zahn, it therefore can 'change with the times'.

The third and final criticism of Cabrelli and Zahn to be dealt with here is what they describe as free consent: 'the wage-labourer, having submitted to a state of domination and traded independence in return for security and continuity of work, must accept his/her lot'.<sup>75</sup> In other words, 'the worker's freely given consent to domination is sufficient to relieve the state from passing protective laws'.<sup>76</sup> However, as it was argued earlier, the employment relationship entails an inherent risk of domination which necessitates intervention by the state in the form of worker-protective regulation and/or collective bargaining to secure the freedom as non-domination workers. This objection, then, is also unfounded.

Another important source of criticism comes from Alan Bogg who makes two salient points.<sup>77</sup> The first concerns the link between the ideal of freedom as non-domination and the right to strike. According to Bogg, Pettit's views on the operation of the right to strike are in violation of ILO standards. For Pettit, it is legitimate to use criminal sanctions against trade unions for abusing their powers. Other prior compliance-inducing measures are envisaged, such as compulsory arbitration. This reflects the point, made previously, that if there is no domination, then the justification for labour law falls away; and in some cases, even trade unions can be dominating.<sup>78</sup> However, this violates art 3 of the Convention on the Freedom of Association and Protection of the Right to Organise 1948 (No 87) which permits compulsory arbitration only in the case of strikes affecting 'essential services', which is itself restrictively defined. While this is a significant problem for Bogg, as he admits, it is not necessarily a 'fatal objection' to Pettit's position given that it is open to Pettit to claim that the international legal order is wrongly or inappropriately constructed.<sup>79</sup> Bogg's second point is that Pettit's understanding of the contract of employment is incorrect, misconstruing it as a ground of domination rather than, as is often the case, a source of

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<sup>75</sup> *ibid* 362.

<sup>76</sup> *ibid*.

<sup>77</sup> Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33 *IJCLLR* 391.

<sup>78</sup> See my example of this in 'The Right to Work in Irish Law' (2020) 42 *DULJ* 119.

<sup>79</sup> 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (n 77) 405.

stability for workers and a way of channelling obligations and risks.<sup>80</sup> However, this criticism is unfair given that Pettit's comments on the contract of employment are made in the context of an appeal to socialists for support of the doctrine of freedom as non-domination, referring specifically to the historical context of the emergence of wage labour in the nineteenth century,<sup>81</sup> something which Bogg acknowledges as historically accurate.<sup>82</sup>

A final source of criticism comes from Keith Breen who claims that, for republicans, 'what is ultimately required to counter workplace domination is a free market exchange underwritten by an effective right of exit that grants workers bargaining power in negotiating labour contracts'.<sup>83</sup> Now while it is true that some republicans, such as Pettit, advocate the establishment of markets in labour, as was noted earlier, these markets are not simply unregulated or regulated in a minimalistic fashion. Moreover, Pettit's republicanism requires that the basic liberties be entrenched in the law and norms of a politically legitimate sovereign state. The basic liberties include not only the good of work but also the good of community. It follows that, inter alia, collective labour law could also be justified to all its extents: collective bargaining; worker consultation; and strikes.

Breen goes on to advocate greater worker voice in and control of firms which, he claims, are inconsistent with Pettit's republicanism for three reasons. First, Pettit has an 'excessively narrow understanding of economic domination'.<sup>84</sup> The paragraph which preceded this entails the rejection of this argument. Second, Pettit fails to address the arbitrary interference to which employees are exposed within the employment relationship.<sup>85</sup> Collins' argument concerning the employment relationship as an institutionalised form of practical authority refutes this argument. Finally, Breen believes that Pettit's advocacy of a universal basic income is insufficient insofar as it does not entail a commitment to a 'living' basic income as opposed to one

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<sup>80</sup> *ibid* 406-409.

<sup>81</sup> *Republicanism* (n 1) 140-143.

<sup>82</sup> 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (n 77) 406.

<sup>83</sup> Keith Breen, 'Non-Domination, Workplace Republicanism and the Justification of Worker Voice and Control' (2017) 33 *IJCLLR* 419, 424.

<sup>84</sup> *ibid* 424-426.

<sup>85</sup> *ibid* 426-428.

which is merely designed to facilitate workers' transition between jobs.<sup>86</sup> But this is not the case: Breen cites no source for Pettit's view on this—he merely assumes the point. As has been noted, it must be remembered that the question in each and every case will be whether a given law and/or norm contributes to the minimisation of domination in people's lives. In principle, there is no objection from Pettit republicanism to measures of worker voice in and control of firms provided that they do not dominate capitalists. Whether they do so will likely involve a complicated socio-economic analysis, but the point still stands. Admittedly, insofar as Pettit does advocate the establishment of markets, the emergence of widespread workers cooperatives may serve to structurally undermine them;<sup>87</sup> to that extent, they would be inconsistent with Pettit's general preference for markets.

There is an oft overlooked aspect of Pettit's republicanism which merits attention, namely, the implications of the external dimension for the regulation of the goods of work and community. While admitting the fairly sparse requirements Pettit currently envisages, global cooperation in respect of international trade, as he suggests, may justify the facilitation of international trade in persons—that is, the free movement of persons between free states, thereby requiring the transnational or international regulation of labour, at least to some extent. Moreover, the mere fact that Pettit's republicanism has internal and external dimensions suggests the need to regulate migration in a manner which is at least consistent with states' human rights obligations.

### **III. Neorepublicanism and the EU**

#### **A. Some Preliminary Remarks**

Well-being has traditionally been guaranteed in political communities which are subject to political authorities that delineate the circumstances in which it is legitimate to restrict the well-being of some for the benefit of others. In other words, well-being

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<sup>86</sup> *ibid* 428-430.

<sup>87</sup> This point is made in *History, Labour and Freedom* (n 51) 276-278.



has been guaranteed by states which are entitled to levy coercion on their subjects to secure their freedom as non-domination; and traditionally the relevant political community has been the state. But, as is well-known, the EU is not a state. This point also raises problems for the analysis of EU law to follow. For if the EU is not a state, then how can EU law be law at all? How, and to what extent, is the EU's legal system a legal system?<sup>88</sup>

This thesis does not reach a conclusive view on these questions, but it must come to a view to be able to apply neorepublican normative political theory to the EU. Accordingly, the first question to consider is whether and to what extent the EU constitutes a political community. Is the EU an authoritative entity which issues binding directives and has the right to rule? There are at least three core views on this issue, each of which has its own further derivative variations. The first can be described as

*The Monist View*: only states are authoritative entities which issue binding directives and have the right to rule.<sup>89</sup>

According to *The Monist View*, only sovereign states claim authority over political communities and, accordingly, sovereign states constitute political communities. But there are two alternatives to *The Monist View*. Call the first

*The Dualist View*: there are two different sources of authority, one national, the other international, both of which are authoritative in their own domain only.<sup>90</sup>

According to *The Dualist View*, the state remains the primary locus of sovereignty while the EU and EU law remains in the international domain. The member states therefore retain sovereignty and incorporate EU law and policy in a manner

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<sup>88</sup> Julie Dickson, 'Towards a Theory of European Union Legal Systems' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012); and Neil Walker, 'The Philosophy of EU Law' in Anthony Arnull and Damien Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

<sup>89</sup> See, inter alia, Robert Schütze, *European Constitutional Law* (2nd edn, CUP 2016) 43-76 who applies *The Monist View* to the EU.

<sup>90</sup> See Pavlos Eleftheriadis, *A Union of Peoples: Europe as a Community of Principle* (OUP 2020) ch 3 and Eleftheriadis' many papers to date.

which recognises the limited sovereignty of the EU in relations between member states but does not acknowledge its hierarchical superiority. It is, rather, sovereign in a different domain. On this understanding of sovereign authorities, the EU is simply another international institution, albeit a highly complex and novel one. For the legal and political philosopher Pavlos Eleftheriadis, chief advocate of *The Dualist View*, the EU is best conceived as an international project; 'a union of peoples organised on the basis of a progressive reinvention of the law of nations in order to manage the economic and social interdependence of the member states'.<sup>91</sup> It does not claim authority in a manner equivalent to nation states because its 'aims, purposes and powers respect the self-government of the member states'.<sup>92</sup> Moreover, the EU lacks the powers of enforcement equivalent to those of a nation state: 'The Commission, the Council and the Court of Justice do not constitute a comprehensive institutional order. The EU has no police force or other enforcement mechanisms securing respect for its laws. It has no complete system of courts'.<sup>93</sup> What stands out, on this perspective, is the paramount importance of an account of the EU's point or purpose.

The final alternative is

*The Pluralist View*: there are conflicting sources of authority. Conflicts between these sources of authority cannot be resolved; rather, each is true from the point of view of that authority.<sup>94</sup>

On *The Pluralist View*, the EU constitutes a partially authoritative entity with the power to issue binding directives and the right to rule. Its claim to authority over and amongst the member states is at least occasionally in conflict with parallel claims of

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<sup>91</sup> *ibid* 111.

<sup>92</sup> *ibid* 108.

<sup>93</sup> *ibid* 136-137.

<sup>94</sup> See, *inter alia*, Neil MacCormick, *Questioning Sovereignty: Law, State and the Nation in the European Commonwealth* (OUP 1999); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317; Neil Walker (ed), *Sovereignty in Transition* (Hart 2003); the essays in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/Beck 2011) part V; Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014); Jirí Pribán, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* (Routledge 2015); and Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism in EU Law* (Edward Elgar 2018).

the member states to authority over their own domain. There is, consequently, a tension under this view caused by this conflict.

Which point of view should be adopted? Often overlooked in accounts of the EU's authority is the relationship between law, purpose and time. *The Pluralist View* represents a partially accurate account of the relationship between the EU and its member states: it is empirically the case that each occasionally makes conflicting and overlapping claims to authority. By contrast, *The Dualist View* adopts a much more rigid distinction between national and international sources of authority, respecting each as valid in its own domain but inconsequential outside it. Finally, *The Monist View* adopts a rigid view on the possible sources of authority, domestic and international: only nation states can be authoritative; outside the nation state, there is no source of binding law. Each of these views adopts, implicitly, an account of the purpose of the state and international organisations. On *The Monist View*, the state is the ultimate beginning and end of authority; on *The Dualist View*, the state may interact and coexist with international organisations, such as the EU but it does not sacrifice its sovereignty; and on *The Pluralist View*, the state and the EU are making conflicting claims to authority.

It is helpful to conceive of these different views on a spectrum across time. What follows is not necessarily claimed to be historically accurate but merely takes an idealised view of legal history. Very roughly, before the EU and many other international institutions, *The Monist View* provided quite an accurate picture of the authority of at least some states and their boundaries. Since the inception of the EU, other international institutions and sources of normativity and greater comity amongst nations, *The Dualist View* represented a picture of nation states and international organisations coexisting, with each respecting the claims to authority of the other. *The Pluralist View* then represents a point in time when the EU began to make equivalent claims to authority over its member states which the member states do themselves. The question then becomes, how can these conflicts be resolved? At this point in time, the respective legal systems of the EU and the member states have been exhausted of all answers; it now becomes a broader issue of legal and political morality—hence the importance of an interpretation of the purpose of the EU now and going forward. Accordingly, the next step must either be for the EU to resile from such claims to

parallel or greater authority to its member states or to become the supreme authority over the member states—in other words, for the EU to become a federation.<sup>95</sup> Such a point in time would mark the end of *The Pluralist View* and a return either to *The Monist View* or *The Dualist View*, with the EU remaining an international institution or actually being or substantially mimicking a federation.

As noted above, for Eleftheriadis, we have already reached a point where *The Dualist View* now holds true: the EU is simply another international institution which does not make conflicting claims to authority with its member states. And, as already suggested, implicit in this account is an understanding of the purpose or end of the EU, built on a methodology which emphasises an interpretation of the EU and its law that starts from the facts on the ground and has to be descriptively accurate but the ultimate task is 'constructive and interpretive on the basis of a theory of political legitimacy'.<sup>96</sup> This methodology is certainly insightful but Eleftheriadis does not accept its full implications. If the ultimate task is an interpretation of the EU and its law on the basis of a theory of political legitimacy, then there is plenty of room for the adoption of a theory of political legitimacy which emphasises further political integration as an end. In other words, Eleftheriadis rejects an integrationist or federalist reading of the EU and EU law on an a priori basis. To do so is certainly open to the theorist; interpretations of legal and political phenomena differ in degrees, emphasising different facts and perspectives and rejecting others. This thesis is no different from Eleftheriadis' in this respect but it does adopt and place emphasis on different facts and materials from him.

It is clear that a fundamental goal of the EU is to promote the well-being of the peoples of the EU.<sup>97</sup> While it has long been considered that well-being is best secured in nation states,<sup>98</sup> increasingly, people are seeking new and better ways to secure their well-being, and the EU constitutes just one response to these demands. The EU is

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<sup>95</sup> See, eg, Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 NLR 5; Armin von Bogdandy, 'The Prospect of a European Republic: What European Citizens are Voting On' (2005) 42 CML Rev 913; Armon von Bogdandy, 'Neither an International Organisation Nor a State: The EU as a Supranational Federation' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012); and Joseph Raz, 'The Future of State Sovereignty' in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (OUP 2019).

<sup>96</sup> *A Union of Peoples* (n 90) 118.

<sup>97</sup> TEU, art 3(1).

<sup>98</sup> Aristotle, *The Politics and Constitution of Athens* (CUP 1996); and NW Barber, *The Constitutional State* (OUP 2010) ch 3.

currently an authority over its member states and peoples to some degree. And if we accept that authority and sovereignty is a matter of degree,<sup>99</sup> then we can further claim that political communities admit of differences in degree. To recall the central case method noted in the introductory chapter, while the nation state remains the paradigm or central case of a political community, the EU is a partial or peripheral case of a political community,<sup>100</sup> consisting of a partial demos or people—a union fostered between peoples with the aim or aspiration of creating a single people.

Moreover, given that '[i]n some respects, the self-understanding of the Union is much closer to that of a federation than to that of a confederation',<sup>101</sup> it is possible to critique the EU in the light of such self-understanding. In other words, it is acceptable to analyse the EU in the light of a model or paradigm of federal statehood because and insofar as the EU aspires and to some extent considers itself to be a true political community.<sup>102</sup> While it is appropriate and necessary to adopt *The Pluralist View* to justify applying neorepublican political theory to the EU at present, we can judge the EU as it currently stands in the light of either *The Monist View* or *The Dualist View* given that and insofar as the EU aspires to be a true political community. There are essentially two steps in applying neorepublicanism to the EU. First, it is necessary to assess the areas of fit between neorepublican political theory and the EU, seeking a degree of consistency between them both as the EU is currently constituted; doing so gives some explanatory weight or value to neorepublicanism. Second, it is necessary to critique the EU and EU law in the light of the normative conditions of neorepublicanism; it is at this point that neorepublicanism can provide a normative justification for a change in culture in the EU going forward.

To recapitulate: to apply neorepublican political theory to the EU, it must be determined whether and to what extent the EU is an authority. The view advanced in

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<sup>99</sup> I take this initiative from Raz, 'The Future of State Sovereignty' (n 95).

<sup>100</sup> *The Constitutional State* (n 98) ch 1, 9 and 10. See further Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Polity Press 1998) ch 6. An alternative approach may be to call the EU a *parasitic* political community; that is, a political community which derives its legitimacy from constituent political communities, ie, the member states. I do not explore that possibility here.

<sup>101</sup> *The Constitutional State* (n 98) 177; and see Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012).

<sup>102</sup> For an example of such a justification of the EU, see Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton University Press 2005).

this thesis is that the EU is currently a partially authoritative entity which makes some claims to authority that conflict with some of those of its member states. In other words, *The Pluralist View* holds true at present. However, given that neorepublicanism is a normative political theory, it is necessary to assume a point or purpose of the EU and EU law from which to critique same. The point or purpose of the EU and its law assumed in this thesis is that the EU aspires to become a federation of federal-like political community. In other words, it assumes an understanding of the EU which Eleftheriadis calls 'aspirational federalism'.<sup>103</sup> From this perspective, it is necessary to rely on either *The Monist View* or *The Dualist View* as to the sources of authority in a political community. To put the point another way, either the EU aspires to be a federal-type polity or it simply remains an international union of states; it is the former view which is assumed here.

The second and final question at this stage concerns the nature of EU law. Justin Lindeboom has analysed EU law in the light of Joseph Raz's criteria for the existence of a legal system: namely, that legal systems be comprehensive; claim supremacy; and are open systems.<sup>104</sup> Legal systems are comprehensive to the extent that they claim to regulate any activity. The EU is clearly limited in this respect because it does not claim to regulate any activity, only activity within its jurisdiction. Legal systems claim supremacy to the extent that they claim authority. As I have already suggested, the EU does claim authority to some degree. Finally, legal systems are open systems to the extent that they enforce norms of other systems, such as through private international law. The EU permits such norms to apply. Accordingly, it is possible to claim that even though the EU is not a state, the EU and its legal system exhibit and mimic certain features of the state meaning that it is possible to apply neorepublican political theory to the EU and its member states.

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<sup>103</sup> *A Union of Peoples* (n 90) 122.

<sup>104</sup> Justin Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 OJLS 328 applying Joseph Raz, *Practical Reason and Norms* (Revised edition, OUP 1999) 150-154.

## B. A Neorepublican European Union

Given that the EU is a partial political community, it is possible to apply, at least in part, Pettit's neorepublicanism to the EU as it currently stands and as it might look in the future in the light of a federalist understanding of the purpose of the EU. First, in relation to the ideal of freedom as non-domination generally—the pursuit of which is the ultimate legitimacy criterion of the actions of neorepublican political authorities—it is probably fair to say that one function of the EU is to secure freedom for the peoples of the EU. The most basic theory of free trade underlying European economic integration would suggest that as the economies of the member states integrate, the factors of production will be allocated more efficiently, leading to increased aggregate welfare, a wider range of options available to consumers and a consequent increase in freedom which comes with those choices.<sup>105</sup> A second observation is that the EU does seek to reduce the domination the peoples of the EU habitually experience, as well as any domination between its member states. That is, the EU as it stands functions to reduce power relations both within the member states and between its member states in the context of increasing interdependence. And as with any nation state, it must do so primarily through being comprehensively just—that is, socially just and politically legitimate. Only the former shall be considered below.

In respect of the internal dimension, it can be said that it is one of the fundamental goals of the EU to establish a market in the factors of production including labour, thereby entrenching, *inter alia*, the basic liberty to work across the EU. The EU has established, through its constitutional documents, legislation and very extensive body of case law a legal system providing for and entrenching some of the basic liberties Pettit envisages as necessary to secure people's well-being. It has also complemented its hard legal *acquis* with a well-developed body of soft law and policy in the form of, *inter alia*, country-specific recommendations provided under the previously outlined European Semester.

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<sup>105</sup> This summary draws on Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, OUP 2019) ch 1.

But to what extent has the entrenchment of a transnational market in the EU entailed redistribution as a matter of social justice? It must be conceded that the EU does not generally or obviously discharge obligations of social justice within the Single Market.<sup>106</sup> While the Union purportedly constitutes a community in which justice 'prevails',<sup>107</sup> wherein some mechanisms exist to benefit the worse off in the EU such as the European Social Fund, Regional Development Fund and the Structural Funds and the EU requires that the member states coordinate their economic and social policies to some extent,<sup>108</sup> the EU does not, for example, have a general competence to levy taxes on the peoples of Europe. Furthermore, while certain social transfers do occur between countries through the EU's budget, this does not occur in a comprehensive manner nor in a manner comparable in scale to that which occurs within the member states.<sup>109</sup> Nor do EU citizens not have unqualified rights of free movement across the Union; their right to social assistance in a host member state, for example, is limited.<sup>110</sup>

Admittedly, since the Great Recession, this picture has become somewhat more complex. For example, EU member states in the Economic and Monetary Union now experience heightened cooperation and coordination in respect of certain budgetary matters, even greater in some respects than that experienced by the constituent states of the United States of America.<sup>111</sup> EU member states which were bailed out by the Troika of the IMF, ECB and the European Commission remain subject to relatively strict budgetary constraints and economic adjustment plans. The previously outlined European Semester, successor to the Open Method of

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<sup>106</sup> See, inter alia, Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2012); Sionadh Douglas-Scott, 'Justice and Pluralism in the EU' (2012) 65 CLP 83; Sionadh Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism and Critical Legal Justice' in *Philosophical Foundations of European Union Law* (n 88); and Sionadh Douglas-Scott, 'Rethinking Justice for the EU' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (CUP 2014). That is not to say that no form of justice exists in the EU at present: in *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) Floris de Witte argues that several forms of transnational solidarity—market, communitarian and aspirational—exist within the EU. Similarly, in *A Union of Peoples* (n 90) 203-208 Eleftheriadis argues that there is a form of corrective justice between the EU's member states insofar as minimal redistribution occurs through the EU's budget and social transfers.

<sup>107</sup> TEU, art 2.

<sup>108</sup> TFEU, art 120.

<sup>109</sup> *A Union of Peoples* (n 90) ch 8.

<sup>110</sup> Pavlos Eleftheriadis, 'The Idea of a European Constitution' (2007) 27 OJLS 1, 19.

<sup>111</sup> Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2016) ch 1.



Coordination, has also been strengthened by the provision of enforcement powers by way of fine. However, notwithstanding these significant and noteworthy changes in fiscal policy coordination amongst some member states, it remains true to say that the EU does not generally discharge obligations of justice within its territory; those changes which have come about since the Great Recession are merely a glimpse of what a federal fiscal union would look like.<sup>112</sup>

Is it nonetheless possible that the EU might presently be bound by and thereby obliged to discharge some obligations of social justice? Political philosopher David Miller has identified the following three features of nation states as playing a vital role in discharging obligations of social justice: (i) they apply coercive laws to all their members; (ii) those members identify with one another as compatriots; and (iii) although it is not fully self-contained from an economic point of view, its economy and accompanying set of social services can be regarded as a large-scale cooperative practice since most production, exchange and distribution occurs within the borders of the state. The EU might not yet fully meet all of these criteria. However, Miller goes on to note that, 'where we find forms of economic cooperation arising at transnational level or where people begin to acquire new identities, say of a regional kind, then the scope of distributive justice will also enlarge even in the absence of coercive political institutions'.<sup>113</sup>

It is plausible that, insofar as the EU exhibits heightened levels of coercion, shared identity and cooperation at a transnational level, the EU is in the process of falling within the scope of the justice relation. To put the point another way, insofar as the EU increasingly mimics those distinctive characteristics of the nation state which give rise to obligations of social justice, so too shall the EU's conduct give rise to obligations of social justice to EU citizens which the EU is required to discharge.<sup>114</sup> This

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<sup>112</sup> For a justification of greater fiscal competence in the Union, see Federico Fabbrini, 'Fiscal Capacity' in Federico Fabbrini and Marvo Ventoruzzo (eds), *Research Handbook in EU Economic Law* (Edward Elgar 2019).

<sup>113</sup> David Miller, *Justice for Earthlings: Essays in Political Philosophy* (CUP 2013) 161-162, 163-164. See also AJ Julius, 'Nagel's Atlas' (2006) 34 *Phil & Pub Aff* 176, 191 and Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *OJLS* 213.

<sup>114</sup> See, *The Ethos of Europe* (n 106) ch 8; Andrew Williams, 'The Problem(s) of Justice in the European Union' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2015) 37-38; and Andrea Sangiovanni, 'Debating the EU's Raison d'Être: On the Relation between

conclusion is also the logical consequence of a similar point made by Stephen Weatherill, who argues that the purpose of the EU is to manage interdependence between its member states.<sup>115</sup> Managing interdependence could be identified as one of the core functions of political communities generally; and once interdependence crosses the Rubicon, as it were, the functions of the EU may (or ought to) mimic more and more those of states.<sup>116</sup> To recapitulate: some characteristics of the nation state give rise to obligations of justice therein; therefore, to the extent that the EU mimics or adopts those characteristics, it has similar obligations; and given that one purpose of the nation state is to advance the well-being of members, to the extent that the EU has the same purpose as the state, then it must be bound by the same obligations.

At present, however, the precise content and extent of such obligations of justice are unclear, given the EU's sui generis nature and widespread speculation about the very future of the EU. But the conditions established by Pettit's normative neorepublicanism do provide criteria by which we could judge the EU's commitment to social justice going forward. As noted in respect of the internal dimension, each should be afforded sufficient resources to exercise their freedom of choice; any remaining material and social inequalities are permissible only insofar as they are unlikely to result in domination. According to Pettit's neorepublicanism, then, each EU citizen should be afforded sufficient resources to participate in the labour market without experiencing domination. In the context of the basic liberty to work, the EU and its member states are thereby legitimised not only to prohibit dominating conduct within the labour market, primarily through establishing appropriate insulation measures, but to also promote people's access to and participation in the labour market, through the establishment of appropriate infrastructural and insurance programmes, which guard

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Legitimacy and Justice' (2019) 57 *JCMS* 13, 24 who argues that the EU's legitimacy stems from its goals (its 'telic legitimacy', in Sangiovanni's words) and given one of the EU's goals is to establish a social market economy, '[a]n account of the telic legitimacy of the Social Market Economy must have at its core (...) an account of social justice that can help us in evaluating tradeoffs.' For an account which also places justice at the centre of the EU's legitimacy, see Jürgen Neyer, 'Europe's Justice Deficit: Justification and Legitimacy in the European Union' in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (OUP 2011); and Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (OUP 2012).

<sup>115</sup> Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 20.

<sup>116</sup> On the sociological preconditions for the existence of obligations of justice within the EU generally, see Juri Viehoff and Kalypso Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity and Choice' in *Europe's Justice Deficit?* (n 114).

against the risk of domination. In other words, the EU should seek to secure at least an aspect of neorepublican justice for people at work therein in the manner envisaged in the previous section on the relationship between neorepublicanism and work. The very fact that EU employment and labour law, as well as related areas such as EU anti-discrimination and equality law, are already well-entrenched in EU law and policy suggests that, notwithstanding that the EU does not generally discharge obligations of social justice, the EU nevertheless does secure a degree of neorepublican justice for people at work in the EU at present. To put the point another way, while the EU does not generally discharge obligations of social justice, it may do so to some extent in particular circumstances, work being merely one of them.

Of course, Pettit does not consider the division of competences in a multi-level polity such as the EU. That is, he does not provide us with a clear scheme according to which competences should be allocated in a federal-type political community like the EU. Presumably, examining the EU's legitimacy in the light of a model of statehood, it is the EU's present and future institutions which should bear the primary responsibility for discharging such obligations of justice,<sup>117</sup> but that is not to say that the member states should have no role to play in securing justice for their citizens. Indeed, it is plausible to think that in a federal republic there will be a significant degree of local autonomy<sup>118</sup> and the principle of subsidiarity will be rigorously adhered to.<sup>119</sup> Given the absence of theoretical guidance on the matter, two distinct questions arise which merit further reflection. Those questions, roughly, are whether it is better, empirically and normatively, for the EU or the member states to have competence to undertake a certain task, such as at least some redistributive obligations. At present the EU has very limited competences in respect of redistribution. The empirical argument for further

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<sup>117</sup> This is necessary to respond to Eleftheriadis' stinging critique of the present institutional inadequacy of the EU to bear and discharge obligations of distributive justice: see *A Union of Peoples* (n 90) 203-208.

<sup>118</sup> Richard Bellamy, 'A European Republic of Sovereign States: Sovereignty, republicanism and the European Union' (2017) 16 EJPT 188, 197. On the problem of the allocation of authority in the EU, see generally Joana Mendes and Ingo Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018) and my review thereof in (2019) 44 EL Rev 577. On the EU as a federation sui generis, see, inter alia, Ingeborg Tömmel, 'The European Union – A Federation Sui Generis?' in Finn Laursen (ed), *The EU and Federalism: Politics and Policies Compared* (Ashgate 2011); and 'Neither an International Organisation Nor a State: The EU as a Supranational Federation' (n 95).

<sup>119</sup> See, inter alia, Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 JCMS 72; and Robert Schütze, 'EU Competences: Existence and Exercise' in Anthony Arnall and Damien Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

such competences is based on the claim that the EU could better secure the well-being of its peoples through redistribution than its member states.<sup>120</sup> This is likely a difficult empirical hypothesis to prove. It could be based on arguments of economic or institutional efficacy. It might make comparisons with other similarly scaled polities such as Brazil, China, India and the USA.<sup>121</sup> By contrast, the normative argument claims that supranational organisations like the EU are most likely to succeed to the extent that they mimic nation states and, accordingly, the EU should be given greater redistributive powers. This is not the place to settle the debate on the relationship between justice and the EU, but this chapter and thesis as a whole joins with others in calling for greater reflection on justice in the EU.

In respect of the external dimension, a key focus of the EU's external relations is international trade and participation in international organisations.<sup>122</sup> As was noted in chapter 1, the EU is a member of the WTO and actively participates in its work. The EU's member states, of course, retain extensive competences in external affairs generally but have pooled their sovereignty quite significantly in respect of their common trade and immigration policies, certain aspects of which will be analysed in Part II of this thesis. And the EU does or should owe humanitarian obligations to other political communities, which are binding irrespective of territory but generally differ in content, insofar as they are generally less onerous, than its obligations of justice towards its own citizens.

### **C. Or a Republican Europe of States?**

The previous section sought to partially apply Pettit's neorepublican normative political theory to the EU. Some significant disparities between theory and practice were noted, particularly in respect of the EU's general commitment to social justice. This was unsurprising; the EU, as it currently stands, is a partial political community and

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<sup>120</sup> Thomas Picketty, *The Economics of Inequality* (HUP 2015) 37 suggests that '[w]ithout fiscal federalism (...) it is impossible to achieve an optimal distribution from capital to labour in the social justice sense'.

<sup>121</sup> See, eg, Kalypsa Nicolaïdis and Richard Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001).

<sup>122</sup> For a helpful survey of the EU's external affairs, see, eg, Knud Erik Jørgensen and Katie Verlin Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions: Performance, policy, power* (Routledge 2013).

so only reflects *The Pluralist View*. Nonetheless, it was argued that the present interdependence between member states may, assuming increasing social and economic integration in the future, result in the sociological conditions necessary to justify the existence of social justice obligations within the EU as a whole. What preceded was thus part interpretive of our actually existing social practices and part normative.

There are, however, a number of alternative neorepublican understandings of the EU,<sup>123</sup> one of which has gained some traction in recent years in and through the work of political theorist Richard Bellamy.<sup>124</sup> It takes a different and more limited view of the future of EU integration, placing greater focus on the role of the member states as drivers of the project of EU integration. It is an understanding of the EU as a republic of sovereign states; that is, 'an order that states and their peoples have given and implement themselves not to supplant their sovereignty but to regulate its exercise with regard to each other'.<sup>125</sup> It thus views the EU as a polity somewhere between a sovereign nation state and a post-sovereign state—that is, a state in which sovereign authority is dispersed above and below the state.

As for the sovereign view of the EU, Bellamy argues that the EU currently lacks a people or demos; and even if the EU was considered to be a union of peoples or demois, given the gross diversity across the EU, there were be 'an ever more conflictual cleavage between nationalists and supranationalists that could be disastrous for the EU'.<sup>126</sup> This line of argument is, as Bellamy accepts, contestable, given the existence of similarly- or larger- scaled polities around the world (eg, the USA, Brazil, India and China) but 'such cases of state-building occurred through war and were accompanied by extensive and invariably coercive processes of nation-building (...) [t]oday, such processes would be deemed unacceptably illiberal and dominating'.<sup>127</sup> It is, however, difficult not to see the EU as a distinctively post-war creation aimed at creating peace and prosperity in Europe. To put the point another way, the EU was born out of and

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<sup>123</sup> Anna Kocharov, *Republican Europe* (Hart 2017); and Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019) and Bellamy's many papers.

<sup>124</sup> *A Republican Europe of States* (n 123).

<sup>125</sup> *ibid* 91.

<sup>126</sup> *ibid* 84.

<sup>127</sup> *ibid* 85.

continues to be shaped by crises which affect the peoples of Europe. Bellamy does concede that some who argue for a sovereign EU, such as Jürgen Habermas, advocate a pooling of sovereignty in areas which lie beyond what each member could handle individually, which represents a more limited federal EU.<sup>128</sup> Nevertheless, he argues that creating an EU polity: would involve an unacceptable degree of domination for the reasons suggested above; would be unjustifiable because it 'assumes the citizens of member states can be likened to individuals who lie outside any constituted sovereign order'; and unnecessary because the task

"is not so much to offer individuals a basic political structure at the EU level capable of securing justice for them in a legitimate manner, as to ensure the existing structures of the different member states prove mutually supportive rather than oppressive and can cooperate in non-dominating ways that enable their citizens to live on free and equal terms with each other."<sup>129</sup>

By contrast, while the post-sovereign view of the EU provides for the possibility of people participating in multiple and differently constituted demos, each of which checks and balances each other's power, Bellamy suggests that in the absence of a comprehensive system of checks and balances in the EU,

"the dispersal of sovereignty among a multiplicity of discrete regimes would risk degenerating into a chaos of conflicting and partial polities, each self-reflexive and incomplete. No incentives to give equal concern and respect to all citizens necessarily exist in an entirely dispersed and non-hierarchical system."<sup>130</sup>

Ultimately, Bellamy's views on both the sovereign and post-sovereign understandings of the EU are debatable. In respect of the sovereign view, it is not entirely clear that creating a supranational federation would necessarily involve an intolerable degree of domination between those countries which are currently the

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<sup>128</sup> Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012).

<sup>129</sup> *A Republican Europe of States* (n 123) 86-87.

<sup>130</sup> *ibid* 89.

member states. Cooperation between sovereign states need not involve domination; cooperation to integrate would not logically entail domination, although it is indeed a possibility. Moreover, many of the polities which are similarly- or more largely-scaled than the EU were borne out of some sort of crisis, economic, social or cultural. The EU's predecessor, the EEC, was also borne out of a crisis. The EU as it stands faces multiple crises, some of which were outlined in chapter 1, which risk fracturing the EU. How successfully the EU will deal with these and future crises is largely a matter of speculation. Bellamy's rejection of the possibility of a fully neorepublican EU in the future is also similarly speculative. Indeed, Bellamy's rejection of Habermas' more limited proposal seems particularly unfair in the light of the fact that Habermas' view is consistent with at least one fairly common view of the EU as it stands, viz, that the member states have pooled their sovereignty in some respects.

It is, furthermore, unclear why a federal EU is unjustifiable if it could provide people with opportunities to carve out their own conception of the good in possibly more diverse conditions than presently hold within any single member state. Even on Bellamy's own view, the purpose of the EU is to secure an aspect of people's well-being, so it is plausible to assume that the EU could in future secure many more aspects of people's well-being than it currently does. Similarly, it is unclear why creating an EU polity is unnecessary given that, as Bellamy himself accepts, globalisation 'generates problems that can only be effectively tackled through collective action between states'.<sup>131</sup> Assuming the deepening of the process of globalisation in the future, it seems likely that global interconnectedness between states and peoples is only likely to continue. If this empirical socio-economic assumption holds, then the possibility of creating an EU polity will become distinctively relevant.

Meanwhile, in respect of the post-sovereign understanding of the EU, while it is true that no incentives to give equal concern and respect to all citizens necessarily exist, that is not to say that they cannot exist at all. The existence of obligations to give equal concern and respect are of course largely contingent on the existence of a sovereign authority claiming the right to rule; but the power which that sovereign requires to enforce its authority may differ greatly depending on existing economic, social and

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<sup>131</sup> *ibid* 68.

cultural practices in a given political community. Bellamy cites the USA as an example which has long been fraught with fractional politics as a result of an inadequately constructed system of checks and balances, but the example does not travel easily.

The penultimate point mentioned raises an important difference between this thesis and Bellamy's project which is likely by now clear. Bellamy's starting point is to acknowledge that the EU is not a state: '[t]herefore, the focus for a theory of legitimacy for the EU is not the provision of fair terms of cooperation among free and equal individual citizens but among free and equal peoples'.<sup>132</sup> Bellamy's republican theory of the EU may therefore better cohere with the reality of our political practice and respond to our intuitions about the EU at present. But given that it is at least unclear to what extent the process of globalisation will give rise to further economic, social and cultural integration within the EU, the theorist is certainly given a reasonable degree of room to speculate as to the likely future trajectory of the project of EU integration. Accordingly, and by contrast with Bellamy's view, this thesis takes the view that while *The Pluralist View* adequately accounts for the EU as it stands, *The Monist View* or *The Dualist View* may one day account for the EU's claim to authority; in other words, it is appropriate to critique the EU in the light of a model of future federal statehood.

There is a second important difference between this thesis and Bellamy's project. For the result of conceptualising the EU as a republican association of sovereign states is not (at least not yet) a particular view of what a socially just EU would look like but rather an understanding of what a politically legitimate EU would look like. This is because, for Bellamy, 'justice has to be located in an account of legitimacy, so that politics comes first'.<sup>133</sup> Bellamy, accordingly, gives explanatory priority to an account of the EU's political legitimacy, suggesting that any account of a socially just EU must follow from compliance with pre-existing conditions of procedural legitimacy. He does not, however, identify what a socially just EU might look like in the light of his account of a procedurally legitimate EU. While the approach embodied in this thesis does not necessarily reject such an approach—indeed, Pettit too believes that questions of political legitimacy precede social justice<sup>134</sup>—it does reject what appears

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<sup>132</sup> *ibid* 18.

<sup>133</sup> *ibid* 53.

<sup>134</sup> *On the People's Terms* (n 1) 24-25.



to be implicit in Bellamy's account, namely, that no conception of social justice can be elaborated without political legitimacy. For the ultimate criterion of the legitimacy of the actions of political authorities is not whether they are politically legitimate but whether they act in a way which respects people's freedom as non-domination. It ought, therefore, to be possible to derive a conception of a socially just EU directly from the ideal of freedom as non-domination while also acknowledging that any such socially just EU must also be politically legitimate and should only be achieved through politically legitimate means.

#### **D. Synthesis and Reflection**

Well-being has traditionally been guaranteed in political communities subject to political authorities which restrict the well-being of some for the benefit of others. The particular manner of doing so advocated in this thesis is on the basis of Pettit's neorepublicanism. The relevant political community is the EU. The EU is currently a partial political community; that much is relatively uncontroversial. What is at least quite controversial, however, is the claim that the EU should become a complete political community. That claim depends on speculation about the future of the EU generally, speculation which the theorist is legitimately entitled to participate in given present uncertainty about the EU's future. Depending on the view of the EU's future taken by the theorist, different outcomes and aspects of the EU and EU law are given explanatory priority. This thesis joins with others in what Eleftheriadis calls the 'aspirational federalist' school of thought, mentioned earlier, who advocate a federal EU. If the EU were to become a complete political community, such as a federal EU, then it would need to be socially just and politically legitimate. The neorepublican requirements of social justice have been here outlined insofar as they apply to work in the EU. From doing so, it appears that while the EU does not generally discharge obligations of social justice at present, it nonetheless does engage in some redistribution and certainly does secure at least an aspect of neorepublican justice for people at work in the EU insofar as it regulates the activity of work. It is, accordingly, now appropriate to consider how at least some of the implications of those

requirements are implemented in practice to regulate work in the EU. In other words, it is time to provide a neorepublican justification for at least some of the parts of EU employment and labour law.

#### IV. Towards a Neorepublican EU Labour Law

As noted in section I.B above, Pettit is of the view that it is essentially through a combination of law and norms of differing degrees of importance and strength that the basic liberties in any given society are to be entrenched and secured. And one of the most prominent and weighty such norms are rights. While the basic liberty to work constitutes the most fundamental and abstract expression of the value of work, it may in practice be secured as a fundamental right to work.<sup>135</sup> As Pettit notes, the basic liberties and their entrenchment will depend on the society in question and its culture. Given the centrality of work to well-being and the fact that rights play a significant role in the culture of the European Union, I here consider what relationship there is between work and any rights, political or legal, which people working in the European Union may have.<sup>136</sup>

There is some important and helpful scholarship to date on the relationship between labour law and (human) rights.<sup>137</sup> While valuable and with respect to these scholars' work, they have largely overlooked the connection between well-being and

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<sup>135</sup> This kind of relationship between the basic liberties and rights is envisaged by Raz in *The Morality of Freedom* (n 55) 246.

<sup>136</sup> See generally Joxerramon Bengoetxea, 'Rights (and Obligations) in EU Law' in *The Oxford Handbook of the European Union* (n 95).

<sup>137</sup> See, inter alia, Amartya Sen, 'Work and Rights' (2000) 139 *Int'l Lab Rev* 119; Philip Alston (ed), *Labour Rights as Human Rights* (OUP 2005); Mathias Risse, 'A Right to Work? A Right to Leisure? Labour Rights as Human Rights' (2009) 3 *Law & Ethics of Human Rights* 1; Kevin Kolben, 'Labour Rights as Human Rights?' (2010) 50 *Va J Int'l L* 449; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *ELLJ* 151; Hugh Collins, 'Is there a Human Right to Work?' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015); Judy Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2015) 37 *Dalhousie LJ* 601; Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland, Alan Bogg, David Cabrelli, Hugh Collins, Nicola Countouris, ACL Davies, Simon Deakin and Jeremias Prassl (eds), *The Contract of Employment* (OUP 2016); Sean Coyle, 'Labour Rights as Natural Rights' in Martha Fineman and Jonatan Fineman (eds), *Vulnerability and the Legal Organisation of Work* (Routledge 2018); Joe Atkinson, 'Human Rights as Foundations for Labour Law' in *Philosophical Foundations of Labour Law* (n 46); and Joe Atkinson, *Labour Law and Human Rights: Legal and Philosophical Perspective* (UCL PhD Thesis 2020).

rights. If rights are defined such that they impose duties and obligations on others to secure an aspect of a person's well-being, then there is a pro tanto case for supposing that at least some theories of rights can provide at least a partial foundation for labour law. In other words, it may be possible to provide at least a skeletal outline of a partial foundation of a neorepublican rights-based justification for some fundamental labour rights. What follows should, therefore, be understood as merely the starting point from which other scholars may build a fuller republican rights-based theory of labour law.

Conveniently, there is a theory which recognises the link between well-being, freedom and rights. According to the interest theory of rights, individual interests justify the imposition of duties, the grounds of which are rights. According to Joseph Raz, 'X has a right if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.<sup>138</sup> For Raz, rights are not necessarily non-aggregative, nor agent-relative.<sup>139</sup> It follows that collective rights are possible, provided that the duty justified by the existence of a collective right is based on a cumulative interest in a public good.<sup>140</sup> This is important insofar as such rights may not necessarily yield the imposition of a duty on any individual but rather on the community in general. It is therefore likely, contra Cabrelli and Zahn, that Pettit's neorepublicanism could justify collective rights generally and, consequently, aspects of collective labour law.

It seems plausible that people working in the EU do have certain rights insofar as their interests in work justify them. The question which then arises is, what rights? The most fundamental right must be the right to work, the most basic expression of the liberty to work; and given the basic liberty to freely associate with others, the right to freedom of association must also be considered as foundational. In the context of unpaid work, besides the right to undertake personal work (ie, leisure time),<sup>141</sup> a derivative right of the right to work, it is difficult to specify further rights because there is a lack of a developed EU culture recognising the undoubted value of such work, or at least one which rivals the recognition of the importance and significance of paid work.

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<sup>138</sup> *The Morality of Freedom* (n 55) 166. For Pettit's views, see 'The Consequentialist Can Recognise Rights' (1988) 35 *Philosophical Quarterly* 537.

<sup>139</sup> *ibid* 187.

<sup>140</sup> *ibid* 190-200, 208-209.

<sup>141</sup> See, eg, Nicolas Bueno, 'From the Right to Work to Freedom from Work' (2017) 33 *IJCLLIR* 463.

While the existence, enforcement and weight of rights depends greatly on the given culture and community in question,<sup>142</sup> the link between neorepublicanism and work in the EU fostered thus far in this chapter suggests that certain fundamental or core labour rights could be entrenched at a constitutional level and given direct vertical and horizontal effect, while further rights may derive therefrom and are linked to the general law of contract, albeit differentiated therefrom by virtue of the autonomy of labour law from the general law of contract.<sup>143</sup> More specifically, laws of the following three kinds are necessary to institute such legal rights as members of the EU's legal system: investitive, divestitive or constitutive laws. An investitive law is one which determines when a person has a certain right, given the existence of certain conditions. A divestitive law is one which determines the conditions for loss of a right. Finally, a constitutive law is one which determines the circumstances in which a person has a right in addition to a pre-existing right. As Raz puts it, 'all the investitive, divestitive and constitutive laws concerning one right, all the laws instituting one legal right in one legal system, define that right in that legal system'.<sup>144</sup> In other words, investitive, divestitive and constitutive laws are necessary to entrench rights as constituent laws or norms of a given legal system, the EU's legal system being the relevant one in this case.

Accordingly, in relation to the basic liberties to work and to freely associate with others, what is envisaged is a neorepublican regulation of work; that is, a legal system which consists of, inter alia, a sub-system or sub-category laws and norms regulating the activity of work which derive their legitimacy from a concern to secure (an aspect of) justice for people working insofar as same is necessary to ensure people's freedom as non-domination—their well-being. Such legal rights as justified above can form part of Pettit's insulation programmes, which generally provide institutional solutions and pathways for the resolution of disputes concerning such rights, be they courts, tribunals or other formal and informal oversight mechanisms. EU institutions that readily come to mind in this respect are the Court of Justice of the European Union and national

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<sup>142</sup> *The Morality of Freedom* (n 55) 172.

<sup>143</sup> On the constitutionalisation of EU employment and labour law, see Mark Bell, 'Constitutionalisation and EU Employment Law' in *Constitutionalisation of European Private Law* (n 68). On constitutional EU employment and labour law generally, see Florian Rödl, 'The Labour Constitution' in *Principles of European Constitutional Law* (n 94).

<sup>144</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, OUP 1980) 176.

courts and authorities of the member states, as well as a host of other public, semi-state and private institutions and authorities such as professional associations, supervisory authorities or commissions and, of course, trade unions.

But the basic liberty to work is also affected by presently largely non-enforceable political expressions of those rights through the social and economic policies of the EU—what Pettit understands as part of infrastructural and insurance programmes rather than insulation measures<sup>145</sup>—which contribute to the creation and flourishing of an autonomy-based culture in the European Union. Some pertinent aspects of such programmes include: the EU and member states' education and training laws and policies which Pettit considers vital in ensuring that 'each have access to the sort of education necessary to provide them with essential skills, to bring their particular talents to fruition';<sup>146</sup> the previously outlined European Semester; the targets established by the Europe 2020 strategy; the recently established European Pillar of Social Rights, a non-binding declaration which seeks to entrench certain social and economic rights in the policies of the member states; the object, embedded in art 3 TEU, of achieving 'full employment and social progress'; and the work undertaken by many of the EU's decentralised agencies, such as the European Centre for the Development of Vocational Training, the European Training Foundation, the European Foundation for the Improvement of Living and Working Conditions, the European Agency for Safety and Health at Work, the European Institute of Innovation and Technology and the European Labour Authority as well as, of course, all of the diverse and correlate member states' laws, policies and authorities.

This justificatory analysis of certain employment and labour rights in EU law brings with it an important and easily overlooked reservation which runs roughly as follows. Given that the EU as it stands is a partial political community and does not claim supreme authority over its member states in many or all domains, it cannot and does not justify the claim that people in the EU can rely on those labour rights in the member states in the face of conflicting member state laws. This is so because, as the EU's claim to authority is currently based on *The Pluralist View* rather than *The Monist*

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<sup>145</sup> *On the People's Terms* (n 1) 110-114.

<sup>146</sup> *ibid* 111.

*View*, it claims to be hierarchically superior to member state law but conflicts with the member states' claim to authority and does not require conflicting member state law to be rendered invalid, the authority to do so remaining solely within the remit of national courts, but merely that the law be set aside. In order for the EU to entrench the rights which are justified on the basis of securing the basic liberties, either its laws must be hierarchical to member states' laws and it be capable of enforcing them, or there be some rule of member state political communities which provide that they apply the EU rules over other rules, which is simply *The Dualist View*. Since the CJEU is only in certain domains a court of first or final instance, the relevant norm must be a part of the member states' legal systems, viz, a norm of the member state legal system which states that EU law applies within that system. That norm will only exist if the member states' legal systems adopt *The Dualist View* or the legal officials of the member states' legal systems accept EU norms as hierarchically superior to member state norms; that is, they view the EU itself through the lens of *The Monist View*. The former is ostensibly not the case in all member states; and if the latter is true, then the EU is or is in the process of becoming a complete political community.

## Conclusion

This chapter has continued the answer to the first sub-question of this thesis, namely, according to what theory shall the well-being of third-country nationals accessing work in the EU be assessed? The answer provided by chapters 1 and 2, which need to be read closely together, can now be restated as follows.

The ultimate concern of this thesis is for a perfectionist conception of people's well-being, namely the ideal of freedom as non-domination. In exercising one's freedom of choice, one must use one's skills. One way of using one's skills is through productivity. Productive activity is the hallmark of work and is one of the primary ways of exercising one's freedom of choice in our culture. Work can therefore make an important contribution, as both a means and/or an end, to people's well-being. Given that well-being is the ultimately concern of this thesis, in particular certain aspects

thereof related to the ability to access and participate in work, the question then becomes, how do we secure people's well-being in accessing work?

Well-being has traditionally been guaranteed by authorities in political communities. The relevant political community we are concerned with is the EU. The EU is currently a partial political community because and insofar as it guarantees people's well-being. Accepting that the EU is a partial political community, it is possible to apply, at least in part, a normative political theory to guarantee people's well-being. That theory, as partially explicated here, is Pettit's neorepublicanism, which has two dimensions. The first is the internal dimension, concerning the relations between individuals and the state or, in the context of this thesis, the EU. The internal dimension itself has two aspects—social justice and political legitimacy. Only parts of the former shall be considered in this thesis. The second is the external dimension, concerning political communities' relations with one another.

In respect of the internal dimension, the EU and its member states have established and are entrenching a Single Market in the four factors of production, thereby entrenching a basic liberty to work. The EU promulgates these and other measures primarily through law, albeit in various and varied forms of law, thus cohering with the internal dimension's governance requirements. Insofar as it has been explicated here, neorepublicanism may provide the beginning of an outline of a partial theoretical justification for at least some labour laws. More specifically, the analysis provided in this chapter suggests that people's well-being in accessing work in the EU could be secured by affording them certain rights relating to work which are entrenched in the EU's legal system. For these purposes, the most fundamental expression of the basic liberty to work is the right to work, which is the focus of the next chapter. In respect of the external dimension, the EU has developed and is developing international relations with other countries often, though not always, through the establishment of binding international legal norms. And, more generally, the EU and its member states are bound by many internationally established norms governing what rights people should have.

The key distinction between the internal and external dimensions of neorepublicanism is the extent of any obligations of justice which arise. While the EU does and/or should owe obligations of justice to its own citizens, it does not owe

obligations of justice to the citizens of other countries. It should owe them other obligations, but they are not obligations of justice. Rather, the EU owes other countries humanitarian obligations, namely, obligations to ensure that the human rights of non-nationals are secured.



### **3. The Right to Work in the EU**

#### **Introduction**

The previous two chapters established that the well-being of third-country nationals accessing work in the EU is to be assessed by reference to a perfectionist conception of well-being, namely, the neorepublican ideal of freedom as non-domination. That ideal requires the entrenchment of people in a political community in respect of certain basic liberties, such as the basic liberties to work and to freely associate with one another. Insofar as such entrenchment may take the form of a right, the right to work, a constitutional right binding vertically and horizontally entrenched by investitive, divestitive and constitutive laws in the EU's legal system, may be the most fundamental expression of the basic liberty to work in the EU. Accordingly, this chapter outlines the right to work in EU law, a right which should be understood as fundamental for the purposes of being able to participate in the good of work. This chapter identifies and analyses one of the two foundational rights which third-country nationals may seek to rely on to secure their well-being in accessing work in the EU, the other being the right to equality or to be free from wrongful discrimination. A further derivative right,

namely, the right to have one's skills recognised, will be considered comprehensively in Part II of this thesis.

This chapter is structured as follows. It first considers the right to work in international and European law (section I). What emerges from this analysis is, first, that the right to work is universally considered to be a fundamental human right; second, it is a multidimensional right; third, that the most important dimension for the purposes of this thesis is the access dimension; and fourth, the multiple and overlapping modes of governance in operation to guarantee that right effectively. The chapter then considers the right to work in EU law, tracing its origins and genesis (section II). Particular attention is paid to the beneficiaries of the right to work, especially third-country nationals, the primary focus of this thesis (section II.D.2). A short conclusion follows.

## I. The Right to Work in International and European Law

### A. International Law

#### 1. International Human Rights Law<sup>1</sup>

Article 23(1) UDHR recognises the right to work as a fundamental right of everyone: '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. The right to work is also guaranteed in several other international human rights treaties, namely, in and through art 8(3)(a) ICCPR,<sup>2</sup> art 6 ICESCR,<sup>3</sup> art 11(1)(a) CEDAW,<sup>4</sup> art 5(e)(i) CERD,<sup>5</sup> art 27(1)

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<sup>1</sup> Colm Ó Cinnéide, 'The Right to Work in International Human Rights Law' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2014).

<sup>2</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) ch 10.

<sup>3</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) ch 8.

<sup>4</sup> Frances Raday, 'Article 11' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012).

<sup>5</sup> Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) ch 12.

CRPD,<sup>6</sup> art 32 CRC<sup>7</sup> and in arts 11, 25, 26, 40, 52 and 54 ICRMW. All member states of the European Union are parties to these respective human rights treaties (except the ICRMW, to which only a minority of member states are party)<sup>8</sup> and, according to art 3 TEU, the EU is committed to respecting, protecting and promoting human rights. It is thus essential that the EU, in its laws and policies, respects, protects and promotes the right to work to ensure its compliance with international human rights law. Of the guarantees of the right to work here mentioned, only the ICESCR and the ICRMW shall be considered in full below because the ICESCR 'deals more comprehensively than any other instrument with this right'<sup>9</sup> and the ICRMW is directly related to the place of migrant workers.

Article 6(1) ICESCR proclaims 'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. This text may suggest a degree of consistency with the concept of work adopted in chapter 1.III.C which includes not only paid work but also unpaid forms of work because the right to work does not only concern the right to undertake paid work.<sup>10</sup> The wording of art 6(1) is broader than a right to undertake paid work alone. But it is also significant in its implications for third-country nationals. It seems to suggest that everyone in the jurisdiction and subject to the powers of the state has the right to work.

Further evidence of the link between the right to work and the concept of work is to be found in General Comment No 18 on the right to work by the CESCR. According to the CESCR, '[t]he right to work contributes (...) to the survival of the individual and

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<sup>6</sup> Ilias Bantekas, Facundo Pennilas and Stefan Trömel, 'Article 27' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP 2018).

<sup>7</sup> Philip Alston, 'Article 32' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019).

<sup>8</sup> Euan MacDonald and Ryszard Cholewinski, 'The ICRMW and the European Union' in Paul de Guchteneire, Antoine Pecoud and Ryszard Cholewinski (eds), *Migrants and Human Rights: The United Nations Convention on Migrant Workers' Rights* (CUP 2009).

<sup>9</sup> CESCR, 'The Right to Work: General Comment No 18' (24 November 2005) 2; *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (n 3) ch 8.

<sup>10</sup> Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995) 196 notes that during the drafting, some delegations suggested that work should not be limited to paid work. Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (n 3) 281 argue that paid and unpaid work should be included in the definition of work for the purposes of art 8 ICESCR.

to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community'.<sup>11</sup> This underlines the fact that 'respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice of work, while emphasising the importance of work for personal development as well as social and economic inclusion'.<sup>12</sup> Moreover, the right to work 'encompasses all forms of work, whether independent work or dependent wage work'.<sup>13</sup> The Committee also emphasises the need to allocate adequate resources to those who are disadvantaged, such as migrant groups.<sup>14</sup> There are also a number of 'core obligations' under the ICESCR; namely, to ensure the right of access to employment; to avoid any measures that result in discrimination and unequal treatment; and to adopt a national employment strategy and plan of action to implement the right to work.<sup>15</sup> Clearly, then, access to employment is key in the overall schema of the right to work as laid out in the ICESCR. The right to work should therefore be understood as vital in enabling people to participate in the labour market.

In its Comment, the CESCR also observes that the following are required to guarantee the right to work, namely, the availability of work, accessibility to work and acceptability of work—hence the multidimensionality of the right to work. It is the accessibility to work which is most relevant to this thesis' aims and purposes. According to the CESCR, 'the labour market must be open to everyone under the jurisdiction of the State parties'.<sup>16</sup> This means that any discrimination on the grounds of, inter alia, national or social origin, is prohibited. This point is raised in the ICRMW, art 7 of which provides that states are obliged to afford migrant workers the rights guaranteed therein without discrimination based on, inter alia, nationality. For the purposes of the ICRMW, a 'migrant worker' is simply any worker who has, is or will be engaged in work in a state of which s/he is not a national. While this seems broad, similar to the ICESCR, art 35 ICRMW provides that

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<sup>11</sup> 'The Right to Work: General Comment No 18' (n 9).

<sup>12</sup> *ibid* 3.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid* 8.

<sup>15</sup> *ibid* 9.

<sup>16</sup> *ibid* 4.

“[n]othing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration...”

It is, therefore, important to distinguish quite sharply between prohibited discrimination on the ground of nationality, on the one hand and permitted discrimination on the grounds of immigration status, on the other hand. While the ICESCR guarantees the rights therein to all persons in the state without discrimination, the ICRMW guarantees those rights only insofar as migrant workers are in a regular situation. Indeed, Part VI of the ICRMW contains provisions concerning the return of irregular migrants to their state of origin. Article 67 provides for the cooperation of states in ensuring the return of migrants when their authorisation to work has expired or their status in the jurisdiction has become irregular and art 68 requires states to bring the employment of irregular migrants to an end, including adopting sanctions on employers for employing irregular migrants. Accordingly, international human rights law prohibits any discrimination on the ground of, inter alia, nationality in respect of the right to work. But it does not prohibit discrimination on the ground of immigration status. The EU and its member states should also do so to comply with their international legal obligations, an issue which shall be addressed in full in the next chapter.

## **2. International Labour Law**

The right to work is not expressly guaranteed as a right in international labour law. However, it is noted as being given effect to in a number of conventions. The Preamble to the Employment Policy Convention 1964 (No 122) notes the guarantee in the UDHR of the right to work and states that the Convention, alongside other conventions, should be seen as a programme for ‘economic expansion on the basis of full, productive and freely chosen employment’. Article 1 of the Convention requires that each member

shall declare and pursue the goal of full, productive and freely chosen employment and to adopt a policy in pursuit of that goal. According to art 1(2), that policy shall aim at ensuring, inter alia, work is as productive as possible. This, superficially at least, resonates well with the definition of work adopted in chapter 1.III.C as the productive use of one's skills. Article 1(3) of the Convention states that the policy shall take into account the relationship between employment objectives and other economic and social objectives. In its reports, the CEACR regularly considers the link between such policies and education and training laws and policies, suggesting a need for coherence between both.<sup>17</sup> Thus, developing what Pettit calls 'infrastructural programmes' form an important part of the protection and instantiation of the basic liberty to work, enabling people to become competent market actors. However, no account is taken, either in the Preamble or the text of the Convention of the role which non-nationals might play in the labour market and what rights they may have or deserve.

### 3. International Economic Law

Article I GATS provides that the agreement applies to measures by member states affecting trade in services, defined as the supply of a service

- From the territory of one member into the territory of another;
- In the territory of one member into the territory of any other another;
- By a service supplier of one member, through commercial presence in the territory of any other member; or
- By a service supplier of one member, through presence of natural persons of a member in the territory of any other member.

The last of these, so-called 'Mode 4' GATS, provides for the temporary presence of a service supplier from one member state in the territory of another member state. Access by service providers of one member state to the market of another member

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<sup>17</sup> See, eg, ILO, *Application of International Labour Standards 2018: Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III Part A)*, part II.

state is a fundamental part of the GATS but is not granted automatically. To put it another way, as a matter of international economic law, service providers—on my analysis in chapter 1.III.C, those who undertake paid self-employed work or their employees—are only permitted access to the market of a given state if a specific commitment in a relevant sector of the economy has been made by the host state. Under the GATS, member states must undertake commitments in respect of each sector of the economy which are contained in a series of schedules to the GATS. A series of minimum, harmonised preferences apply to the EU. Thus, for example, market access is generally unrestricted for Mode 4 service suppliers entering the EU except for certain categories of natural persons, namely self-employed persons; business visitors; highly-skilled workers; intra-corporate transferees; and posted workers.<sup>18</sup> These persons must obtain a visa from national authorities. In the case of self-employed service providers availing of visas under default GATS rules in the Annex on Movement of Natural Persons supplying Services under the Agreement, those rules are often practically unenforceable due both to the nature of the rules as deriving from an international economic order, which are difficult to enforce in practice, and the failure of WTO member states to properly implement these rules in domestic law.

For example, Simon Tans has demonstrated that the Netherlands and the UK failed to implement their obligations under the GATS appropriately because (i) their implementation lacked sufficient clarity due to the mode of governance adopted (often, executive policy documents rather than legislation) and the language used; (ii) the restrictions imposed on service providers domestically went beyond what was required under the GATS; and (iii) GATS rules generally lack enforceability at a domestic level. Thus, in terms of facilitating the market access of self-employed persons, much will rest on the good faith of the domestic authorities in designing and implementing these rules.<sup>19</sup> Market access is not, therefore, the default position as a matter of international economic law. If a member state specifically (as opposed to generally) permits market access in a given sector, then it is prohibited from, inter alia,

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<sup>18</sup> Simon Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalisation and Their Impact on Dutch and UK Immigration Rules* (Brill Nijhoff 2017) chs 5-6 and see my review in (2018) 9 ELLJ 218.

<sup>19</sup> *ibid* ch 7.

imposing any limitations on the number of service suppliers which may enter the jurisdiction.<sup>20</sup>

## B. European Law

### 1. The ECHR<sup>21</sup>

The ECHR does not protect the right to work as such, but in protecting certain other rights the ECtHR has effectively protected the right to work. Rory O'Connell, in his analysis of the case law of the ECtHR, outlines a number of areas in which the Court has effectively protected the right to work: under arts 6 (fair procedures), 8 (respect for private and family life), 9 (freedom of thought, conscience and religion) and 14 (non-discrimination). Only the Court's case law based on art 8 ECHR will be discussed here as it is most relevant.

In *Sidabras v Lithuania*, two former KGB agents were dismissed from public employment in Lithuania due to their involvement in the KGB.<sup>22</sup> By virtue of a provision of national law, the applicants were also prohibited from applying for various jobs in the private sector. They argued that their dismissal violated art 8 on its own and in conjunction with art 14 ECHR. The Court first assessed whether there was a difference in treatment of the applicants and then considered whether the facts of the case fell within the ambit of art 8 ECHR. The Court first concluded that there was a difference of treatment between the applicants and persons who had not worked for the KGB. In turning to the second question, the ECtHR had regard to art 1 of the European Social Charter and the ILO's Convention on Discrimination (Employment and Occupation) 1958 (No 111) and concluded that 'a far-reaching ban on taking up private-sector employment does affect "private life"'.<sup>23</sup> While the ECtHR accepted that the ECHR does

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<sup>20</sup> GATS, art XVI(2)(a).

<sup>21</sup> Rory O'Connell, 'The Right to work in the ECHR' [2012] EHRLR 176; Filip Dorsemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart 2014); and Virginia Mantouvalou, 'The Protection of the Right to Work through the European Convention on Human Rights' (2014) 16 CYELS 313.

<sup>22</sup> (2006) 42 EHRR 6.

<sup>23</sup> (2006) 42 EHRR 6 [47].



not guarantee a right of access to a particular profession,<sup>24</sup> nevertheless 'state imposed restrictions on the possibility for a person to find employment with a private company for reasons of lack of loyalty to the state cannot be justified (...) in the same manner as restrictions governing access to their employment in the public service'.<sup>25</sup> Accordingly, the restrictions in place were disproportionate and violated art 8 in conjunction with art 14 ECHR. *Sidabras* thus identifies access to work as a vital constituent element of a person's life and their well-being.

*Campagnano v Italy* concerned a bankruptcy case.<sup>26</sup> The applicant's name was entered in the bankruptcy register and as a result, she argued, was unable to engage in any business activity and several other activities, thereby violating her right to private and family life under art 8 ECHR. The scope of application of the restrictions included a prohibition on being appointed a guardian, a prohibition on being appointed as the director or trustee in bankruptcy of a commercial or cooperative company and the inability to carry on the occupations of trustee in bankruptcy, stockbroker, auditor or arbitrator. The applicant was also prohibited from participating in certain professions, such as the legal profession. Because these restrictions on a bankrupt affected 'the applicant's ability to develop relationships with the outside world',<sup>27</sup> the ECtHR found that they fell within the ambit of art 8 ECHR. According to the Court, being listed on the bankruptcy register clearly amounted to an interference with the applicant's right to respect for her private life.<sup>28</sup> Given the wide-ranging nature of these restrictions and the length of time before rehabilitation could be obtained (a period of five years), the Court considered that infringement of the applicant's art 8 rights were not 'necessary in a democratic society'.<sup>29</sup> *Capagnano* therefore locates work as a central source of meaning and identity in people's lives and emphasises the contribution of participation in the labour market to a person's well-being.

These cases can, however, be distinguished from two more recent cases of the ECtHR concerning the right to work or, more specifically, the right of access to a

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<sup>24</sup> (2006) 42 EHRR 6 [52].

<sup>25</sup> (2006) 42 EHRR 6 [58].

<sup>26</sup> (2009) 48 EHRR 43.

<sup>27</sup> (2009) 48 EHRR 43 [54].

<sup>28</sup> (2009) 48 EHRR 43 [58].

<sup>29</sup> (2009) 48 EHRR 43 [66].

profession. In *Jankauskas v Lithuania (No 2)*, the applicant, who had committed several crimes while working as a law enforcement officer, sought to be enrolled as a trainee advocate in Lithuania.<sup>30</sup> The applicant did not disclose the fact of his previous convictions in his application and the Bar Association accordingly rejected his application. The applicant appealed this decision throughout Lithuania before it was eventually affirmed by the Supreme Court. Similarly, in *Lekavičienė v Lithuania*, the applicant had been admitted to the Bar and subsequently committed several criminal offences involving fraud.<sup>31</sup> She was then removed from the list of practising advocates and subsequently sought readmission but was refused. While the applicant's conviction had expired, she nonetheless lacked the necessary high moral character required to be a practising advocate.

In both cases, while the ECtHR found that there had been an infringement of the applicants' right to respect for private and family life, the restrictions were nonetheless justified. They were prescribed by law, pursued the legitimate aim of underlining 'the advocates' obligations towards clients, courts and society and the need to safeguard the functioning of the justice system overall'<sup>32</sup> and did not permanently prohibit the applicants from later applying to be admitted to the Bar when their moral standing in the community had recovered.<sup>33</sup> Both *Jankauskas* and *Lekavičienė* stand out from *Sidabras and Dziautus* and *Campagnano* because of the obvious criminal wrongdoing and previous criminal behaviour of the applicants. But it is possible to reach a stronger conclusion in relation to these cases. In all the above discussed cases, there was some fault on behalf of the applicants—in the former two, merely civil in nature; in the latter two, criminal. Such fault triggered the restrictions imposed. Nonetheless, the restrictions prima facie infringed their right to respect for private and family life and were found to actually infringe that same right in *Sidabras and Dziautus* and *Campagnano*. In the context of migrant workers, however, there is no such fault justifying restrictions on their right to work.

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<sup>30</sup> (2018) 66 EHRR 16.

<sup>31</sup> (2018) 67 EHRR 5.

<sup>32</sup> (2018) 66 EHRR 16 [73]; (2018) 67 EHRR 5 [50].

<sup>33</sup> (2018) 66 EHRR 16 [79]; (2018) 67 EHRR 5 [55].

Finally and conversely, Hugh Collins has argued that recent case law of the ECtHR under art 8 affectively guarantees a right to protection against unjustified dismissal.<sup>34</sup> The landmark case establishing this point for Collins is *Denisov v Ukraine*<sup>35</sup> in which the applicant, a judge, was removed from office on the ground of 'significant shortcomings, omissions and errors and grave violation of the foundation of the organisation and administration of justice'. While the applicant's case was unsuccessful under art 8, the ECtHR nonetheless made a number of important remarks relating to the emerging right to protection against unjustified dismissal. The purpose of describing the Court's observations is as follows: if exclusion from employment by way of dismissal may constitute a breach of art 8 ECHR, then the converse must also be true: namely, that exclusion from the good of work in general may, if sufficiently serious, violate art 8.

The Court in *Denisov* began by affirming that, while there is no right to employment or to take up any particular profession under the ECHR, nonetheless, '[p]rofessional life is (...) part of the zone of interaction between a person and others which, even in a public context, may, under certain circumstances, fall within the scope of 'private life''.<sup>36</sup> The Court then distinguished between two different approaches it takes to employment-related cases. The first it called a 'reason-based approach', viz, where 'factors relating to private life were regarded as qualifying criteria for the function in question and when the impugned measure was based on reasons encroaching upon the individual's freedom of choice'.<sup>37</sup> The second the ECtHR described as the 'consequence-based approach', viz, where the 'impugned measure has or may have serious negative effects on the individual's private life'.<sup>38</sup> In relation to this approach, the Court has considered negative consequences on a person's 'inner circle', their opportunity to 'develop connections with the outside world' and their social and professional reputation. Moreover, any impugned measures or restrictions on any of these areas of a person's life must meet a threshold level of severity: in the

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<sup>34</sup> Hugh Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' (2020) ILJ 1 (advanced access).

<sup>35</sup> [2018] ECHR 1061.

<sup>36</sup> [2018] ECHR 1061 [100].

<sup>37</sup> [2018] ECHR 1061 [103].

<sup>38</sup> [2018] ECHR 1061 [107].

case of the 'consequence-based approach', '[t]he applicant has to present evidence substantiating consequences of the impugned measure' and '[t]he Court will only accept that arts 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree'.<sup>39</sup> In sum, if exclusion from the domain of work by way of unjustified dismissal is a violation of a person's human rights, then so too may unjustified exclusion from work in general.

## 2. The (R)ESC<sup>40</sup>

Article 1 ESC guarantees the right to work and provides as follows:

"With a view to ensuring the effective exercise of the right to work, the Parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation."

As Simon Deakin has observed, '[l]ooking at these provisions as a whole (...) it can be argued that the unifying idea in Article 1 is that of a *right to access the labour market*'.<sup>41</sup> According to Deakin, there are three senses in which it guarantees a right to

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<sup>39</sup> [2018] ECHR 1061 [116].

<sup>40</sup> Diamond Ashiagbor, 'The Right to Work' in Gráinne de Búrca and Brunno de Witte (eds), *Social Rights in Europe* (OUP 2005); Simon Deakin, 'Article 1: The Right to Work' in Nikklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart 2017); and Edoardo Ales, 'Article 1 RESC' in Edoardo Ales, Mark Bell, Olaf Deinert and Sophie Robin-Olivier (eds), *International and European Labour Law: A Commentary* (Nomos/Hart 2018).

<sup>41</sup> Deakin, 'Article 1: The Right to Work' (n 40) 148 (emphasis original).

access the labour market. A first is the way it protects the property right—the right to sell one’s labour—in the market. It accurately acknowledges that labour is indeed a commodity in a social market economy. Second, the conception of the labour market developed therein is a social one: art 1 ESC protects a social market economy. And third, art 1 ESC ‘assumes that the state and the legal system constitute the labour market not in an abstract sense, but with a particular instrumental goal in mind: this is the goal of protecting and enhancing the capabilities of market actors’<sup>42</sup> or, according to the analysis developed in this thesis, people’s skills. All of this is consistent with the approach developed thus far in this thesis. And, according to Edoardo Ales,

“the right to work as affirmed by Article 1 RESC can be qualified as a social right to work (...) In order to realise a social right to work, a strong institutional (public or public authorised and supervised) intervention on the labour market is needed. However, it does not oblige (sic) to look at the labour market as an institution itself. On the contrary, the institutionalised intervention is meaningful only if one looks at the labour market as a free place of encounter between labour demand and supply, encouraged, facilitated and assisted in its transitions by the institutionalised intervention.”<sup>43</sup>

According to the approach developed in this thesis, such institutionalised intervention in the labour market shall primarily be undertaken on the basis of the neorepublican doctrine of freedom as non-domination, aiming to reduce domination in the labour market. And, as Colm Ó Cinnéide notes, art 1(2) ESC is ‘in many ways the ‘core’ of the right to work’.<sup>44</sup> The ECSR has identified three different types of protection which states may adopt in respect of art 1(2) ESC: the prohibition of all forms of discrimination in employment; the prohibition of forced or compulsory labour; and the prohibition of any practice that might interfere with workers’ right to earn their living in an occupation freely entered upon.<sup>45</sup> While the ESC does prohibit discrimination

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<sup>42</sup> *ibid* 149.

<sup>43</sup> Ales, ‘Article 1 RESC’ (n 40) 253.

<sup>44</sup> ‘The Right to Work in International Human Rights Law’ (n 1) 115.

<sup>45</sup> ECSR, ‘Conclusions II, Statement of Interpretation on Article 1(2)’ 4.

generally, in respect of nationality discrimination, the ECSR has stated that no nationality discrimination is permitted in respect of persons who are legally in the jurisdiction of the state, except on certain limited grounds of, eg, national security or the exercise of public authority.<sup>46</sup>

## II. The Right to Work in EU Law

### A. Origins

The most obvious manifestation of the right to work in EU law first emerged in *Nold*,<sup>47</sup> wherein the applicant, a wholesaler in the coal industry, challenged a decision of the Commission concerning the establishment of conditions required for the acquisition of the status of 'direct wholesaler' in the industry. Those rules required, amongst other things, the acceptance of minimum purchase arrangements from a consolidated coal consortium in the Ruhr area of Germany. The applicant, however, was unable to meet these minimum requirements. In essence, the applicant's business was too small to survive in heightened conditions of competition. As the applicant argued, 'the effect of the new terms of business [was] to favour the concentration of this distribution into the hands of a small number of major dealers'.<sup>48</sup>

The Court of Justice rejected the applicant's challenge to the decision of the Commission on the grounds of discrimination and breach of fundamental rights. For the purposes of this chapter, the most relevant aspect of the Court's judgment is that part concerning fundamental rights. According to the Court, the right to free pursuit of a business activity, as protected by the German Basic Law and in the constitutions of the other member states, must be considered as a fundamental right which forms an integral part of the general principles of EU law.<sup>49</sup> The Court then went on to note the social nature of the right to choose and practice a trade or profession, in holding that such a right and analogue rights must be considered in the light of their social function:

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<sup>46</sup> 'The Right to Work in International Human Rights Law' (n 1) 117.

<sup>47</sup> Case 4/73 *Nold* [1974] ECR 491. See also Case 44/79 *Hauer* [1979] ECR 3727.

<sup>48</sup> [1974] ECR 491, 499.

<sup>49</sup> [1974] ECR 491 [12]-[13].

such rights 'are protected by law subject always to limitations laid down in accordance with the public interest'.<sup>50</sup> In the instant case, while the applicant's right to practice its profession was engaged, it was not infringed: 'the disadvantages claimed by the applicant are in fact the result of economic change'.<sup>51</sup>

*Nold* is important for a number of reasons. First, the Court grounded the right to work in the constitutional traditions of the member states. According to Michele Everson and Rui Correia Goncalves, such constitutional traditions share, at least, an elementary or basic republican heritage, emerging in particular out of the Weimar Constitution. Specifically, the constitutions of Ireland,<sup>52</sup> Luxembourg, Spain and Portugal, which draw on the Weimar Constitution to some extent, all guarantee the right to work in some shape or form. In addition, the right to work can also be traced, albeit more obliquely, in the constitutional traditions and jurisprudence of the UK, France, Austria, Germany, Greece, Sweden and Finland.<sup>53</sup> Albeit at a high and abstract level, Everson and Correia Goncalves' research helps to legitimise my republican perspective on the right to work insofar as their research suggests a broad cultural link between the right to work in the law of the member states and the EU as a whole, on the one hand, and republicanism, on the other hand. To put it another way, even from its earliest stages, part of the CJEU's self-understanding was somewhat based on republican values.

A second and vital point emerges from *Nold* concerning the nature of our culture. The right to work as explicated therein can be understood as functioning in at least three dimensions or vectors. It is, therefore, a multidimensional right. First, and most fundamentally, the right to work logically entails a right of access to the market. This is a *de minimis* condition with regards to the exercise of one's freedom to work. If anyone is prohibited from working tout court, then, given the centrality of work in European culture, there ought to be very weighty reasons justifying such a prohibition. This aspect of the right to work also highlights the link between the right to work and

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<sup>50</sup> [1974] ECR 491 [14].

<sup>51</sup> [1974] ECR 491 [15].

<sup>52</sup> See my 'The Right to Work in Irish Law' (2020) 42 DULJ 119.

<sup>53</sup> Michele Everson and Rui Correia Goncalves, 'Article 16' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 438-439, 445-446.

neorepublican freedom as non-domination. In historic terms, republican freedom as non-domination was most concerned with the phenomena of slavery, 'unfree' and forced labour. The access dimension of the right to work reflects this republican perspective insofar as it ensures that everyone has an opportunity to exercise their freedom to sell their labour.

Second, the right to work is also constitutive of the labour market because it, amongst other norms, delineates the contours of the labour market.<sup>54</sup> While the right to work guarantees people's freedom of choice insofar as people are, at a minimum, enabled to contractually sell their labour, restrictions on the exercise of that right in the public interest (eg, not permitting children under a certain age to work, working time regulations, etc) ensure that people's well-being is secured. This point is, in effect, noted by the Court in *Nold*, when it is observed that the right to work may be 'subject to certain limits justified by the overall objectives pursued by the Community'.<sup>55</sup> Further evidence of this point is found in numerous later cases which acknowledge that the fundamental freedoms and right to work,

"may be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed."<sup>56</sup>

The right to work is thus a vital tool for the construction of a common competitive culture of work in the European Union. A final dimension to the right to work is its corrective nature. In contrast to its constitutive dimension, the corrective dimension of the right to work provides people with the ability to challenge existing

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<sup>54</sup> I borrow this reasoning from Wolfgang Streeck, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy' in Stephan Liebfried and Paul Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Brookings Institute 1995).

<sup>55</sup> [1947] ECR 491 [14] (emphasis added).

<sup>56</sup> Case C-177/90 *Kühn* [1992] ECR I-35 [16] (emphasis added); Case C-280/93 *Germany v Council* [1994] ECR I-4973 [78]; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115 [55]; Case C-200/96 *Metronome Musik* [1998] ECR I-1953 [21]; and Joined Cases C-20/00 and C-64/00 *Booker Aquacultur and Hydro Seafood* [2003] ECR I-7411 [68].



limitations, by way of judicial review, on the exercise of the right to work (as opposed to access to work itself). This dimension of the right to work is made quite clear in *Nold* itself where the applicant attempted to challenge the apparently unfair regulations in place. Although the applicant's claim failed on the facts, what is important is that the applicant was enabled to review the seemingly oppressive regulation on the ground of its infringing the right to work. Some scholars have noted that the amenability of legal measures to judicial review can form a cornerstone of neorepublicanism. As Tom Hickey puts it, 'individualised, non-electoral contestatory institutions[, such as judicial review,] can be valuable in democratic principle as far as facilitating the realisation of common goods is concerned'.<sup>57</sup> In other words, judicial review of legal rights forms but one part of a much broader neorepublican institutional structure designed to guarantee the basic liberties as entrenched in the law and norms of the state.

Third, it is significant that the Court did not consider that the applicant's right to work was infringed. In particular, the fact that the Court did not intervene in the economic changes evident in the coal industry suggests that the Court was reluctant to give legal—as opposed to moral—effect, in a strident manner, to the corrective dimension of the right to work in this context. While, in principle, the applicant's right to access the market was guaranteed, little more than access was ensured. This conclusion raises interesting questions concerning the potential imbalance between the three dimensions of the right to work. For, in *Nold*, the constitutive dimension trumped the corrective dimension to the right to work insofar as the right to work was not used to amend the regulations in question but to affirm them.

However, the Court's reasoning for this is unclear and somewhat limited. It would have been preferable for the Court to identify an internal hierarchy amongst these possible dimensions, deploying them in a reasoned manner. One plausible reason for this outcome is that the Court adopted a moral approach to the corrective dimension; that is, the Court did enforce the corrective approach morally rather than

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<sup>57</sup> Iseult Honohan, 'Republicans, Rights and the Constitution: Is Judicial Review Compatible with Republican Self-Government?' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (OUP 2009); and Tom Hickey, 'The republican core of the case for judicial review' (2019) 17 *ICJ* 288, 300. Cf Richard Bellamy, 'The republican core of the case for judicial review: A reply to Tom Hickey. Why political constitutionalism requires equality of power and weak review' (2019) 17 *ICJ* 317.

legally. This leaves it up to the applicant to bring the challenge elsewhere, through perhaps appropriate executive or legislative lobbying. Another and probably the most plausible reason may be the evolution of the Court's role in developing EU law. In the early case law on the general principles of EU law, the reasoning provided was often very brief.<sup>58</sup>

Certainly, going forward, it would be helpful if such a hierarchy amongst the different dimensions or vectors of the right to work was identified by the CJEU or the EU's legislative bodies, so as to serve as guidance to law and policy makers when implementing the constitutional vision of work regulation in the EU. From the perspective of this thesis, the access dimension would likely merit positioning at the top of the hierarchy given the overarching interest of every person in the EU in being able to participate in the good of work. Its constitutive and corrective dimensions may then follow suit in that order. The corrective dimension should be understood as a catch-all mechanism facilitating the review of the legality of restrictions on the right to work in the light of some sort of balancing or proportionality test between the different rights at play, a possibility to be considered presently.

## B. Genesis

It is worth considering, albeit briefly, some of the key cases touching on the basic liberty to work in recent years: namely, *Schmidberger*,<sup>59</sup> *Omega Spielhallen*,<sup>60</sup> *Viking*<sup>61</sup> and *Laval*.<sup>62</sup> While not dealing with the right to work directly, these cases are nonetheless very important in developing our understanding of the basic liberty to work in general by virtue of the architectonic role they play in structuring the regulation of work in the EU.

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<sup>58</sup> See Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013); Chiara Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar 2018); and Takis Tridimas, *The General Principles of EU Law* (3rd edn, OUP 2019).

<sup>59</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659.

<sup>60</sup> Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

<sup>61</sup> Case C-438/05 *Viking* [2007] ECR I-10779.

<sup>62</sup> Case C-341/05 *Laval* [2007] ECR I-11767.

In *Schmidberger*, an association to protect the biosphere in the Alpine region held a demonstration, resulting in the closure of a motorway. The demonstration was not banned. HGVs consequently were unable to use this motorway. The applicant in this case was an international transport undertaking which generally used that motorway between Germany and Austria, hence bringing a cross-border element to the case and triggering EU law. It was argued that the failure to prohibit the demonstration constituted an infringement of the free movement of goods. The Court of Justice held that where two or more fundamental rights are in conflict, a double proportionality<sup>63</sup> analysis must be deployed. That is, in the context of the right to work and other rights, 'in addition to assessing the proportionality of restrictions that labour rights impose on the exercise of economic freedoms, courts should examine whether the exercise of economic freedoms is justified and proportionate given their capacity to restrict the exercise of collective labour rights'.<sup>64</sup> The CJEU emphasised that national courts are afforded a wide margin of discretion in developing such an analysis and, on the facts of this case, were entitled to conclude that the restriction on the free movement of goods was proportionate.

This case therefore implies that the right to work, amongst other rights related to work, must be balanced against seemingly conflicting rights, such as the fundamental economic freedoms, when there is an alleged conflict between the interests of workers and the interests of others, such as other actors in the market generally. The question in each case will likely be a highly complex one, involving legal doctrinal, economic and other theoretical perspectives explaining and justifying the introduction or removal of laws and norms governing work.

*Omega Spielhallen* provides a good example of such double proportionality analysis at work. In that case, the applicant was a German company which produced a 'laserdrome' game. The police authority issued an order against the applicant forbidding it from 'facilitating or allowing in its (...) establishment games with the object of firing on human targets using a laser beam or other technical devices (such as

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<sup>63</sup> Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalisation of European Private Law* (OUP 2014) 49-51.

<sup>64</sup> Vilija Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights' (2015) 15 HRL Rev 73, 97.

infrared, for example), thereby, by recording shots hitting their targets, 'playing at killing' people', on pain of a DEM 10,000 fine for each game played in breach of the order. The national court was concerned that the order constituted an infringement of the free provision of services. The Court of Justice upheld the restriction on the freedom to provide services in the public interest, where the public conception of a fundamental right (in this case, the right to human dignity) in the national constitution supported such a restriction.<sup>65</sup> In essence, the domestic court was given a significant margin of discretion, against a background where the prevailing public policy of the state ostensibly supported such a restriction, to determine the legitimacy of that restriction. The Court also noted that it is not necessary 'for the restrictive measure issued by the authorities of a member state to correspond to a conception shared by all member states as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'; however, such a convergence of values across member states may offer stronger support than a single member state's values alone.<sup>66</sup>

In *Viking*, the applicant ferry, running between Finland and Estonia, was flagged in Finland and the wages of the crew were regulated by a collective agreement in Finland. As the ferry was running at a loss, the applicant sought to reduce its costs by reflagging the ferry in Estonia where wages were lower, with a view to reaching a collective agreement with an Estonian trade union. The respondent, an international association of trade unions, called on its affiliated trade unions in Estonia not to enter into negotiations with the applicant, while its affiliated trade union in Finland threatened strike action. In other words, the respondent threatened transnational strike action against the applicant. The applicant accordingly issued proceedings seeking to have the threatened strike action rendered as an unlawful infringement of EU free movement law.

The CJEU reasoned as follows. It began by acknowledging that the right to strike was a fundamental right which was guaranteed by EU law, notwithstanding that such a right was expressly excluded from the scope of the EU's constitutional texts. It then held that such collective action constituted a restriction on the freedom of

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<sup>65</sup> [2004] ECR I-9609 [32].

<sup>66</sup> [2004] ECR I-9609 [37].

establishment. While the Court accepted that national competent authorities would have a significant discretion to assess the extent to which such a restriction was justified, it nonetheless held that such national authorities could not conclude that the restriction was justified if it could be established that the jobs or conditions of employment were not jeopardised or under serious threat. Moreover, even if workers' jobs or conditions of employment were jeopardised or under serious threat, it would need to be further demonstrated whether the collective action taken was proportionate.

*Laval* concerned posted workers. The applicant posted construction workers from Latvia to Sweden to work on sites operated by a company which was wholly owned by the applicant. While the workers were bound by and benefited from collective agreements made in Latvia, they were not bound by nor did they benefit from similar collective agreements in Sweden. A branch of the respondent trade union in Sweden entered into negotiations with a view to reaching a collective agreement with the applicant on the conditions of employment of its posted workers in Sweden. Elements of this collective agreement provided for further negotiations in respect of, inter alia, pay. The applicant refused to sign the collective agreement and the respondent initiated collective action in the form of blockading sites on which the applicant's posted workers worked. Sympathy action followed from other trade unions in Sweden until the applicant's wholly owned company in Sweden went bankrupt. The question for the CJEU was whether such collective action violated the freedom to provide services.

As in *Viking*, the Court began by acknowledging that the right to take collective action was indeed a fundamental right guaranteed by EU law. However, the Court then held that the collective action in question constituted a restriction on the freedom to provide services since it was likely to make it less attractive for market actors to exercise that same freedom. While the Court accepted that collective action was in principle a justifiable restriction on that freedom, nonetheless, in this case, where the negotiations on pay formed 'part of a national context characterised by a lack of

provisions, of any kind, which are sufficiently precise and accessible<sup>67</sup>, such a restriction was not justifiable.

What is the relevant point which emerges from this brief overview of *Viking* and *Laval*? Criticisms of these cases abound and this is not the place to consider many or all of them.<sup>68</sup> Two brief points do, however, merit noting. A first is the failure to apply the double proportionality test envisaged in *Schmidberger*. Instead of first considering the right to strike as a restriction on the freedom to provide services and the freedom of establishment and then considering the converse, the Court simply considered the right to take collective action as a restriction on EU free movement law which required justification. No assessment was undertaken of the extent to which EU free movement law restricted the right to strike. This is deeply lamentable. A second and related point emerges from the first, namely, that the Court thereby established an internal hierarchy amongst rights to free movement and certain collective aspects of EU labour law. It unduly privileged parts of EU free movement law over elements of EU labour law without any real justification, beyond citing the fundamental need to establish an internal market in the EU. This hierarchy entrenches a certain economic vision of the Union within at least part of the EU's legal system, namely, one which emphasises commercial freedom and certainty. While this occurred solely in relation to the possibility of transnational collective action, given that these cases are so significant for the basic liberties to work and freely associate generally, then the possibility of a similarly unsympathetic hierarchy between rights or within the internal dimensions of multidimensional rights becoming entrenched in other areas of EU law must be kept in mind with due caution. As suggested in relation to the right to work in the previous section, while some sort of hierarchy between the different dimensions of that right should be established, overemphasising any one of them may have detrimental effects. For example, one could envisage the right to work in its access dimension being used to challenge ostensibly protective regulation restricting access to certain professions, thereby making it easier for more and more people to participate in the labour market

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<sup>67</sup> [2007] ECR I-11767 [110].

<sup>68</sup> See, inter alia, Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart 2014).

but with less consumer and labour protective regulation. This possibility is explored, derivatively, in chapter 7.

In relation to the right to work more generally, it is trite to say that access to and participation in the labour market will be either enabled or hindered by rules governing work and the right to work can be used to challenge and liberalise such measures in its access, constitutive and corrective dimensions. The question in each case will thus be whether the relevant laws and norms are more or less likely, empirically speaking, to facilitate people's access to and participation in the market, sufficiently broadly construed to include the self-employed. This is an extremely difficult question to answer. It will be necessary to consider the extent to which existing laws and norms governing access to and participation in the relevant part of the labour market are justified by empirical considerations relating to people's well-being. The regulation of business reorganisation<sup>69</sup> provides an example of laws and norms designed, within certain limits, to double or even triple balance the rights of businesses, workers and consumers, a balance which must be rigorously adhered to and developed. What normative structure justifying redundancy regulations will have either the least detrimental or most optimal impact on people's well-being and skills construed in the light of the philosophical concepts thereof discussed in chapter 1.II? The answer can only be provided by making arguments within the interpretive space provided by Pettit's neorepublicanism and those arguments will be complex ones based on empirical data appealing to the normative values underling neorepublicanism.

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<sup>69</sup> Council Directive 2001/23/EC on the transfer of undertakings [2001] OJ L 82/16.

## C. The Charter of Fundamental Rights<sup>70</sup>

The culmination of the analysis thus far is the rights now stated in arts 15 & 16 CFREU. Article 15, the explanatory notes to which refer to art 1 ESC already discussed, extends to 'everyone' the right to work and pursue a freely chosen occupation. This general expression of the right to work is then applied, more particularly, to certain categories of person in the sub-clauses of art 15. Thus, art 15(2) provides that Union citizens have the freedom to seek employment, to work and to exercise the right of establishment and to provide services in the territory of the member states. While the neorepublican overtones are difficult to find here, links can be drawn with other rights in the CFREU—particularly art 5 on the prohibition on slavery and forced labour—to see the neorepublican undertones in operation in the Charter's schema of protection. By contrast, according to art 15(3) CFREU, third-country nationals who are duly authorised to work are merely afforded working conditions 'equivalent' to those of member state nationals, a point to which I shall return in the next chapter.

Article 16 CFREU provides for the freedom to conduct a business 'in accordance with Union law and national laws and practices'. While arts 15 & 16 thus express different rights, they must emanate from the same central basic liberty, namely, the liberty to work, be it as an employed person, or a self-employed person or service provider. In his Opinion in *Alemo-Herron*, AG Cruz Villalón made a number of helpful comments in relation to art 16 CFREU.<sup>71</sup> The AG first noted that art 16 is based not only on case law concerning the freedom to pursue an economic activity but also contractual

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<sup>70</sup> See, inter alia, Valeria Bonavita, 'The EU Charter of Fundamental Rights and the Social Dimension of International Trade' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 259-260; Jermeias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42 ILJ 434; Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 ERCL 167; Diamond Ashiagbor, 'Article 15' and Everson and Correia Goncalves, 'Article 16' in *The EU Charter of Fundamental Rights: A Commentary* (n 53) Stefan Giubboni, 'Freedom to Conduct a Business and EU Labour Law' (2018) 14 EUConst 172; Simon Deakin, 'Article 15' and Bruno Veneziani, 'Article 16' in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019); Nils Wahl, 'The Freedom to Conduct a Business' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Lawrence Gormley* (CUP 2019); and Niall O'Connor, 'Whose Autonomy is it Anyway? Freedom of Contract, the Right to Work and the General Principles of EU Law' (2019) ILJ 1 (advanced access).

<sup>71</sup> Case C-426/11 *Alemo-Herron* [2014] 1 CMLR 21.



freedom and the principle of free competition.<sup>72</sup> Second and relatedly, the AG made several comments on the nature of art 16 CFREU as a market norm, similar to those made earlier in respect of the right to work evidenced in *Nold*. The AG first observed that the freedom to conduct a business 'acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law'.<sup>73</sup> Second and relatedly, the AG emphasised that the freedom to conduct a business 'protects economic initiative and the ability to participate in a market'.<sup>74</sup> Once again, the significance of the right to work in facilitating access to the labour market can be seen. Finally, AG Cruz Villalón emphasised the possibility of using art 16 CFREU as a 'counterweight' to other fundamental rights.<sup>75</sup> This suggests a need to balance competing concerns through the sort of double proportionality analysis as envisaged in *Scmidberger*.

## D. Beneficiaries

### 1. Citizens

According to art 15(1) CFREU, the right to work is enjoyed by 'everyone'. But art 15(2) CFREU acknowledges that only 'citizens' have the 'freedom to seek employment' and exercise their freedom of movement for the purposes of work, service provision or establishment anywhere in the Union. Intuitively, then, 'workers'<sup>76</sup> and so-called 'work-seekers'<sup>77</sup> can avail of the right to work;<sup>78</sup> but what of employers, the self-employed and the unemployed? And what of those undertaking unpaid personal work? The case law

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<sup>72</sup> [2014] 1 CMLR 21 [AG48].

<sup>73</sup> [2014] 1 CMLR 21 [AG50].

<sup>74</sup> [2014] 1 CMLR 21 [AG51].

<sup>75</sup> [2014] 1 CMLR 21 [AG52].

<sup>76</sup> Nicola Countouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47 ILJ 192.

<sup>77</sup> Catherine Barnard, 'Free movement of natural persons and citizenship of the Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP 2017) 377.

<sup>78</sup> Case C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5923 (dock workers); Case C-355/93 *Eroglu v Land Baden-Württemberg* [1994] ECR I-5116 (Turkish workers).

to date makes it clear that self-employed persons,<sup>79</sup> co-operatives,<sup>80</sup> SMEs<sup>81</sup> and other substantially-sized economic operators and employers on the market can and do avail of the right to work and the freedom to conduct a business.<sup>82</sup>

## 2. Non-Citizens

What, then, of non-citizens? The answer to this question is surely crucial in the context of this thesis. To be clear, third-country nationals are only entitled to the right to work when and to the extent that they are entitled to equal treatment with member state nationals, are lawfully resident in the EU and have permission to work in a member state, in particular on the basis of some visa scheme, circumstances which I explore in more detail in the next chapter.<sup>83</sup>

But given that third-country nationals habitually experience wrongful discrimination and inadequate skills recognition in access to employment, is the right to work a sufficient protection of the well-being of third-country nationals currently in or coming to the EU? To answer this question, it is necessary to make two points. The first point concerns the circumstances in and extent to which third-country nationals are entitled to equal treatment with member state nationals. If and when third-country nationals are entitled to equal treatment with member state nationals, then it may be possible to challenge the wrongful discrimination they regularly face through anti-discrimination law. To put the point another way, third-country nationals' equal treatment with member state nationals enables us to apply anti-discrimination norms to their circumstances. The possibility of so doing is the subject of the next chapter. The second point is the relationship between core and derivative rights.<sup>84</sup> While the

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<sup>79</sup> Joined Cases C-184/02 and C-223/02 *Spain v Council* [2004] ECR I-7829.

<sup>80</sup> Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115.

<sup>81</sup> Case 4/73 *Nold* [1974] ECR 491.

<sup>82</sup> Case 44/79 *Hauer* [1979] ECR 3727; Case C-134/15 *Lidl* ECLI:EU:C:2016:498; Case C-534/16 *Finančné riaditeľstvo Slovenskej republiky v BB construct s. r. o.*, ECLI:EU:C:2017:820; Case T-732/14 *Sberbank of Russia OAO v Council* ECLI:EU:T:2018:541; Case T-734/14 *VTB Bank OAO v Council* ECLI:EU:T:2018:542; Cases T-735/14 and T-799/14 *Gazprom Neft PAO v Council* ECLI:EU:T:2018:548; Case T-798/14 *DenizBank AS v Council* ECLI:EU:T:2018:546; and Case T-207/15 *National Iranian Tanker Company v Council* ECLI:EU:T:2016:471.

<sup>83</sup> Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 182-188.

<sup>84</sup> Joseph Raz, *The Morality of Freedom* (OUP 1986) 168-170.

right to work is the core right based upon the basic liberty to work and therefore of significant importance in and of itself, there is a vital derivative right which merits special consideration in response to the inadequate skills recognition which third-country nationals habitually face. The derivative right in question, namely, the right to have one's qualifications recognised for the purposes of access to and participation in the labour market, is the major subject of Part II of this thesis.

## E. Scope

The scope of the right to work is broad. While the Court of Justice has not stated any single overarching objective for or scope of the right to work, the Court has nonetheless deployed it in a wide variety of circumstances. Specifically, the right to work has been deployed in the context of the rights of migrant family members,<sup>85</sup> numerous commercial activities,<sup>86</sup> intellectual property rights,<sup>87</sup> product labelling,<sup>88</sup> the regulation of professional bodies<sup>89</sup> and working time.<sup>90</sup> In so deploying the right to work, the Court often uses what may be described as 'labour market reasoning', namely, an approach characterised by its addressing the structural conditions in the labour market.

This point is perhaps made most clear in the Court's age discrimination case law. For example, in *Fuchs*, the Court considered the legitimacy of a mandatory retirement law for state prosecutors in Germany.<sup>91</sup> In addressing the question of whether such a law pursued a legitimate aim, the Court noted that a mandatory retirement law can have the effect of facilitating intergenerational fairness in the labour market, enabling young people to access jobs which would otherwise be unavailable. The Court then noted that, while the member states enjoyed a broad margin of discretion in defining measures capable of achieving the aim of intergenerational fairness, the member

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<sup>85</sup> Case 267/83 *Diatta v Land Berlin* [1985] ECR 574.

<sup>86</sup> Joined Cases 63 and 147/84 *Finsider v Commission* [1985] ECR 2857; Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-36/02 *Omega Spielhafen* [2004] ECR I-9609.

<sup>87</sup> Case C-200/96 *Metronome Musik* [1998] ECR I-1953.

<sup>88</sup> Case 234/85 *Keller* [1986] ECR 2897; Case C-134/15 *Lidl* ECLI:EU:C:2016:498.

<sup>89</sup> Case C-237/18 *Stiernon* ECLI:EU:C:2018:630.

<sup>90</sup> Joined Cases C-184/02 and C-223/02 *Spain v Council* [2004] ECR I-7829.

<sup>91</sup> Case C-159/10 *Fuchs* ECLI:EU:C:2011:508.

states may not frustrate the prohibition on age discrimination set down in the Framework Directive.<sup>92</sup> Moreover, the Court noted, the prohibition on age discrimination must be read in the light of the right to work in art 15 CFREU. According to the Court, it followed that 'particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life'.<sup>93</sup> The right to work has therefore not only been deployed in diverse areas of law but has also played an important role in designing or structuring the labour market, as previously suggested in respect of *Nold*.

## F. Restrictions and Limitations

In addition to the restrictions on certain non-citizens noted in section III.E.2 above, restrictions on the right to work may be made through statute, administrative practice or contract. The standard of review of restrictions has varied slightly, from assessing whether the restriction in question are proportionate or violate the very substance of the right.<sup>94</sup> The role of the neorepublican doctrine of freedom as non-domination here is to reduce arbitrary infringements on rights through the appropriate application of proportionality analysis.<sup>95</sup> In other words, restrictions on people's well-being should be based on valid reasons.

Restrictions of various kinds have been considered by the Court of Justice. Prominent among them are those regulatory restrictions on the exercise of the right to work of the self-employed,<sup>96</sup> restrictions on collective action taken by workers<sup>97</sup> and restrictions on the operations of certain financial service providers<sup>98</sup> while fewer restrictions on the right to work of workers and non-nationals have been considered. In

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<sup>92</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>93</sup> ECLI:EU:C:2011:508 [63].

<sup>94</sup> Case 4/73 *Nold* [1974] ECR 491; Case C-280/93 *Germany v Council* [1994] ECR I-4973.

<sup>95</sup> See the materials cited at (n 57).

<sup>96</sup> Case C-177/90 *Kühn* [1992] ECR I-35 (milk quotas); Joined Cases C-184/02 and C-223/02 *Spain v Council* [2004] ECR I-7829 (working time of self-employed lorry drivers).

<sup>97</sup> Case C-341/05 *Laval* [2007] ECR I-11767; Case C-438/05 *Viking* [2007] ECR I-10779.

<sup>98</sup> Case C-304/16 *American Express* ECLI:EU:C:2017:524; Case C-534/16 *Finančné riaditeľstvo Slovenskej republiky v BB construct s. r. o.*, ECLI:EU:C:2017:820; Case T-732/14 *Sberbank of Russia OAO v Council* ECLI:EU:T:2018:541; Case T-734/14 *VTB Bank OAO v Council* ECLI:EU:T:2018:542; Case T-798/14 *DenizBank AS v Council* ECLI:EU:T:2018:546.

assessing whether restrictions are permissible, the Courts may seek specific evidence of detriment suffered<sup>99</sup> and the negation of other options which might reasonably be open to an applicant.<sup>100</sup>

## Conclusion

This chapter continued the response to the first sub-question this thesis investigates, namely, according to what theory shall the well-being of third-country nationals accessing work in the EU be assessed? Specifically, it began the consideration of the core rights necessary to secure the well-being of third-country nationals accessing work in the EU. Building on the earlier chapters, this chapter has established a number of conclusions concerning the right to work, particularly as it relates to third-country nationals.

First, as can be seen from the analysis of international and European law, the overarching significance of the right to work lies in facilitating access to and participation in the labour market, which is possibly the primary way in which people pursue their own conception of the good in our contemporary culture, thereby instantiating their well-being, which is what this thesis is ultimately concerned with.

Second and relatedly, the right to work can and should be understood as a vital ingredient in the ongoing construction and deepening of the Single Market. From workers to businesses, the right to work provides part of the normative basis for structuring a social market economy which supports and instantiates freedom as non-domination. It provides people with opportunities for deregulation and reregulation; that is, to challenge over-regulation and under-regulation of productive activity which contributes to people's well-being. The net question in each case will be whether the relevant norms have either the least detrimental or most optimal impact on people's well-being in the light of the demands of the neorepublican ideal of freedom as non-domination.

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<sup>99</sup> Case C-177/90 *Kühn* [1992] ECR I-35.

<sup>100</sup> Case C-36/02 *Omega Spielhafen* [2004] ECR I-9609 [36].

Third and finally, the right to work enables third-country nationals to participate in the labour market when and to the extent that they are entitled to equal treatment with member state nationals. But it is not enough in and of itself: further related and derivative rights are necessary to respond to the wrongful discrimination and inadequate skills' recognition third-country nationals habitually face. The precise circumstances and extent to which third-country nationals are so entitled to equal treatment will, therefore, be vital; hence the forthcoming examination of those circumstances in the next chapter, to which I now turn.

## **4. Equal Treatment**

### **Introduction**

The previous chapter concluded by noting the important role which a guarantee of equal treatment or non-discrimination plays in enabling third-country nationals to rely on the right to work. This chapter, therefore, is concerned with the extent to which third-country nationals benefit from a right to equal treatment or non-discrimination with member state nationals. For the right to work of third-country nationals is contingent on their status in EU law and permission to work in a member state and the primary way the right to work is guaranteed for third-country nationals is through guaranteeing them equal treatment, to varying degrees, with member state nationals under EU migration and asylum law in respect of their access to and participation in the labour market. Strictly speaking, it will not always be the case that the right to work forms part of an express equal treatment guarantee as such; but where it does not, it will nonetheless be arguable that third-country nationals are not treated equally with member state nationals in respect of their right to work. Third-country nationals will therefore need to rely on comparative reasoning to challenge their difference in

treatment from member state nationals.

Third-country nationals are entitled to differing degrees of equal treatment with member state nationals in respect of certain basic liberties, such as the basic liberty to work, depending both on the nature and purpose of their migrating and residence—labour,<sup>1</sup> voluntary,<sup>2</sup> or forced<sup>3</sup>—and the length of time spent in the EU.<sup>4</sup> The same sort of reasoning also applies, *mutatis mutandis*, to EU nationals—such as workers and their family members—exercising free movement rights in the EU.<sup>5</sup> Unsurprisingly, these guarantees are often heavily circumscribed in their scope. In particular, the scope of such equal treatment guarantee constructs the extent to which

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<sup>1</sup> Parliament and Council Directive 2011/98/EU 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] OJ L343/1 (Single Permit Directive), art 12; Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17 (Blue Card Directive), art 14; Parliament and Council Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375 (Seasonal Workers' Directive), art 23; Parliament and Council Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1 (ICT Directive), art 15; posted workers under art 56 TFEU (see Case C-43/93 *Van der Elst* [1994] ECR I-3803; Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761); persons entering the EU on the basis of association and trade agreements; and Parliament and Council Directive 2016/801/EU 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 (recast) [2016] OJ L132/21 (Researchers', Students', Volunteers' and Au Pairs' Directive), art 22.

<sup>2</sup> Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12 (Family Reunification Directive), art 14. However, Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Free Movement Directive), art 24 is an essential companion to the Family Reunification Directive. In addition, some association agreements, such as the EEA Agreement, may provide for family reunification schemes. See also Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 (Long Term Residents Directive), art 11.

<sup>3</sup> Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive); Parliament and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Directive); and Parliament and Council Directive 2011/95/EU 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 (recast) [2011] OJ L337/9 (Uniform Status Directive).

<sup>4</sup> See in particular, the Long-Term Residents' Directive.

<sup>5</sup> See, eg, the Free Movement Directive; Parliament and Council Regulation 492/2011/EU on freedom of movement for workers within the Union [2011] OJ L 141/1 (Free Movement Regulation), art 7; Parliament and Council Regulation 883/2004/EC on the coordination of social security systems [2004] OJ L 166/1 (Social Security Systems Regulation), art 4; and Anne Pieter van der Mei, 'The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of the European Union' (2011) 18 MJ 62.



migrants can participate in the host member state. Thus, for example, more rights facilitating migrants' integration are given to those who are considered to be more valuable whereas less rights are afforded to migrants who are considered less valuable.<sup>6</sup>

To be clear, the guarantees of equal treatment found in the EU's internal and external migration acquis concerns persons who are moving or migrating across borders. The scope of these equal treatment guarantees—which may be broader than the explicit guarantee of equal treatment in the relevant legal measure—condition or permit their integration, particularly their participation in the labour market. They do so by treating them equally, to differing degrees and in different respects, with member state nationals, be they home state nationals (in the case of third-country nationals moving to the EU) or host state nationals (in the case of member state nationals or third-country nationals moving within the EU). In other words, these various guarantees of equality and non-discrimination prohibit discrimination on the ground of nationality in respect of some basic liberty.

By contrast with these guarantees of equal treatment and non-discrimination found in EU migration law, EU equality law itself does not prohibit discrimination on the ground of nationality. Rather, it prohibits discrimination on the grounds of sex, race or ethnicity, sexual orientation, religion or belief, age and disability.<sup>7</sup> It is only once a person enters a member state that EU equality law is triggered and works to reduce discrimination people experience in, inter alia, access to employment. For third-country nationals, this means that once labour market access has been granted,<sup>8</sup> EU equality and anti-discrimination law reduces obstacles to their actual participation in the labour market. But it does not prohibit discrimination on the ground of their nationality.

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<sup>6</sup> For example, cf the Blue Card Directive and the Seasonal Workers' Directive.

<sup>7</sup> See, eg, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 (Racial Equality Directive); Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Equality Directive); and Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 (Recast Sex Directive).

<sup>8</sup> It will only be necessary to grant labour market access to those who do not already have it; in general, non-nationals.

These prohibitions on discrimination on different grounds prompt a number of questions. A first question concerns the relationship between equal treatment and non-discrimination and neorepublicanism. What does neorepublicanism require of equality? Section I of this chapter considers whether and to what extent third-country nationals should be entitled to equal treatment with member state nationals—the threshold condition for being entitled to all other rights at work in the EU. The answer is that, given certain empirical facts about the discrimination which third-country nationals habitually face, third-country nationals should generally benefit from equality and anti-discrimination norms in the EU. More specifically, they should benefit from a prohibition of discrimination on the ground of nationality.

A second question is whether, as a matter of legal doctrine, third-country nationals can ever benefit from EU equality law. The response to this question is provided in section II. The answer is that, third-country nationals can benefit from EU equality law when they are entitled to be treated equally with member state nationals on the ground of nationality. But, as has already been noted, EU equality law does not prohibit discrimination on the ground of nationality. Where EU law does specifically do so, such as in EU migration law, third-country nationals can then benefit from EU equality law. However, much of international and European law requires that nationality discrimination be abolished in general. Section II explores the doctrinal reasons for the status quo and finds them somewhat unconvincing, suggesting that EU law should generally prohibit discrimination on the ground of nationality.

A third question, which follows from the second, is whether and to what extent the prohibitions of discrimination found in EU migration law and equality law are truly different. While the second question has been addressed on numerous occasions by scholars, this third question is often overlooked. The response to this issue is provided by section III. Specifically, this section considers the extent to which the reasons which explain and justify the differences between these prohibitions are compelling. The answer is that there are reasons—political, conceptual and sociological—to believe that these prohibitions are not that different. As such, we have reason to unify them, in whole or in part. Reflecting on the theme of governance running throughout this thesis, the section suggests that we should assimilate these conceptions in part to avoid the further fragmentation or proliferation of different conceptions of equal treatment in

the EU. In other words, it calls for the further entrenchment or constitutionalisation of a general norm of equal treatment in the EU. A short conclusion follows.

## I. Neorepublicanism and Equality

### A. The Link

Chapter 2.I.B-C outlined the internal and external dimensions of Pettit's neorepublicanism. There was one element which stood out as being shared by both the internal and external dimensions: that people and peoples be treated as equals in some respect. Internally, Pettit observes not only that people be given sufficient resources to exercise their basic liberties but that the state, '[i]n order to establish a proper balance between the claims of its citizens (...) must treat them as equals in determining that balance'.<sup>9</sup> That is, 'in selecting policies, the state should recognise that people count equally'.<sup>10</sup> Expanding on this, Pettit notes:

"the very paradigm of injustice is the scenario where those of a certain caste or colour, religion, gender or ethnicity suffer discrimination under the institutions established by the state. The just system, so the lesson goes, cannot be a system that discriminates on any such basis between its members; it is inherently impartial."<sup>11</sup>

What is thus required of the state in making and deploying policies is equality or non-discrimination between people. People should not be treated differently because of, by reason of or on the basis of certain characteristics they hold. And this policy applies equally to the external dimension of the republican doctrine of freedom as non-domination. States and peoples which constitute states should be able to relate

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<sup>9</sup> Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 78. Cf Fabian Schuppert, 'Non-domination, non-alienation and social equality: towards a republican understanding of equality' (2015) 18 *Critical Review of International Social and Political Philosophy* 440.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

to one another 'as equals'.<sup>12</sup> Given that states' relationship with one another should generally be one of non-domination, satisfying the 'straight talk' test outlined in chapter 2.I.C, it seems natural that they should relate with one another as equals on at least some grounds.

However, this obligation applies only to relationships between people and the state and between states. But what of relationships between people? Indeed, EU migration and asylum law and anti-discrimination and equality law applies not only to the relationship between people and the state but also to relationships between people; and it is probably naïve to think that the obligation of the state to treat people with equal concern and respect justifies state intervention in the context of both kinds of relationship.<sup>13</sup> Rather, the quite advanced scheme of norms constituting EU anti-discrimination and equality law require some further justification. But what does that justification look like? Any comments made here attempting to explain and justify EU anti-discrimination and equality law in the light of neorepublicanism must be considered purely introductory. These remarks only provide an outline of some of the basic reasons upon which a full neorepublican justification of anti-discrimination and equality law must build.

The starting point must be to recall that the neorepublicanism of Pettit emphasises the expressive equalisation of freedom as non-domination. In other words, the state is obliged to provide each with the resources and opportunities necessary to exercise their freedom of choice over the basic liberties, on the basis of public laws and norms up to whatever standards meets the eyeball test in a given culture. So, what are the implications of this expressive equalisation of freedom as non-domination for equality and anti-discrimination norms? Gillian Demeyere has argued that such norms can be justified by an appeal to the ideal of freedom as non-domination on the basis that wrongful discrimination is based on considerations that are irrelevant and arbitrary, something which freedom as non-domination is capable of targeting.<sup>14</sup> With respect, this is probably not an accurate characterisation of much discrimination in

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<sup>12</sup> Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton and Co 2014) 182.

<sup>13</sup> Cf John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 OJLS 1, 3; Deborah Hellman, *When is Discrimination Wrong?* (HUP 2011); and Benjamin Eidelson, *Discrimination and Disrespect* (OUP 2015).

<sup>14</sup> Gilliam Demeyere, 'Discrimination, Freedom and the Limits of Contract' (2009) 10 IJDL 219, 231.

practice. As Benjamin Eidelson puts it, 'one cannot discriminate on no basis at all'.<sup>15</sup> Discrimination is generally based on operative or auxiliary premises in our reasoning<sup>16</sup> and is, therefore, strictly non-arbitrary. What makes discrimination bad or wrongful, however, is that it is based on premises which are either invalid—that is to say, epistemically invalid—or excluded—that is, according to a social or legal choice as to whether certain reasons should or should not be excluded.<sup>17</sup> How, then, if at all, can equality and anti-discrimination law be justified in the light of republican ideals?

As with the concept of work discussed in chapter 1.III, it is helpful to make a few brief remarks about the nature of discrimination in general. Discrimination qua activity can be a good or a bad thing. It is good to be a discerning individual, making good friends and turning a cold shoulder to those one cannot rely on. Discrimination of this kind is a virtuous character trait. But this sort of discrimination is not what attracts most attention. Rather, the kind of discrimination we are most concerned with occurs when people use certain actual or imputed characteristics to treat people differently and, in particular, detrimentally so. For example, some people do not employ women because they think women are inferior or because women are statistically more likely to take time of work to have a family. The former reason is invalid while the latter ought to be excluded as a reason justifying differential treatment because of the intrinsic wrongfulness and consequential effects, in our culture, of such treatment on people's ability to flourish.

This last sentence should suggest to the reader that there is an important link between discrimination and freedom. My freedom to choose who to employ is significantly limited by equality and anti-discrimination norms; and contrastively my freedom to seek and change employment is significantly hindered by discrimination. But how precisely can this be understood in terms of freedom as non-domination? How and to what extent does discrimination involve one being subjected to the will of another? Discrimination of the kind we are most often concerned with—on the grounds of sex, religion, race or sexual orientation and so forth—is a paradigm form of

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<sup>15</sup> *Discrimination and Disrespect* (n 13) 16.

<sup>16</sup> John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167, 180; and see further Joseph Raz, *Practical Reason and Norms* (Revised edition, OUP 1999) 33-35.

<sup>17</sup> John Gardner, 'Discrimination: the Good, the Bad and the Wrongful' (2018) 118 Proceedings of the Aristotelian Society 55.

domination in our culture. If I am seeking work and at each turn being rejected because of my sexual orientation, whether directly or indirectly, then I am being subjected to the direct or indirect will of another in a way which undermines my ability to look others in the eye with a sense of self-respect—falling below, in other words, the eyeball test outlined in chapter 2.I.A, restricts my ability to access and participate in the basic liberties and on the whole frustrates my ability to exercise my will.<sup>18</sup>

That is not to say that no discrimination between people and peoples at all is permitted. Rather, whether a certain kind of discrimination is permitted or not will largely depend on the particular political community in question. What is clear from the EU's labour migration acquis, for example, is that discrimination on the ground of skills is not only considered unproblematic but is actually necessary. That is, it is legitimate to distinguish between people and peoples on the basis of their skills, a position with which at least some political philosophers of migration agree.<sup>19</sup> Such discrimination is necessary for the proper functioning of the Single Market. Being able to discriminate on the ground of skills enables improved matching of supply and demand in the market because those demanding skilled workers (ie, member states, employers, consumers, etc) can filter the supply of workers, assessing and distinguishing workers for certain qualities such as certain levels of experience, qualifications and so forth. Those workers who are in high demand are able to attract higher prices—often in the form of increased

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<sup>18</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) ch 5 provides a similar set of reasons explaining the link between freedom and discrimination. See similarly Sophia Moreau, 'What is Discrimination?' (2010) 38 *Phil & Pub Aff* 143; Sophia Moreau, 'In Defence of a Liberty-based Account of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013); Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (OUP 2014) ch 6; and Sophia Moreau, 'Discrimination and Freedom' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018).

<sup>19</sup> The point is noted by David Miller, 'Immigration: The Case for Limits' in Andrew Cohen and Christopher Heath Wellmann (eds), *Contemporary Debates in Applied Ethics* (Blackwell 2005) 204; Joseph Carens, *The Ethics of Immigration* (OUP 2013) ch 13; Ayelet Shachar and Ran Hirschl, 'On Citizenship, States and Markets' (2014) 22 *Journal of Political Philosophy* 231; David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (HUP 2016) ch 6; and Douglas MacKay, 'Are Skill-Selective Immigration Policies Just?' (2016) 42 *Social Theory and Practice* 123. Cf Désirée Lim, 'Selecting Immigrants by Skill: A Case of Wrongful Discrimination?' (2017) 43 *Social Theory and Practice* 369; and Désirée Lim, 'The indirect gender discrimination of skill-selective immigration policies' (2019) 22 *Critical Review of International Social and Political Philosophy* 906. On the intersection of immigration and other kinds of discrimination, see Sarah Fine, 'Immigration and Discrimination' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016) and José Jorge Mendoza, 'Discrimination and Immigration' in *The Routledge Handbook of the Ethics of Discrimination* (n 18).

rights—while workers in low demand generally attract a lower price—generally, fewer rights.<sup>20</sup> Discriminating on the ground of people’s skills, as that concept was defined in chapter 1.II.B, is nothing more than a basic and fundamental function of a modern and efficient labour market.

## **B. Neorepublicanism, Equality and Third-Country Nationals<sup>21</sup>**

All of this seems fine in respect of EU citizens; but what of third-country nationals? Are they entitled to be treated as equals with EU citizens? Pettit admittedly adopts a broad definition of citizenship, considering those ‘all the more or less settled residents of a state’ as citizens.<sup>22</sup> Some voluntary migrants may satisfy this condition, but many other migrants would not. What, then, is the relationship between freedom as non-domination, equality and third-country nationals? Recall that chapter 2.I.C discussed the role of freedom as non-domination in respect of third-countries and third-country nationals. It was stated that one state should not dominate another. This applies as much to the EU’s general external relations as it does to its reliance on another political community for the purposes of labour migration, an issue I shall address more fully in chapter 6. In essence, freedom as non-domination enables and permits the EU to rely on the labour and skills of third-country nationals insofar as those nationals and their states of origin are not being dominated. This means that it is legitimate for the EU to discriminate between people and peoples on the ground of skills. But it does not give the EU a *carte blanche* to discriminate on many other grounds.

One such ground may be nationality. Discrimination on the grounds of nationality is fundamental to the process of EU integration. Reducing discrimination on the ground of nationality enables EU integration because it facilitates greater and more open competition on relevant grounds, such as skills, between peoples through a

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<sup>20</sup> Harald Bauder, *Labour Movement: How Migration Regulates Labour Markets* (OUP 2006); Martin Ruhs and Philip Martin, ‘Numbers vs Rights: Trade-Offs and Guest Worker Programs’ (2008) 42 *IMR* 249; Martin Ruhs, ‘Migrant Rights, Immigration Policy and Human Development’ (2010) 11 *Journal of Human Development and Capabilities* 259; and Martin Ruhs, *The Price of Rights: Regulating International Labour Migration* (Princeton University Press 2013).

<sup>21</sup> See generally Iseult Honohan and Marit Hovdal-Moan (eds), *Domination, Migration and Non-Citizens* (Routledge 2015).

<sup>22</sup> *On the People’s Terms* (n 9) 75.

reduction of barriers to information, movement and so forth. But widespread discrimination on the ground of residence and, therefore, indirect nationality discrimination, remains permissible across the EU. As noted in the introduction to this chapter, while nationality is a prohibited ground of discrimination *to some extent* as a matter of EU migration and asylum and free movement law, EU anti-discrimination and equality law does not prohibit discrimination on the ground of nationality. Abolishing discrimination on the ground of nationality altogether would mean that EU nationals could migrate freely across the EU as they can in their own country. Such a development may even require widespread harmonisation of social security, tax and other entitlements, essentially entailing a single EU state or, at the very least, a much greater degree of free movement on behalf of EU nationals. There is, naturally, a degree of speculation involved in considering what exactly abolishing nationality discrimination would entail in practice. Nonetheless, abolishing nationality discrimination in general would be a very significant step towards further and deeper EU integration.<sup>23</sup>

So much for the role of nationality discrimination in the process of EU integration generally. What of third-country nationals? It is plausible that the EU does have some special obligations to the nationals of at least certain third-countries. Some examples are those nationals in the EEA States, Switzerland and the EU's Neighbourhood; and given that the increasing

"external governance defined as the expansion of EU rules beyond EU borders is particularly intensive with the 'close' neighbours in the West who have committed themselves to the adoption of significant parts of the EU acquis (...) [t]hese processes extend the scope of European integration (or at least its acquis communautaire) beyond formal membership."<sup>24</sup>

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<sup>23</sup> *The Ethics of Immigration* (n 19) ch 11. On the link between equal treatment and the process of EU integration, see Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (OUP 2018) 3-5.

<sup>24</sup> Sandra Lavenex and Frank Schimmelfennig, 'EU rules beyond EU borders - theorising external governance in European politics' (2009) 16 *JEPP* 791, 807. See also Anu Bradford, 'Exporting standards: The externalisation of the EU's regulatory power via markets' (2015) 42 *International Review of Law and Economics* 158.



As and when the EU begins to integrate certain third-countries into its economy, the EU's obligations of non-domination with respect to third-countries and third-country nationals will become particularly relevant because the EU risks dominating those states and their citizens through the exercise of its economic, social and political power. This point applies not only to the countries in the EU's Neighbourhood but also to those other countries which have developed partnership, trade and association agreements with the EU. In exercising its economic power and influence over others, the EU risks dominating citizens of such states both generally and in the case of inward migration therefrom to the EU. Moreover and crucially, we know that third-country nationals in the EU habitually experience discrimination in recruitment processes. Furthermore, third-country nationals are regularly at risk of domination insofar as they are subject to the arbitrary will of the state through states' sovereign power to regulate immigration, depending on the intensity and extent of the domination such immigration controls exercise over migrants. As Iseult Honohan puts it in a lengthy but important passage,

"The intensity of domination (...) will depend on the degree of arbitrariness; the ease of exclusion; and the severity of the measures excluding foreigners. (...) The arbitrariness of migration controls appears in the way in which the exact requirements for migration are liable to change according to the will of the admitting state (...) The intensity is increased by the arbitrariness that arises from the greater prevalence of discretionary powers in the area of migration than in most areas of domestic policy: here agencies and officials are given wide powers, often laid down without legislative provision or oversight; their decisions are often not subject to review, judicial or otherwise; the framework within which they make decisions is often neither clearly laid out nor well known to citizens as well as non-citizens. As to the ease of exclusion, while states have difficulty in excluding migrants entirely, they can readily restrict legal access, and impose illegal status on those who breach entry controls; and they can shift the burden of controlling borders to others (other states, carriers, etc.). Finally, the severity of the procedures, which (even when not discretionary in practice)

range from exclusion by walls and barbed-wire fences, through deportation to detention or incarceration of illegal migrants.

...

The extent of domination will depend, first, on the range of areas of their lives affected, and the degree to which their options are limited for those who are excluded. On this basis, evidence suggests that the extent of domination by migration controls is significant. The whole lives of potential migrants who lack the basics of a reasonable level of subsistence may be determined by the difficulty of migration, which leaves them unable to access the preconditions for a flourishing life—even if they are not continuously subject to interference in each aspect of their lives.”<sup>25</sup>

The question which must be asked is, how can we avoid or minimise such forms of domination? How can we ensure non-domination of third-countries and third-country nationals? One way to address this problem is to make nationality a protected ground of discrimination. Doing this will, consistently with the ideal of freedom as non-domination, reduce the arbitrary power to which third-country nationals are regularly subjected<sup>26</sup> and better ensure their freedom by targeting obstacles, such as discrimination in recruitment processes, which they regularly face. By being required to provide good reasons for discrimination on the ground of nationality, member states and market actors would reduce the discrimination third-country nationals habitually experience and the consequent risk of domination third-country nationals face. It would expose the EU’s institutions, member states and market actors’ intentions to contestation and deliberation, allowing us to more clearly consider and contest the reasons in favour of or against the status quo. Moreover, as previously suggested, it would also constitute a significant step in the project of EU integration.

To be clear, however, (i) nothing so far implies that abolishing discrimination on the ground of nationality would be some sort of panacea (ii) nor is it strictly a logical

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<sup>25</sup> Iseult Honohan, 'Domination and migration: an alternative approach to the legitimacy of migration controls' in *Domination, Migration and Non-Citizens* (n 21) 40.

<sup>26</sup> Sarah Fine, 'Non-domination and the ethics of migration' in *Domination, Migration and Non-Citizens* (n 21) 19-24.

necessity to so abolish nationality discrimination in seeking to address the discrimination which third-country nationals habitually face. First, as third-country nationals regularly experience discrimination, I am implicitly assuming that EU equality law as it stands must be deficient in some way; and one way of remedying such deficiency is through making nationality a prohibited ground of discrimination. Moreover, as previously suggested, making nationality a prohibited ground of discrimination would be a significant step towards further and deeper EU integration. It is, of course, plausible that the real problem is not that equality law as it is currently constituted is inadequate to address the discrimination which third-country nationals face but rather that its enforcement in practice has not addressed the problems third-country nationals experience. It is possible, for example, that third-country nationals are not fully aware of their rights under EU anti-discrimination and equality law. I do not explore this possibility here. A full analysis of the remedies necessary to address the discrimination third-country nationals face would need to take into account such theoretical and practical obstacles.

Second, it could be objected that discrimination on other grounds, such as third-country nationals' migration status, socio-economic standing<sup>27</sup> or cultural background could also result in, at least, the risk of domination. Why not abolish discrimination on one of these grounds instead? On the one hand, doing so would make it necessary for states and others to proffer good reasons every time they establish norms which distinguish between people on one of those grounds. This may be beneficial insofar as it further reduces the domination to which third-country nationals are habitually subject. On the other hand, nationality is the relevant and fundamental ground according to which third-country nationals are to be distinguished from member state nationals, as the language of the relevant provisions of the TFEU suggests.<sup>28</sup> Moreover, abolishing nationality discrimination in general should, in many cases, entail the functional reduction of discrimination on some of the aforementioned grounds.

However, to make nationality a protected ground of discrimination requires further clarification of the two different conceptions of equal treatment I referred to in

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<sup>27</sup> Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 HRL Rev 411.

<sup>28</sup> TFEU, Part Three, Title V, Chapter 2 refers to third-country nationals.

the introduction: equal treatment with member state nationals, on the one hand, and equal treatment in general, on the other hand. Accordingly, it is to an analysis of these in international, European and EU law which I now turn.

## II. The Entitlement of Third-Country Nationals to Equal Treatment in the EU

### A. International Law

#### 1. International Human Rights Law

Article 2 UDHR guarantees the rights contained therein without discrimination on the basis of, inter alia, national or social origin. Thus, the right to work guaranteed in art 23(1) UDHR benefits all persons regardless of national or social origin. The right to equality and non-discrimination on the ground of nationality is also guaranteed in arts 2(1) and 26 ICCPR,<sup>29</sup> arts 2 and 7 ICESCR,<sup>30</sup> art 2 CRC<sup>31</sup> and arts 1 and 7 ICRMW. All member states of the European Union are parties to these respective human rights treaties (except the ICRMW, to which only a minority of member states are party) and, according to art 3 TEU, the EU is committed to the respect, protection and promotion of human and fundamental rights. It is thus essential that the EU, in its laws and policies, respect, protect and promote the right to non-discrimination to ensure its compliance with international human rights law. Furthermore, it is important to note here that art 21 TEU obliges the EU to respect the principles of international law. Accordingly, EU law should follow the approach under international law of generally affording third-country nationals' equal treatment and providing reasons for discriminating against them. Of the guarantees stated here, only the ICCPR, ICESCR

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<sup>29</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013) ch 23.

<sup>30</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) ch 4.

<sup>31</sup> Samantha Besson and Eleonor Kleber, 'Article 2' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019).

and ICRMW will be considered in further detail.

In respect of the ICCPR, the HRC in its General Comment No 18 has observed that prohibited discrimination involves

“any distinction, exclusion, restriction or preference which is based on any ground such as (...) national or social origin (...) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>32</sup>

According to the HRC, non-discrimination ‘constitute[s] a basic and general principle relating to the protection of human rights’.<sup>33</sup> The Committee also acknowledges that not all discrimination is prohibited discrimination; some distinctions and differentiations are legitimate. This is consistent with the view that discrimination on the grounds of, inter alia, skills is permissible.

The HRC has considered the possibility of nationality discrimination in a number of cases.<sup>34</sup> In *Gueye v France*, retired Senegalese members of the French army complained of discrimination on the ground of race in relation to their pension entitlements. While not finding discrimination on the ground of race, the HRC did conclude that there had been discrimination on the ground of nationality. According to the HRC, ‘mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment’.<sup>35</sup>

*Karakurt v Austria* concerned the right of a Turkish national, in possession of an open-ended residence permit to live in Austria, to be elected to a work-council. The applicant’s election as a member of the work-council was challenged on the ground that the relevant provision of Austrian labour law limited the entitlement of non-nationals to stand for election to such work-councils. In the domestic courts, this challenge was successful. However, the HRC found that, although an international agreement which grants preferential treatment to certain nationals of a state party to

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<sup>32</sup> CCPR, ‘General Comment No 18: Non-discrimination’ (10 November 1989) para 7.

<sup>33</sup> *ibid* para 1.

<sup>34</sup> *Gueye v France* (196/85); *Adam v Czech Republic* (589/94); and *Karakurt v Austria* (965/00). Cf *Van Oord v The Netherlands* (658/1995).

<sup>35</sup> *Gueye v France* (196/85) para 9.5.

that agreement might constitute an objective and reasonable ground for differentiation,<sup>36</sup> no general rule of discrimination could be drawn therefrom. Accordingly, the Committee found that the applicant had been subjected to prohibited discrimination on the ground of nationality. This case is particularly interesting because it acknowledges that an international agreement between states may justify discrimination on the ground of nationality.

In chapter 3.I.A.1, I noted that, according to art 6 ICESCR, 'everyone' is entitled to the right to work. Accordingly, discrimination on the ground of, inter alia, nationality is prohibited. Unlike art 26 ICCPR, however, art 2 ICESCR is not a free-standing guarantee of equality; rather, it is a parasitic guarantee of equality, requiring violation of some other right in the ICESCR to be triggered. This may be because equality has been considered 'the dominant single theme of the Covenant'.<sup>37</sup> But, like the ICCPR, the guarantee of equality in art 2 ICESCR is non-exhaustive; it extends to grounds other than those listed therein. According to art 2(2) ICESCR, states party to the ICESCR undertake to guarantee the rights stated therein 'without discrimination of any kind as to (...) national or social origin, property, birth or other status'. It is important to point out that while this guarantee seems very broad, it does not apply to all possible distinctions.<sup>38</sup>

In interpreting the ICESCR, the CESCR adopts the same approach as the HRC and the ECtHR. Accordingly, decisions of these other bodies are likely to inform the approach of the CESCR.<sup>39</sup> They should therefore be read together. In respect of the ground of discrimination—'national or social origin'—the CESCR has interpreted this as including 'a person's State, nation or place of origin'.<sup>40</sup> In addition, and contrary to the expressed intentions of many states parties,

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<sup>36</sup> *Van Oord v The Netherlands* (658/1995).

<sup>37</sup> Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1998) 153-154, quoting Bertrand Ramcharan, 'Equality and Non-discrimination' in Louise Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 246.

<sup>38</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2016) 177.

<sup>39</sup> *ibid* 179.

<sup>40</sup> CESCR, 'General Comment No 20: Non-discrimination in economic, social and cultural rights' (2 July 2009) para 24.

"[t]he ground of nationality should not bar access to Covenant rights (...) The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation."<sup>41</sup>

At least one group of leading commentators, in an attempt to reconcile the views of the CESCR with those of states party to the ICESCR, have argued that 'what is prohibited is *arbitrary* distinctions in treatment based on nationality, that is, distinctions for which there is no 'objective and reasonable justification'.<sup>42</sup> In the light of the discussion in chapter 3 and in section II of this chapter, reducing arbitrary power and the risk of domination inherent therein is precisely the object of freedom as non-domination within and between states. Such an interpretation of international human rights law is therefore directly consistent with the requirements of freedom as non-domination. However, as noted in chapter 3.I.A.1, art 7 ICRMW prohibits discrimination on the ground of nationality but is without prejudice to distinctions drawn on the basis of immigration status. Accordingly, discrimination on the ground of immigration status is permitted under art 7 ICRMW.<sup>43</sup>

## 2. International Labour Law<sup>44</sup>

In relation to international labour law, the relevant measures are the Conventions on Freedom of Association and Protection of the Right to Organise 1948 (No 87), Migration for Employment (Revised) 1949 (No 97), Discrimination (Employment and Occupation) 1958 (No 111), Equality of Treatment (Social Security) 1962 (No 118) and

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<sup>41</sup> *ibid* para 30.

<sup>42</sup> Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (n 35) 198.

<sup>43</sup> Bernard Ryan, 'In Defence of the Migrant Workers Convention: Standard Setting for Contemporary Migration' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Theory and Policy* (Ashgate 2013) 494-495.

<sup>44</sup> Shauna Olney and Ryszard Cholewinski, 'Migrant Workers and the Right to Non-discrimination and Equality' in Cathryn Costello and Mark Freedland (ed), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

Migrant Workers (Supplemental Provisions) 1975 (No 143).<sup>45</sup> While all EU member states have ratified Conventions No 87 and 111, only a minority of member states have ratified the remaining three conventions. Indeed, Convention No 143 has only been ratified by five member states. These latter conventions are therefore not binding on the member states. Nonetheless, the ILO states that all conventions apply to migrant workers unless otherwise stated. In general, all conventions noted require non-discrimination in respect of migrant workers, although Convention No 97 states that its terms do not apply to irregular migrants.

Convention No 111 on Discrimination, one of the core conventions of the ILO, defines, in art 1(a), discrimination as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. By contrast, and consistently with the approach adopted in this thesis, discrimination on the grounds of job requirements—ie, skills—is expressly permitted. As art 1(2) of the Convention states, 'any distinction, exclusion or preference' in respect of a particular job 'based on the inherent requirements thereof' shall not be considered prohibited discrimination. In other words, where a job requires certain skills, employers are entitled to discriminate between people on the basis of their skills. Accordingly, given that, under international labour law, discrimination on the grounds of nationality—'national extraction or social origin'—is generally prohibited, it is submitted that the EU should amend its position by prohibiting nationality discrimination in general to ensure compliance with international labour law. While, as noted in the introductory chapter, the EU is not a subject of international law and is not, therefore, strictly bound by international labour law, the EU does participate in the work of the ILO and the Court of Justice does rarely cite provisions of international labour law in its judgments.<sup>46</sup>

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<sup>45</sup> See generally ILO, *Migrant Workers* (Geneva 1980), ILO, *Migrant Workers* (Geneva 1999) and ILO, *Promoting fair migration* (Geneva 2016). It is important to note that Conventions Nos 97 and 143 do not apply to self-employed persons, people who I would consider to be undertaking a form of work in chapter 3.II.B.

<sup>46</sup> Tzehainesh Teklè, 'Labour Rights and the Case Law of the European Court of Justice: What Role for International Labour Standards?' (2018) 9 ELLJ 236.



### 3. International Economic Law

In the previous chapter, I highlighted the relevance of granting market access in international economic law. Equality and non-discrimination come in two forms in international economic law. The first is the so-called 'most-favoured-nation' obligation. Article II(1) GATS provides that each member state of the WTO shall 'accord immediately and unconditionally to services and service suppliers' of any other member state 'treatment no less favourable than that it accords to like services and service suppliers of any other country'. This is most pertinent to the possibility of third-country nationals accessing and participating in the Single Market on equal terms with one another. However, art II(2) GATS goes on to provide that any member state may maintain a discriminatory measure provided that it is listed in the Annex on art II exemptions. Under international economic law, therefore, states are given a wide-ranging power of exemption from the obligation to treat other states equally. But the thrust of the position under international economic law is similar to that which is advocated for in this chapter; namely, that discrimination on the ground of nationality should be generally prohibited subject to specific exceptions. A general principle can be maintained subject to many specific and reasoned exceptions. And exceptions based on valid, valuable reasons are perfectly justifiable.

By contrast, the second obligation of equality and non-discrimination in international economic law is, as we shall see shortly, very like EU law at present. Like the market access obligation considered in the previous chapter, art XVII GATS provides for 'national treatment' in specific as opposed to general circumstances, where listed in the schedules of WTO member states. According to art XVII(1) GATS, each member state of the WTO shall give services and service suppliers of other member states 'treatment no less favourable than it accords its own services and service suppliers'. In other words, the default position in international economic law generally permits discrimination on the ground of nationality. Only in specific circumstances will third-countries be afforded equal treatment with home state nationals. Given the position argued for in section I above, this should be reconsidered so that third-countries are generally afforded equal treatment as nationals, subject to specific, reasoned exceptions.

## B. European Law

### 1. The ECHR<sup>47</sup>

Although nationality discrimination is not expressly prohibited by art 14 ECHR, it does fall within the scope of that article and requires justification.<sup>48</sup> As the ECtHR noted in *Gaygusuz v Austria*, 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.<sup>49</sup> However, as Claire Kilpatrick has noted, the ECtHR has long acknowledged the legitimacy of differences between EU nationals and third-country nationals.<sup>50</sup> Moreover, the weight to be attached to differences of treatment based on nationality is very different from that to be attached to differences based on immigration status. Because immigration status as a characteristic is not immutable and involves an element of choice, distinctions made on the grounds of immigration status are less weighty, or less morally significant, than those based on nationality.<sup>51</sup> Of relevance in this context is the wide discretion granted to contracting parties 'when it comes to general measures of economic or social strategy'.<sup>52</sup> Indeed, the Court has confirmed that for any welfare or resource-redistribution system to operate effectively, the state may need to make distinctions and broad categorisations between different groups.<sup>53</sup>

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<sup>47</sup> Generally, see Rory O'Connell, 'Cinderella comes to the ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29 LS 211; Oddny Mjöll Arnardóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 HRL Rev 647; and Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 HRL Rev 273; and specifically Sonia Morano-Foadi and Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third-Country Nationals: The ECJ and ECtHR Jurisprudence' (2011) 22 EJIL 1071.

<sup>48</sup> See *Gaygusuz v Austria* (1996) 23 EHRR 364; *Zeibek v Greece* App no 46368/06 (ECtHR, 9 July 2009); and *Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003).

<sup>49</sup> (1996) 23 EHRR 364 [42].

<sup>50</sup> Claire Kilpatrick, 'Article 21' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 589-590 citing *Moustaquim v Belgium* (1991) 13 EHRR 802 and *Ponomaryovi v Bulgaria* (2014) 59 EHRR 20.

<sup>51</sup> *Bah v United Kingdom* (2012) 54 EHRR 21 [46]-[48].

<sup>52</sup> *James v United Kingdom* (1986) 8 EHRR 123 [46]; *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 27 [80]; and *Bah v United Kingdom* (2012) 54 EHRR 21 [37].

<sup>53</sup> *Runkee v United Kingdom* App 42949/98 (ECtHR, 10 May 2007) [39]; and *Ponomaryovi v Bulgaria* (2014) 59 EHRR 20 [54].

Three cases of the ECtHR stand out in their treatment of third-country nationals. The first is *Ponomaryovi v Bulgaria*. In that case, the applicants, two brothers, were Russian nationals who had been taken to live in Bulgaria by their mother, a Russian national, in virtue of her marriage to a Bulgarian national. The applicants' mother obtained a permanent residence permit, on the basis of which the applicants resided and remained in the jurisdiction lawfully until their eighteenth birthday. At this point, the applicants' immigration status in Bulgaria became irregular. The applicants were then required to pay fees to complete their secondary school education which were only levied on foreign nationals. The applicants challenged the decision to levy fees on them arguing that it violated their rights under the Convention, in particular art 2 of Protocol 1 to the Convention (the right to education) in conjunction with art 14 (the right to non-discrimination).

The ECtHR first noted that education fell within the scope of art 14. The Court then held that the applicants were being discriminated against solely on the basis of their nationality and immigration status: 'the applicants were thus clearly treated less favourably than others in a relevantly similar situation, on account of a personal characteristic'.<sup>54</sup> The Court finally turned to the question of justification. Although contracting parties are entitled to a wide margin of appreciation in respect of expensive and resource-intensive public services, given that the right to education forms an important part of the Convention's framework, this margin must be narrowed in respect thereof. Moreover, the Court observed, in the present case, the applicants were highly integrated in Bulgarian society, having lived in Bulgaria for more than 10 years and being fluent in Bulgarian; the applicants had taken steps to regularise their immigration status; and the applicants' conduct could in no way be described as abusive of Bulgaria's public services. In the light of these considerations, the Court concluded that the discrimination against the applicants on the basis of their nationality and immigration status was unjustifiable and in contravention of art 2 of Protocol 1 in conjunction with art 14 ECHR.

*Ponomaryovi* is important for a number of reasons. First, the Court placed great emphasis on nationality and immigration status as constituting a 'personal

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<sup>54</sup> (2014) 59 EHRR 20 [50].

characteristic' of the applicants. This contrasts strongly with EU law in a number of ways. For although nationality is a ground of prohibited discrimination as a matter of EU free movement law, the same is not the case as a matter of EU equality and anti-discrimination law and nowhere in EU law is immigration status considered as a ground of discrimination. A second point is the fact that the applicants' immigration status was irregular. The fact that (i) the applicants had been in the jurisdiction for so long and that, (ii) by the time the case reached the Court, they had obtained permanent resident status, may have given the Court reason to be sympathetic. But the result is nonetheless significant; that irregular migrants might ground a successful claim for discrimination is an outlier. Indeed, in other cases concerning irregular migration, the Court has not been so sympathetic.<sup>55</sup>

The second case of relevance is *Dhahbi v Italy*.<sup>56</sup> In that case, the applicant, a Tunisian national legally resident and working in Italy, claimed certain social welfare entitlements on behalf of himself and his family. His application was rejected. The applicant challenged this outcome on the basis of, inter alia, an equal treatment guarantee in the Euro-Mediterranean Association Agreement.<sup>57</sup> The ECtHR initially accepted that there had been differential treatment on the basis of a personal characteristic between the applicant and member state nationals. The Court then turned to the question of justification: could restricting access to such benefits for third-country nationals be justified? According to the Court, the answer was 'no'. The applicant was lawfully resident, working and contributing to the funding of public services; and the sole reason for denying the applicant the allowance was his nationality. Although not expressly acknowledged in the Court's reasoning, the fact that the applicant had subsequently (and at the time of the hearing) become a naturalised Italian citizen, may also have been relevant.

*Dhabi* is particularly relevant to my discussion here insofar as the applicant relied on the existence of an equal treatment guarantee in one of the EU's many

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<sup>55</sup> *Osungu and Lokongo v France* App nos 78860/11 and 51354/13 (ECtHR, 8 September 2015).

<sup>56</sup> App no 17120/09 (ECtHR, 8 April 2014). See also *Fawsie v Greece* App no 40080/07 (ECtHR, 28 October 2010) and *Saidoun v Greece* App no 40083/07 (ECtHR, 28 October 2010).

<sup>57</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member states, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2, art 64.

international agreements. While a full exploration of these guarantees is undertaken in chapter 7.III, it merits noting summarily that similar terms are found in the Ankara Agreement,<sup>58</sup> EU-Andean Trade Agreement,<sup>59</sup> Euro Mediterranean Agreement with Algeria,<sup>60</sup> EC-Azerbaijan Agreement,<sup>61</sup> Bosnia and Herzegovina Stabilisation and Association Agreement,<sup>62</sup> EC-Georgia Association Agreement,<sup>63</sup> EU-Kazakhstan Partnership and Cooperation Agreement,<sup>64</sup> Euro-Mediterranean Agreement with Morocco,<sup>65</sup> EC-Moldova Association Agreement,<sup>66</sup> EC-Russia Partnership and Cooperation Agreement,<sup>67</sup> EC-Serbia Stabilisation and Association Agreement,<sup>68</sup> and EU-Ukraine Association Agreement.<sup>69</sup> In principle, therefore, provided that nationals of those countries enter the EU lawfully, they should be entitled, under EU law, to equal treatment with member state nationals in respect of their working conditions and other areas dealt with under EU anti-discrimination and equality law. This point is consistent with the point, made in section II.B above, concerning the special obligations which the EU may have towards citizens of third-countries with which the EU has preferential

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<sup>58</sup> Agreement establishing an Association between the European Economic Community and Turkey [1977] OJ L361/1, art 9.

<sup>59</sup> Trade Agreement between the European Union and its member states, of the one part, and Columbia and Peru, of the other part [2012] OJ L353/3, arts 269 & 276.

<sup>60</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member states, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2, art 67.

<sup>61</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L246/3, art 20.

<sup>62</sup> Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2, art 47.

<sup>63</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and Georgia, of the other part [2014] OJ L261/4, art 416.

<sup>64</sup> Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member states, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/3, art 19.

<sup>65</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member states, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2, art 64.

<sup>66</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, art 447.

<sup>67</sup> Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3, art 23.

<sup>68</sup> Stabilisation and Association Agreement between the European Communities and their Member states of the one part, and the Republic of Serbia, on the other part [2013] OJ L278/16, art 49.

<sup>69</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3, art 17.

trade, association and cooperation agreements. The case for affording equal treatment to those nationals is therefore particularly strong.

The final case of relevance is *Hode and Ali v United Kingdom*,<sup>70</sup> which concerned elements of the UK's asylum code. The first applicant had been granted asylum in 2006 and was given leave to remain in the UK until 2011. The first applicant subsequently married the second applicant in Djibouti in 2007. The second applicant applied for a visa to enter the UK, but this application was rejected on the ground that the applicants did not qualify for family reunion. At the time, the family reunification rules in the UK's immigration code applied only to the spouses of refugees who were part of the refugee's family before they had left the country of origin. The applicants challenged these rules as infringing art 8 (the right to family life) in conjunction with art 14. The ECtHR agreed. First, the Court confirmed that there had been discrimination on the basis of immigration status: the ground for treating the applicants differently was the first applicant's status as a refugee. The Court then turned to the question of justification. It accepted that, in principle, 'offering incentives to certain groups of immigrants may amount to a legitimate aim'.<sup>71</sup> The UK Government argued that in providing preferential treatment to the spouses of students and workers coming to the UK, it was providing such incentives in a legitimate manner. However, the Court disagreed because the respondent government had never relied on such a justification domestically and, moreover,

"the Court sees no justification for treating refugees who married post-flight differently from those who married pre-flight. The Court accepts that in permitting refugees to be joined by pre-flight spouses, the United Kingdom was honouring its international obligations. However, where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the state's international obligation will not in itself justify the difference in treatment."<sup>72</sup>

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<sup>70</sup> (2013) 56 EHRR 27. See also *Biao v Denmark* (2017) 64 EHRR 1.

<sup>71</sup> (2013) 56 EHRR 27 [53].

<sup>72</sup> (2013) 56 EHRR 27 [55].

*Hode and Ali* is important for two reasons. First, it acknowledges the legitimacy of providing benefits and incentives to certain types of immigrants. This may appear to support the type of differentiation in rights evident in labour migration regimes generally, particularly as evident in the EU's labour migration acquis, consistently with my earlier comments in respect of the legitimacy of discrimination on the grounds of skills. Second, and most significantly, the decision challenges a rule which forms part of the immigration code as *itself* being discriminatory on the ground of immigration status. The significance of this element of the decision cannot be understated. The CJEU has not yet questioned whether the EU's immigration acquis is in compliance with international or regional human rights norms; by contrast, the ECtHR here concluded that part of the UK's immigration regime was inherently discriminatory on a ground closely associated with nationality, namely, immigration status. This suggests that it is possible for the courts to review many areas of law, including immigration and asylum law, as to whether same is discriminatory on the basis of nationality.

## 2. The RESC<sup>73</sup>

Article E RESC commences Part V thereof concerning implementation and enforcement, 'thereby indicating its primary role in securing the effective and equal enjoyment of all rights under the Charter'.<sup>74</sup> Article E RESC is, like art 14 ECHR, a parasitic right. It is not a free-standing guarantee of equality; rather, it requires that some other right be infringed. And art E applies to all provisions in Part II RESC.

However, two points merit noting. First, while 'national extraction' is a prohibited ground of discrimination, nationality or citizenship is not: differential treatment on the ground of citizenship is permitted.<sup>75</sup> Second, third-country nationals are in general expressly excluded from the scope of application of the RESC: art 1 of the Annex to the RESC provides that the persons covered by the RESC 'includes foreigners

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<sup>73</sup> Colm Ó Cinnéide, 'Migrant Rights under the European Social Charter' in *Migrants at Work: Immigration and Vulnerability in Labour Law* (n 44).

<sup>74</sup> Csilla Kollonay-Lehoczy, 'Article E: Non-Discrimination' in Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart 2017).

<sup>75</sup> Explanatory Report to the European Social Charter (Revised) para 137.

only insofar as they are nationals of other parties lawfully resident or working regularly within the territory of the party concerned'. However, refugees and stateless persons lawfully present in the jurisdiction of the parties to the RESC are entitled to treatment not less favourable than that required under the parties' international obligations. Furthermore, in extreme cases, the ECSR has considered that the RESC can apply to third-country nationals 'on a right of fundamental importance to the individual'.<sup>76</sup> While the Committee has not yet applied art E RESC to irregular third-country nationals,<sup>77</sup> it is nonetheless possible that in future cases it may apply that article to third-country nationals. And given the centrality of work to personal autonomy—people's well-being, it would seem that the right to work and equality of access to the labour market should be understood as being of 'fundamental importance' to the individual. In other words, third-country nationals should be guaranteed equal treatment with member state nationals when exercising their right to work.

## C. EU Law

### 1. Article 18 TFEU

Article 18 TFEU is the fundamental textual expression of equality and non-discrimination in EU law. In general, art 18 TFEU applies as an independent guarantee of equality unless a specific guarantee of equality has been provided elsewhere in EU law.<sup>78</sup> Of course, that is not to say that art 18 TFEU cannot be used as a source of inspiration and interpretation for those other, more specific guarantees of equality; indeed, it has been so used on numerous occasions.<sup>79</sup> The text of art 18 provides that non-discrimination on the basis of nationality shall be guaranteed 'within the scope of application of the Treaties'. Who, then, falls within the scope of EU law? The answer is

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<sup>76</sup> *FIDH v France* (Collective Complaint No 14/2003) paras 30-32.

<sup>77</sup> *DCI v The Netherlands* (Collective Complaint No 48/2008).

<sup>78</sup> Case C-379/92 *Peralta* [1994] ECR I-3453 [18]; Case C-55/00 *Gottardo* [2002] ECR I-413 [21]; Case C-91/08 *Wall* [2010] ECR I-2815 [32]; Case C-195/16 / ECLI:EU:C:2017:815 [70]; and Case C-25/10 *Missionswerk Werner Heukelbach eV* [2011] 2 CMLR 35 [18].

<sup>79</sup> Case C-73/08 *Bressol* [2010] ECR I-2735 [86]; Case C-391/09 *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* [2011] 3 CMLR 13 [43]; and Case C-42/11 *Lopes de Silva* ECLI:EU:C:2012:517 [59].



all those persons who are within the territory of the EU member states or overseas territories, are EU nationals or are entitled to equal treatment therewith.<sup>80</sup>

If third-country nationals are entitled to equal treatment with EU nationals on the ground of nationality, then they can rely on EU equality and anti-discrimination law because the former, logically, entails the latter. To put it another way, once migrants are guaranteed equal treatment on the ground of nationality, they are then entitled to equal treatment on other grounds. Equal treatment on the ground of nationality is a threshold condition for equal treatment in general. But the Court of Justice has asserted that art 12 EC—now art 18 TFEU—does not apply to third-country nationals. As the Court noted in *Vatsouras and Koupatantze*, that article

“concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.”<sup>81</sup>

This position has been affirmed in several post-Lisbon cases.<sup>82</sup> In *Hadj Hamed*, for example, the applicant was an Algerian national resident in Belgium holding a valid resident permit and had entered Belgium on the basis of the Family Reunification Directive to be united with her partner there, who was a French national. The couple had a child together of French nationality and the applicant had another child of Algerian nationality. The couple subsequently separated and the applicant, who was not dependent on her partner, was then reliant on social assistance in Belgium. Shortly thereafter, the applicant stopped receiving allowances for her child of Algerian

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<sup>80</sup> Elspeth Guild and Steve Peers, ‘Out of the Ghetto? The Personal Scope of EU Law’ in Steve Peers and Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Brill 2006); and Eleanor Spaventa, ‘Seeing the Wood for the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45 CML Rev 13. The CJEU has, however, equivocated at times on this point: cf Case C-233/14 *Commission v The Netherlands* [2017] 1 CMLR 5 [76] and Case C-182/15 *Petruhhin* [2017] 1 CMLR 28 [30].

<sup>81</sup> Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325 [15]; and Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585 [52].

<sup>82</sup> Case C-291/09 *Francesco Guarnieri & Cie* ECLI:EU:C:2011:217 [20]; and Case C-42/11 *Lopes de Silva* ECLI:EU:C:2012:517; Case C-45/12 *Hadj Hamed* ECLI:EU:C:2013:390.

nationality. The applicant applied for such benefits, but her application was rejected on the basis that she had not been resident in Belgium for five years or more. The applicant challenged this decision and the ground for it, namely the five-year residency requirement.

A number of questions relating to this challenge were referred to the Court of Justice, the most pertinent for my purposes being whether the applicant was entitled to equal treatment with member state nationals on the basis of the Family Reunification Directive, in particular arts 13(2) and 14 thereof. According to the Court, given that (i) the applicant's circumstances fell outside the scope of arts 13(2) and 14 of the Family Reunification Directive and (ii) the fact that the applicant had a resident permit did not, in and of itself, entitle her to equal treatment with member state nationals in accordance with art 18 TFEU, the applicant was accordingly not entitled to equal treatment with member state nationals. Specifically, the Court noted that as the background to art 18 TFEU was Union citizenship, art 18 TFEU could not apply 'as it stands' to third-country nationals holding a resident permit in a member state. Reflecting on the Court's approach, however, Evelien Brouwer and Karin de Vries observe, rightly in my view, that

"[u]sing the wording 'as it stands' (...) seems to indicate that Article 18 TFEU could apply to TCNs, but only if their situation is covered by EU law. In this case, the CJEU found that the person invoking Article 18 TFEU (and Articles 20 and 21 of the Charter) did not fall within the categories of persons protected by EU law: neither the mother nor her daughter, for whom she applied for family benefits, fell within the scope of Directive 2004/38 or Regulation 1612/68 or of Directive 2003/109."<sup>83</sup>

In the light of this case law, it is clear that in no case has the CJEU expressly held art 18 TFEU applicable to third-country nationals. But the case law is, at least,

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<sup>83</sup> Evelyn Brouwer and 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 Marjolein van de Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble? Liber amicorum Titia Loenen* (SIM 2015) 141.

consistent with the following view: namely, that art 18 TFEU, as an expression of the equal treatment in general, may apply to third-country nationals only when they fall within the scope of some other, more specific, expression of that conception. In other words, while third-country nationals are not generally entitled to equal treatment with member state nationals as a matter of EU law, they are so entitled in specifically enumerated circumstances, such as under the terms of the Family Reunification Directive. This is consistent with other case law concerning art 18 TFEU. In general, that article will not be invoked if an alternative and specific guarantee of equality exists. However, it has been acknowledged that, if such a specific guarantee does exist, then art 18 can be used to interpret that guarantee, giving it greater breadth.

Given this possibility, it is not entirely clear, as a matter of legal doctrine, why the CJEU has refused to recognise the general application of art 18 TFEU to third-country nationals. Indeed, a general principle may be subject to many exceptions and so such a position may be roughly the same, in practice, with the current legal protection of the rights of third-country nationals in EU law. One reason for this may be that the CJEU has left the definition of the specific guarantees of equality for third-country nationals to the EU's legislative institutions. That much is evident, at least in the case of third-country nationals, from the legislative history of the drafting of much of the EU's migration acquis. For, as Bjarney Friðriksdóttir has recently outlined, the extent of the equal treatment guaranteed to third-country nationals in many of the EU's migration measures was a matter of a great debate and lobbying on behalf of the member states.<sup>84</sup> While this legislative and political reality is certainly enlightening, it does not explain, as a matter of legal doctrine, why art 18 TFEU does not apply in principle to third-country nationals.<sup>85</sup>

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<sup>84</sup> Bjarney Friðriksdóttir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill Nijhoff 2017) ch 9. See also Sonia Morano-Foadi and Karin de Vries, 'The Equality Clauses in the EU Directives on Non-discrimination and Migration/Asylum' in Sonia Morano-Foadi and Micaela Malena (eds), *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (Edward Elgar 2012).

<sup>85</sup> It is plausible to think that the reason art 18 TFEU does not apply to third-country nationals is because it is designed to strengthen EU citizenship. But this does not explain why art 18 apparently ignores legal doctrine. There is an important difference between the actual or potential purpose of a law and its actual coherence within the legal system of which it is a part.

## 2. Article 21 CFREU

It is also necessary to consider art 21(2) CFREU, which is textually similar to art 18 TFEU, and states that '[w]ithin the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'. This appears to designate art 21(2) CFREU as something of an exception or derogation to art 21(1) CFREU,<sup>86</sup> a point which has been borne out in subsequent case law.<sup>87</sup> For example, *Kamberaj* concerned an application by an Albanian national, resident and working in Italy, for a housing allowance. The allocated funding for housing allowance was divided into two categories, for EU national residents and non-EU national residents respectively. The applicant challenged this distinction as being discriminatory on grounds of nationality but was unsuccessful. Ultimately, the Court of Justice avoided addressing the issue under art 21(2) CFREU, instead addressing the issue under art 34 CFREU concerning rights to social assistance and social security. The structure of the Court's reasoning is nonetheless interesting to consider.

The Court first noted that the referring court had failed to make a concrete link between, inter alia, arts 18 TFEU and 21 CFREU and the case before it. The CJEU then turned to a specific equal treatment guarantee for third-country nationals in the Long-Term Residents' Directive. Noting that, according to the terms thereof, the member states are entitled to restrict equal treatment in respect of social assistance and social protection to 'core benefits', the Court then considered the meaning of 'core benefits' in the light of art 34 of the Charter. The Court concluded that the allocative distinction made in national law fell within this concept and was therefore contrary to the terms of the Long-Term Residents' Directive. It thus appears that instead of addressing the scope of the equal treatment guarantee as defined in the Long-Term Residents' Directive, the Court instead began from the terms of thereof, taking for granted a priori

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<sup>86</sup> Mark Bell, 'Article 20' and Claire Kilpatrick, 'Article 21' in *The EU Charter of Fundamental Rights: A Commentary* (n 50).

<sup>87</sup> Case C-571/10 *Kamberaj* [2012] 2 CMLR 43; Cases C-443 and C-444/14 *Kreis Warendorf* [2016] 3 CMLR 11; Case C-579/13 *P and S* [2015] 3 CMLR 44; *Sannah v Work and Pensions Secretary* [2015] 2 CMLR 27; Case C-508/10 *Commission v The Netherlands* [2012] 2 CMLR 48; Karin de Vries, 'Towards Integration and Equality for Third-Country Nationals? Reflections on *Kamberaj*' (2013) 38 EL Rev 248; and Steve Peers, 'The Court of Justice lays the Foundations for the Long-Term Residents Directive: *Kamberaj*, *Commission v Netherlands*, *Mangat Singh*' (2013) 50 CML Rev 529.

that the Directive granted third-country nationals equal treatment with member state nationals. Rather than challenging this position, as made by the EU's legislative institutions in drafting the Directive, the Court accepted it and continued its reasoning therefrom. The Court's reasoning can be reconstructed, more simply, as follows:

- (i) [Third-country nationals are entitled to equal treatment with member state nationals.]<sup>88</sup>
  - (ii) The TFEU and CFREU do not specify the extent of third-country nationals' entitlement to equal treatment with member state nationals clearly.
  - (iii) The Long-Term Residents' Directive provides one clear specification of same.
- ∴ Third-country nationals who fall within the scope of the Long-Term Residents' Directive are entitled to equal treatment with member state nationals as defined therein.

A similar phenomenon is also evident in subsequent case law. In *Kreis Warendorf*, the Court addressed certain restrictions on the free movement of beneficiaries of subsidiary protection in Germany under the Uniform Status Directive. The Court referred neither to the TFEU nor the CFREU, but the language of equality imbues much of the judgment. Specifically, in assessing whether a residence condition, which had as its object the integration of third-country nationals, was permissible, the Court held that beneficiaries of subsidiary protection may not be in an 'objectively comparable situation' to other third-country nationals in this respect and so the question of equal treatment will not arise. However, the Advocate General, in his analysis, did refer expressly to art 21 CFREU. He noted that, notwithstanding that there was no reference to it in the Charter, immigration status must be a prohibited ground of discrimination, an interpretation which he suggested would bring art 21 CFREU into line with art 14 ECHR.<sup>89</sup>

At issue in *Commission v The Netherlands* were charges for resident permits for

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<sup>88</sup> I state this as a necessary, but enthymematic, premise in the reasoning.

<sup>89</sup> [2016] 3 CMLR 11 [AG77].

third-country nationals who had obtained long-term resident status elsewhere in the EU and wished to move to the Netherlands. No reference was made to the equality guarantees in the Union's constitutional documents in the judgment of the Court. However, the Advocate General did conclude that, on the basis of the equal treatment guarantee in the Long-Term Residents' Directive, 'the principle of non-discrimination seems to me to preclude the establishment of charges the amounts of which have a deterrent effect on third-country nationals who do not have sufficient financial resources'.<sup>90</sup> The Advocate General's comments are, unfortunately, ambiguous between discrimination on different grounds. On the one hand, the Advocate General could be here referring to indirect nationality discrimination. If, statistically, it could be established that nationals from certain third-countries are less able to afford the charges for the resident permits than others, then those third-country nationals are being discriminated against indirectly on the ground of nationality. On the other hand, the Advocate General could merely be referring to direct discrimination on the grounds of socio-economic standing. If this is the case, then the question of nationality discrimination does not necessarily arise. If we prefer the former interpretation, at least for the sake of argument, then it seems clear that the Advocate General is offering us a potentially robust conception of equal treatment in the context of the design of immigration regimes. Specifically, on this view, the EU's migration acquis would need to be (re)designed so as to avoid, at least, indirect nationality discrimination.

Finally, *Petrov*<sup>91</sup> and *Voigt*<sup>92</sup> concerned the withdrawal of security clearance for several Russian nationals to enter and use certain facilities at the European Parliament. Mr Voigt, a member of the European Parliament, applied to use certain facilities at the Parliament to host a political forum and working meeting. Several Russian citizens were due to attend. Security clearance is required of all non-members of the Parliament and, although security clearance was initially granted to all attendees, it was subsequently withdrawn for all Russian guests. The applicants in both cases argued, *inter alia*, that this decision was discriminatory. The General Court's response, in both judgments, was as follows. First, the Court considered the interpretation of art

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<sup>90</sup> [2012] 2 CMLR 48 [AG69].

<sup>91</sup> Case T-452/15 *Petrov* ECLI:EU:T:2017:822.

<sup>92</sup> Case T-618/15 *Voigt* ECLI:EU:T:2017:821.

21(2) CFREU. It held that, on the basis of the explanations accompanying the Charter, art 21(2) is equivalent to art 18 TFEU and has the same scope. Accordingly, the Court returned to the meaning of art 18 TFEU, affirming the application of *Vatsouras and Koupatantze* to art 21(2) CFREU. In other words, the applicants could not rely on art 18 TFEU. In so doing, the Court did not refer to any of the more recent case law outlined above. With respect, this is a significant failing in an otherwise opportune case to address the issue this chapter raises. Instead, the General Court went on to observe that art 21 CFREU,

“is a particular expression of the principle of equal treatment (...) and both that principle and the prohibition of any discrimination are simply two labels for a single general principle of law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment.”<sup>93</sup>

### 3. Expanding the Entitlement: The Argument

Numerous scholars have argued for a shift away from the status quo due to, inter alia, the post-Lisbon change in the structure and operation of the Union and move away from the so-called ‘pillar’ system. This view implies that the areas of migration and asylum, previously governed by quite distinct rules, now fall, at least to some extent, under general provisions of the treaties. As such, third-country nationals should in principle benefit from the conception of equal treatment with member state nationals, as embodied in arts 18 TFEU and 21 CFREU.<sup>94</sup> In other words, third-country nationals

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<sup>93</sup> ECLI:EU:T:2017:821 [98]; ECLI:EU:T:2017:822 [53].

<sup>94</sup> See ‘Out of the Ghetto? The Personal Scope of EU Law’ (n 80); Kees Groenendijk, ‘Citizens and third-country nationals: differential treatment or discrimination’ in Jean-Yves Carlier and Elspeth Guild (eds), *The Future of Free Movement of Persons in the EU* (Bruylant 2006); Moritz Jesse, ‘Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community Law’ in Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate 2009); Kees Groenendijk, ‘Are third-country nationals protected by the Union law prohibition of discrimination on grounds of nationality?’ in Klaus Barwig and Rainer Döbelstein (eds), *Den Fremden akzeptieren – Festschrift fuer Gisbert Brinkmann* (Nomos 2012); Sara Iglesias Sánchez, ‘Fundamental Rights Protection for Third-Country Nationals and Citizens of the Union: Principles for Enhancing Coherence’ (2013) 15 EJML 137; Theodore Konstadinides and Noreen O’Meara,

should generally be afforded equal treatment with member state nationals.

However, two problems arise. First, even post-Lisbon, the CJEU has distinguished to some extent, in the scope and exercise of its jurisdiction, between the Union's external and internal dimensions. While, post-Lisbon, the Court has expressed a willingness to exercise jurisdiction in cases concerning the Union's common foreign and security policy, in general, this is a jurisdiction which it exercises lightly. In particular, the General Court has acknowledged that the Council has a broad discretion in this area.<sup>95</sup> This may suggest that the Court will not exercise jurisdiction to adjudicate on the rights of third-country nationals as such, thus maintaining the deference to the EU's legislative institutions and the member states which has been the conventional practice of the Court to date.

The CJEU has also acknowledged the possibility of judicial review of activities in this area and academic commentary suggests that the Court's jurisdiction is only expanding, albeit slowly and incrementally.<sup>96</sup> Moreover, in some cases, the Court has interpreted the Council's discretionary powers in a manner consistent with the fundamental rights and values of the Union.<sup>97</sup> It is therefore arguable that the CJEU does have jurisdiction over areas of the EU's external dimension which it heretofore did not have and can exercise it in a manner consistent with the rights of third-country nationals. As such, it is no longer necessary, as a matter of *legal doctrine*, for the Court to defer to the EU's legislative institutions in this area. Rather, the Court can pave its own way and provide its own interpretation and definition of the scope of the

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'Fundamental Rights and Judicial Protection' in Diego Acosta Arcarazo and Cian Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014); Katharina Eisele, *The External Dimension of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill Nijhoff 2014); Daniel Thym and Margarite Zoetewey-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015); Steve Peers, *EU Justice and Home Affairs Law Volume I: EU Immigration and Asylum Law* (OUP 2016) ch 6; and *What Happened to Equality?* (n84) ch 2.

<sup>95</sup> Case T-63/14 *Iran Insurance Company* ECLI:EU:T:2016:264 [90].

<sup>96</sup> Case T-255/15 *'Almaz-Antey' Air and Space Defence* ECLI:EU:T:2017:25 [99]; Christina Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 *ELJ* 492; Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *EUConst* 673; and Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *ICLQ* 1.

<sup>97</sup> See Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harv Int'l LJ* 1; Case T-68/14 *Post Bank Iran* ECLI:EU:T:2016:263 [91]; 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (n 96) 680, 700; and Peter van Elswege, 'Upholding the rule of law in the Common Foreign and Security Policy: *H v Council*' (2017) 54 *CML Rev* 841.



conception of equal treatment with member state nationals.

A second problem concerns a similar issue arising out of the wording of the treaties. Articles 67(2) and 79 TFEU refer to the need to treat third-country nationals 'fairly'. An ordinary language/semantic reading of these articles may imply the non-application of the conception of equal treatment with member state nationals to third-country nationals. However, this guarantee needs to be read in the light of the EU's general objectives in the context of its external action, laid down in art 21 TEU, to recognise, advance and promote, inter alia, respect for human dignity, the principles of equality and solidarity, and the protection of human rights and fundamental freedoms. As such, the obligation to treat third-country nationals 'fairly' should not be implemented in a manner inconsistent with the fundamental values of the Union, such as equality, espoused in art 21 TEU. As a matter of treaty interpretation, therefore, the possibility of affording third-country nationals equal treatment in accordance with EU law and, therefore, in principle the protection of arts 18 TFEU and 21 CFREU, is more than possible.

In relation to the scope of application of the equal treatment guarantee in arts 18 TFEU and 21 CFREU, semantic differences in these and other articles are themselves grounds for the view that third-country nationals are generally entitled to equal treatment with member state nationals. One obvious example is the guarantee of equality before the law in art 20 CFREU, which simply states that 'everyone' shall benefit therefrom. This may be a simple guarantee of procedural fairness.<sup>98</sup> But it could also constitute a sign of the fundamental, unitary concept of equality underlying all equal treatment and non-discrimination norms, which the EU institutions shape and develop. Indeed, as art 20 prefaces the entirety of the 'equality' title of the Charter, it might indicate the generality of the guarantee of equality for all persons. Later instantiations of the equality guarantee, particularly in arts 21 and 23-26 CFREU, delineate different conceptions.<sup>99</sup> If this is the case, then art 20 CFREU, like art 18 TFEU, could be used as a source of inspiration and expansion of those conceptions.<sup>100</sup>

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<sup>98</sup> Bell, 'Article 20' (n 86).

<sup>99</sup> In Case C-528/13 *Léger* ECLI:EU:C:2015:288 [48], the Court noted that art 21(1) CFREU is a 'particular expression of the principle of equal treatment, which is a general principle of EU law enshrined in Article 20 [CFREU]'.

<sup>100</sup> Case C-333/13 *Dano* [2015] 1 CMLR 48 [61].

Furthermore, while it is undoubtedly true that art 18 TFEU has its origins in the emergence and genesis of EU citizenship law,<sup>101</sup> that does not mean that art 18 cannot inspire and imbue other areas of EU law. For, first, art 18 has already been so used.<sup>102</sup> Second, the Court of Justice has also done so in respect of other articles of the treaties, even broadening their scope of application to areas of law which were expressly excluded by the treaties.<sup>103</sup> And third, it is not inconsistent or incoherent to expand the scope of application of art 18 TFEU to third-country nationals given that, as a matter of first principles, all persons must, in general, be entitled to equal treatment.<sup>104</sup> Indeed, it would be inconsistent, incoherent<sup>105</sup> and, in accordance with my analysis in section II above, inegalitarian for the EU to claim to be based on the values of freedom, human dignity, equality and solidarity while nonetheless refusing *in general* to recognise the right of third-country nationals to equal treatment.

Another reason to be hesitant of the truth of the orthodox view is the existence of a general principle of equality and non-discrimination<sup>106</sup> and the fundamental right to non-discrimination in EU law.<sup>107</sup> The general principles of EU law and fundamental rights, as drawn from the constitutional traditions of the member states, are of equal importance to the texts of the constitutional documents but their scope of application is unclear. Moreover, while in principle they are of equal normative significance to the constitutional documents, and therefore normatively superior within the EU hierarchy

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<sup>101</sup> Daniel Thym, 'EU Migration Law and its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 CML Rev 709; Daniel Thym, 'Citizens' and 'Foreigners' in EU Law. Migration Law and its Cosmopolitan Outlook' (2016) 22 ELJ 296; and Case C-45/12 *Radia Hadj Hamed* ECLI:EU:C:2013:390.

<sup>102</sup> See the cases cited at (n 79).

<sup>103</sup> Most famously, Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-341/05 *Laval* [2007] ECR I-11767.

<sup>104</sup> Cf Case C-52/81 *Faust v Commission* [1982] ECR 3745 [25]; Case C-122/95 *Germany v EU Council* [1998] 3 CMLR 570 [60]; and Case C-272/15 *Swiss International Air Lines* EU:C:2016:993 [14].

<sup>105</sup> Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei and Maja Smrkolj, 'Reverse *Solange*—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 CML Rev 489, 516-517.

<sup>106</sup> Case 117/76 *Ruckdeschel* [1979] 2 CMLR 445 [7]; Case 106/83 *Sermide SpA v Cassa Conguaglio Zucchero* [1984] ECR 4209 [28]; Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689 [129]; Case C-149/96 *Portugal v Council* [1999] ECR I-8395 [91]; and Case C-411/98 *Angelo Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-08081; and Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (2nd edn, OUP 2012) ch 3.

<sup>107</sup> Case C-442/00 *Caballero v Fondo de Garantia Salarial (Fogasa)* [2002] ECR I-11915 [32].

of norms as a whole, they are not of decisive weight.<sup>108</sup> As with many provisions of the constitutional texts, the general principles and fundamental rights always lie in the background, forming a repository of norms which courts, in particular, draw on to explain and justify a particular interpretation or approach. The general principle of equality and the fundamental right to non-discrimination have not featured heavily in the context of nationality discrimination nor has their application to third-country nationals been denied or rejected as of yet. It is therefore certainly possible that third-country nationals do benefit from the application of the general principle of equality and the fundamental right to non-discrimination. A final reason, similar in form to the previous, is the obligation in EU law to interpret derogations and exceptions narrowly.<sup>109</sup> This is particularly relevant for analysing art 21(2). However, as of yet, this obligation has not been applied stringently at the level of the Charter, although it is often applied in respect of EU legislation. Other norms and principles of EU law, therefore, provide grounds for an expanded interpretation of the equal treatment guarantee.

A general recognition of equal treatment with member state nationals for third-country nationals implies that EU law could be reviewed on the grounds of nationality discrimination by third-country nationals. This might seem like a bold claim but holding that the law is subject to a certain type of review is of course different from suggesting that the law must adopt a specific interpretation, conception or concept of equality. It merely suggests that EU law and decisions based thereon must be reviewed in the light of anti-discrimination norms. This leaves member states with a(n unspecified) degree of discretion to justify their discriminatory decisions and laws. I have already suggested in section II.A.1 above that one type of justifiable nationality discrimination may be that found in preferential trade and association agreements.

Moreover, holding that third-country nationals are generally entitled to equal treatment may not be, in practice, that different from holding that third-country nationals are only entitled to equal treatment in certain, specifically defined

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<sup>108</sup> Deirdre Curtin and Tatevik Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law' in Damien Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (OUP 2015); and Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (6th edn, OUP 2015) ch 4.

<sup>109</sup> Case C-75/11 *Commission v Austria* [2013] 1 CMLR 17 [54]; Case C-46/12 *NECLI:EU:C:2013:97* [33]; Case C-233/14 *Commission v Netherlands* [2017] 1 CMLR 5 [86].

circumstances. Under my suggested approach, the practical difference may be that third-country nationals will have a right to review certain decisions affecting them taken under EU law on the grounds of nationality discrimination. This, minimally, provides another ground for review of legality. The result, more often than not, will be an obligation to provide reasons for decisions heretofore immune from review on this ground. But an approach that emphasises the reasons of the discriminator is one which the doctrine of freedom as non-domination requires. It requires that member states act on valid, valuable *reasons* in exercising their discretion. It requires that laws and policies be drafted taking into consideration the rights of nationals and the potential for (direct and indirect) discrimination.

#### 4. Objections

A number of objections to the analysis thus far merit consideration. A first is the sample size: I have drawn on a very limited range of case law to justify my view of the trends and many of the comments identified as justifying my view are those of Advocates General. This is an objection I feel bound to accept. Hopefully, given time, the sample size will increase and the CJEU will adopt the Advocate Generals' reasoning. A second objection concerns the role of conventional practices in the area of nationality discrimination. As Friðriksdóttir noted, the EU's legislative institutions played a predominant role in delineating the scope of third-country nationals' right to equal treatment. This may provide a reason for the Court of Justice *not* to adopt a new approach, given that by convention the EU's legislative institutions have definitional authority in this area. This objection, too, is powerful. For, given the increasing cultural and political significance of the securitisation of border controls in Europe and the Global North generally, it seems unlikely that courts are going to lead the way in this area in a manner which is politically palatable. Third, the suggestion that the general principles of EU law may provide an opportunity for expanded protection for third-country nationals seems misplaced, particularly when the CJEU has rejected an expansion of the obvious textual guarantees of equality. That is, if the CJEU has rejected the obvious textual guarantees of equality as opportunities for expanded protection for third-country nationals, then it seems highly unlikely that the Court

would rely on unspecified guarantees of equality to do the same work, controversial as it is. At present, this objection is strong, but given the CJEU's reputation for expanding into new territory without obvious textual justification this possibility should not be disregarded lightly.

There is a final and significant recent objection from Elise Muir to the line of reasoning developed so far in this section. Muir's objection runs as follows. In some contexts, provisions of the constitutional treaties have been used to expand the rights located in more specific legislative instantiations of the right to equal treatment.<sup>110</sup> However, in the context of the EU's migration and asylum acquis, this has not been done. Rather, the case law to date suggests that the equal treatment guarantees in the relevant legislation are 'understood as directly and exclusively related to the dynamics of legislation-making on migration, thereby avoiding an organic connection with the constitutional version of the right to equal treatment.'<sup>111</sup> In making this point, Muir relies on *Kamberaj* (previously discussed), *P and S*<sup>112</sup> and *Martinez Silva*.<sup>113</sup>

*P and S* case concerned a civic integration course the applicant long-term residents were required to undertake after they had been granted long-term resident status; and given that such a course was not required of member state nationals, nor should it be required of long-term residents on the basis of the guarantee of equal treatment contained in the Long-Term Residents' Directive. However, the CJEU reasoned that third-country nationals are not in a comparable situation to member state nationals given that member state nationals are more likely to have a knowledge of the national language; and as the principal purpose of the Long-Term Residents' Directive is to facilitate the integration of third-country nationals, a civic integration course is consistent with its aims. For Muir, it is 'remarkable' that the CJEU in *P and S* 'only refers to the 'principle' of equal treatment and not to the 'general principle' of equal treatment which has the same content, thereby exclusively locating its analysis

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<sup>110</sup> In correspondence on this point, Muir referred the author, as illustrative, to the recent cases of Case C-193/17 *Achatzi* ECLI:EU:C:2019:43, Case C-684/16 *Shimizu* ECLI:EU:C:2018:874, Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* ECLI:EU:C:2018:871, Case C-68/17 *JQ* ECLI:EU:C:2018:696, Case C-414/16 *Egenberger* ECLI:EU:C:2018:257 and Case C-22/18 *Biffi* ECLI:EU:C:2019:497.

<sup>111</sup> *EU Equality Law* (n 23) 135.

<sup>112</sup> Case C-579/13 *P and S* [2015] 3 CMLR 44.

<sup>113</sup> Case C-449/16 *Martinez Silva* ECLI:EU:C:2017:485.

at a legislative level'.<sup>114</sup> While not a damning criticism, this does echo the criticism made earlier that the CJEU's approach to date must be considered to operate on the implicit assumption that third-country nationals are entitled to equal treatment with member state nationals but only in specific circumstances.

*Martinez Silva* concerned a cash benefit intended to meet family expenses claimed by the applicant third-country national who entered the EU on the basis of the Single Permit Directive. The member state in question refused to grant the applicant the benefit on the basis that she was not a long-term resident. The Court of Justice first held that the benefit in question was a social security benefit for the purposes of EU law and was therefore one which third-country nationals were, in principle, entitled to on the basis of an equal treatment guarantee in the Single Permit Directive. The Court then considered, in detail, whether denying certain third-country nationals the benefit was consistent with the Directive. The Court noted that member states are entitled to rely on certain derogations from the equal treatment guarantee provided in the Single Permit Directive so long as they state that they are relying on them in advance of adopting any measure restricting third-country nationals' equal treatment with member state nationals. However, that had not occurred in the case before the Court. Accordingly, the member state measure restricting the applicant's access to the cash benefit was contrary to EU law. Again, however, as Muir notes, 'the Court barely discussed the content of the prohibition of discrimination and drew no parallels with EU equality law'.<sup>115</sup>

It therefore turns out that, on a close analysis of Muir's argument, rather than taking the current approach of the CJEU as justified, Muir would actually support the normative arguments made thus far in this section in favour of a more integrated approach—an approach according to which the CJEU could and should make connections and links between EU equality law, on the one hand, and EU migration law, on the other hand.

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<sup>114</sup> *EU Equality Law* (n 23) 136.

<sup>115</sup> *ibid.*

### III. Converging Conceptions of Equal Treatment

#### A. Competing Conceptions of Equal Treatment

As noted in the introduction to this chapter, EU migration and asylum law and free movement law prohibit discrimination on the ground of nationality to different degrees, while EU equality and anti-discrimination law prohibits discrimination on many other grounds.<sup>116</sup> The Framework Equality Directive, for example, one of the foundational measures of EU equality and anti-discrimination law, does not 'cover differences of treatment based on nationality'.<sup>117</sup> The reasons for the exclusion of the ground of nationality from EU anti-discrimination law were, and no doubt remain, primarily political.<sup>118</sup> Such 'political' motivations are generally considered to point one way, targeting third-country nationals only and thereby protecting EU citizens. But it is undoubtedly the case that the exclusion of nationality discrimination from EU equality and anti-discrimination law impacts on member state nationals too. For if discrimination on the ground of nationality was prohibited by the Framework Directive, then the scope of application of EU law may expand very significantly into areas of domestic law heretofore not addressed by EU free movement law. Indeed, it may entail the partial or total abolition or amendment of the 'purely internal situation' rule.<sup>119</sup> If this rule was abolished, for example, it may enable the CJEU to provide answers to

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<sup>116</sup> Elise Muir, 'Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test' (2011) 18 MJ 136, 141.

<sup>117</sup> Framework Equality Directive, art 3(2). See Sonia Morano-Foadi, 'Third Country Nationals Versus EU Citizens: Discrimination Based on Nationality and the Equality Directives' (21 December 2010) available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1729141](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729141)> (accessed 9 July 2019).

<sup>118</sup> Mark Bell, *Racism and Equality in the European Union* (OUP 2008) ch 7; Sara Benedi Lahuerta, 'Race Equality and TCNs, or How to Fight Discrimination with a Discriminatory Law' (2009) 15 ELJ 738; Chloé Hublet, 'The Scope of Article 12 of the Treaty of the European Communities *vis-à-vis* Third-Country Nationals: Evolution at Last?' (2009) 15 ELJ 757; 'Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test' (n 116); 'EU Migration Law and its Constitutional Rationale: A Cosmopolitan Outlook' (n 101); Citizens' and 'Foreigners' in EU Law. Migration Law and its Cosmopolitan Outlook' (n 101) and *What Happened to Equality?* (n 84).

<sup>119</sup> Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 CML Rev 731; Alina Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009); and Sara Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14 EUConst 7.

preliminary questions, in a wider array of cases than is currently possible, where the facts of the case are confined within a single member state.<sup>120</sup> This is but one example among many; abolishing completely or restricting the application of the purely internal situation rule in part would nonetheless pave the way for a significant expansion of the scope of application of EU law. Abolishing discrimination on the ground of nationality, then, is a vital ingredient in the deepening of the project of EU integration. Moreover, as suggested in section I.B above, it may have particularly beneficial effects for third-country nationals, enabling them to avail of anti-discrimination norms in a wider range of circumstances than is currently possible.

Having thus identified the relevant difference between these conceptions of equal treatment, the question which then arises is whether these differences are legitimate or necessary. To interrogate the legitimacy or necessity of these differences, it is helpful to analyse the reasons underlying the distinction drawn discrimination on the grounds of nationality, on the one hand, and discrimination on other grounds, on the other hand. In addition to the legal doctrinal reasons previously discussed, there are at least three types of reasons which are relevant to the legitimacy and necessity of the distinction between these two conceptions of equal treatment: moral or political reasons; conceptual reasons; and sociological reasons.

### **1. Neorepublican Reasons**

Recall that the CJEU has effectively adopted a position of total deference in the context of nationality discrimination in EU migration and asylum law, leaving the definition and scope of equal treatment a matter for the EU's legislative institutions to address. As suggested in section II.B.3 above, there are certainly some legal doctrinal reasons for disagreeing with this approach. There may also be moral or political reasons for doubting that justification. If, as Colm Ó Cinnéide notes, 'a consensus emerged that EU law should reflect and give effect to a strongly substantive concept of equality', then perhaps the CJEU would change its approach.<sup>121</sup> In other words, if equality became a

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<sup>120</sup> Case C-268/15 *Ullens de Schooten* ECLU:EU:C:2016:864.

<sup>121</sup> Colm Ó Cinnéide, 'The Constitutionalisation of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 MJ 370, 383-384.



general norm of the EU, then the CJEU should change its approach. But such a change would require a significant change in culture and the practice of the CJEU and, more generally, the EU as a whole. The explanation and justification for such changes are intimately tied up with a distinctive political theory.<sup>122</sup>

The distinctive political theory that I have adopted in this thesis is Pettit's neorepublicanism. As suggested in section I above, one implication of that theory is the adoption of a guarantee of non-discrimination not only in respect of citizens but also in respect of those other people who are at risk of domination, such as at least some non-citizens. The suggested way of implementing this requirement in practice was to make nationality a protected ground of discrimination as a matter of EU anti-discrimination and equality law. Accordingly, neorepublicanism has normative moral or political implications for the role of the CJEU in participating in social and legal change. Given that these factors suggest that change is necessary, they may legitimise the CJEU taking part in developing a general norm of equality in the EU. It is therefore argued that there are both legal doctrinal and moral or political reasons which weigh in favour of entrenching a general prohibition of discrimination on the ground of nationality in EU law, extended in particular to at least some third-country nationals.

Of course, whether it is legitimate all-things-considered<sup>123</sup> for the CJEU to spearhead such change by expanding the scope of application of EU law is a larger question about the role of the CJEU in the project of EU integration more generally.<sup>124</sup> The argument of this chapter thus far does not identify the precise role of the CJEU in such process of change but it does suggest that there are at least some reasons in favour of that change and that those reasons may be relevant to and feature in the

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<sup>122</sup> 'EU Migration Law and its Constitutional Rationale: A Cosmopolitan Outlook' (n n 101); and 'Citizens' and 'Foreigners' in EU Law. Migration Law and its Cosmopolitan Outlook' (n 101).

<sup>123</sup> On the distinction between pro tanto judgments and all-things-considered judgments, see David Ross, *The Right and the Good* (OUP 1930) 18-33 and Skelly Kagan's corrective thereof in *The Limits of Morality* (OUP 1989) 17.

<sup>124</sup> See, inter alia, Gráinne de Búrca and JHH Weiler (eds), *The European Court of Justice* (OUP 2001); Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006); Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013); Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (OUP 2015); Susanne K Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (OUP 2018); and Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (CUP 2018).

CJEU's process of reasoned adjudication. It does not afford those reasons decisive weight in that process but merely suggests that they are relevant and worthy of reflection.

## 2. Conceptual Reasons

Conceptual reasons explain and justify, at least in part, the nature and structure of a given concept. In this context, the following is an example of reasoning about concepts:

- (i) A is constituted by rules (1, 2, 3,...n).
  - (ii) B is constituted by rules (1x, 2x, 3x,...xn).
- ∴ A and B are different.

What relevance is this to the conceptions of equal treatment under discussion in this chapter? Some egalitarian legal scholars claim, for example, that sex discrimination is of a different type or kind from nationality discrimination. They appeal to the rules applying to each to explain and justify this claim in a manner similar to the sample reasoning provided at the beginning of this sub-section. For example, the fact that equality between the sexes attracts greater legal protection than other forms of discrimination may or may not suggest a difference in the kind or type of wrong being addressed.<sup>125</sup>

It is, however, far from clear that this is the case for at least two reasons. First, there is a difference, in principle, between disagreements over concepts and disagreements over competing conceptions of the same concept.<sup>126</sup> Some egalitarian legal scholars claim that what the law should aspire to protect is a certain conception of equality, such as 'equality of opportunity', 'substantive equality' or 'multi-

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<sup>125</sup> Cf Christopher McCrudden, 'Theorising European Equality Law', in Cathryn Costello and Barry (eds), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law 2003); Mark Bell and Lisa Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 EL Rev 349; Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13 MJ 445; and Sara Benedi Lahuerta, 'Taking EU Equality Law to the Next Level: In Search of Coherence' (2017) 7 ELLJ 348.

<sup>126</sup> On the distinction between concepts and conceptions, see Ronald Dworkin, *Law's Empire* (HUP 1986) 90-96.

dimensional equality'.<sup>127</sup> Such egalitarian legal scholars, however, would be wrong in believing that those conceptions are different concepts; rather, they are merely a particular conception of the same concept—the concept of equality. Others, however, appeal to different concepts as explaining and justifying the existence of certain rules for different reasons. Some egalitarian legal scholars do advocate apparently egalitarian rules but for non-egalitarian purposes. Ó Cinnéide suggests, for example, that 'a strongly substantive concept of equality (...) [would] be informed by a strong commitment to human dignity'.<sup>128</sup> Here, two interpretations are possible: either Ó Cinnéide is advocating a dignitarian conception of the concept of equality or he is advocating for a concept of dignity which entails egalitarian principles.

What is the implication of this for the present discussion? It is to clarify that, in principle, it is certainly possible for a single concept of equality, along with competing conceptions of that same concept, to achieve egalitarian goals. The existence of competing conceptions of equality and possibly competing conceptions of some other concept, such as dignity mentioned by Ó Cinnéide, in EU law does, however, suggest a tension in the ultimacy and primacy of egalitarian goals within the EU's legal order.<sup>129</sup> Moreover, the greater the number of conceptions of the same concept there is, the more likely it is that the ability to achieve the goals and aims espoused by subscribers to that same concept will diverge to a greater degree.<sup>130</sup> What is therefore required is convergence and standardisation in respect of one or several, but in general fewer, conceptions of equality. Greater focus and attention to fewer conceptions of equality may better aim and achieve egalitarian goals. Hence the recent prominence in academic debates of the 'constitutionalisation' of certain issues, such as equality, in EU law.

This imperative gives us at least one reason to assimilate the prohibitions on discrimination previously outlined. Indeed, as noted in chapter 2.I.A, neorepublicanism

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<sup>127</sup> For a helpful overview of such competing conceptions, see Christopher McCrudden and Haris Kountouris, 'Human Rights and European Equality Law' in Helen Meenan (ed), *Equality Law in an Enlarged European Union* (CUP 2007) and Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) ch 1.

<sup>128</sup> The Constitutionalisation of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (n 121) 383-384.

<sup>129</sup> Colm Ó Cinnéide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 7 IJDL 7.

<sup>130</sup> This is a probabilistic claim.

requires that we harness currently existing norms, even using the law to change those norms where necessary, to achieve our normative goals. And one such normative goal is the existence and creation of a non-discriminatory culture, ultimately constitutive of the ideal of freedom as non-domination and, therefore, people's well-being.

From here, the second reason to doubt the claim that different types of discrimination involve different types of wrongs emerges more clearly. Discrimination always involves a certain type of conduct—the use of certain criteria, property or ground to distinguish and differentiate between people for some purpose—but what makes discrimination wrongful is the fact that the particular criteria, property or ground—be it sex, gender, race, ethnicity, etc—tends to attract, in a given society, certain kinds of disadvantages, be it socially, economically, politically, etc, to different degrees.<sup>131</sup> Thus, the fact that discrimination on the ground of sex is viewed as being particularly wrongful is because our culture, now at least, recognises it as such. By contrast, our culture has not always, or even recently, viewed discrimination on the basis of other grounds as wrongful, sexual orientation being an obvious example. The goal of egalitarian legal scholars should be, it seems, to attempt to create a culture in which discrimination on each such ground is recognised as being equally wrongful in proportion to the detrimental effects which exist in respect of that discrimination on that ground—hence the desire and impetus to assimilate the currently many competing conceptions of equality to fewer conceptions thereof. To put it another way, the conceptual distinction between the different prohibitions of discrimination, the subject of this chapter, should not be treated as definitive. Rather, the aim should be to assimilate and consolidate both of these prohibitions as found in EU migration and asylum law, EU free movement law and EU equality and anti-discrimination law.

### **3. Sociological Reasons**

However, we may have reason to resist this move on the basis of other types of reasons. According to what I shall call 'sociological reasons', the immediate consolidation and

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<sup>131</sup> 'Liberals and Unlawful Discrimination' (n 13); John Gardner, 'Discrimination as Injustice' (1996) 16 OJLS 353; 'On the Ground of Her Sex(uality)' (n 16); and 'Discrimination: the Good, the Bad and the Wrongful' (n 17).

expansion of EU equality and anti-discrimination law into a single body or category of law may actually weaken the law's ability to achieve its egalitarian goals. Suppose that both conceptions of equality here discussed were wholly assimilated tomorrow. In principle, vast swathes of immigration and asylum law across the EU would become vulnerable to comprehensive deconstruction by anti-discrimination norms.<sup>132</sup> Immigration and asylum laws would need to be immunised from challenge on the basis of nationality discrimination, direct and indirect. If that did happen, such laws may require significant redrafting because we know that many immigration and asylum regimes are riddled with either or both forms of discrimination. Some of the case law discussed in section II.B of this chapter illustrates that point and much the same can be said of the EU's labour migration regime itself. Beyond immigration law, norms prohibiting nationality discrimination could also be used to challenge otherwise immune provisions of domestic laws. Logically, this would entail abandoning, in full or in part, the purely internal rule in EU law. The need to reconfigure many areas of the law is not, itself, an obstacle to the achievement of egalitarian goals; indeed, it may be a necessary step in the pursuit thereof. But unless legal change is preceded by a significant cultural and societal shift in the recognition and acknowledgement of the wrongfulness of nationality discrimination, then equality law may not operate effectively to challenge nationality discrimination. In other words, a comprehensive top-down approach to nationality discrimination may be useless in the absence of an appropriately similar comprehensive bottom-up societal response.<sup>133</sup>

That is not to say that equality and anti-discrimination law, for example, cannot and has not achieved at least some of its goals by relying on traditional modes of governance. Geoffrey Brennan, Lina Eriksson, Robert Goodin and Nicholas Southwood describe the different ways in which norms emerge. Sometimes, norms emerge on the basis of top-down processes; on other occasions, norms emerge due to their widespread adoption by more diffuse, decentralised sources. Neither mode of emergence is necessarily preferred here. Rather, it is suggested that a combination of modes of emergence of norms is most likely to serve egalitarian goals. Relying on both

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<sup>132</sup> I am of course assuming that immigration and asylum law can be subjected to the rigour of anti-discrimination and equality law, something which may not be possible at present.

<sup>133</sup> 'Discrimination: the Good, the Bad and the Wrongful' (n 17) 76-78.

top-down and bottom-up approaches is more likely to result in the emergence and creation of a (more) egalitarian culture.<sup>134</sup> More detailed political science discussions may be led concerning the ability of interest groups to have their norms established for the general public but I do not explore those here.

Whether there is or is not a significant cultural acknowledgement of the wrong of nationality discrimination is essentially an empirical one. To come to a conclusive view on this question, one would need to ascertain the current levels of nationality discrimination in Europe generally, differentiating between discrimination against EU nationals (intra-EU discrimination) and third-country nationals (extra-EU discrimination). Such data is not generally collected across the Union and so one might quickly conclude that there is not a significant cultural recognition of the phenomenon. A helpful alternative starting point, however, is data concerning the prevalence of racial and ethnic discrimination in the Union. According to the most recent Eurobarometer on discrimination, Europeans are more comfortable than ever with having a person of a different ethnicity elected to the highest political office.<sup>135</sup> This may suggest that rates of ethnic and racial discrimination are declining and that there is a significant cultural recognition of the wrongfulness of racial and ethnic discrimination in Europe; or it may not. The empirical data provided to date by the Eurobarometer is too indefinite to rely on to be sure.

Recall further the recent 'EU-MIDIS II' Survey conducted by the EU's Fundamental Rights Agency, outlined in section I.E of the introductory chapter.<sup>136</sup> That survey confirms the persistency of discrimination against immigrants, descendants of immigrants and minority ethnic groups across the EU, observing that 'a failure to deliver effective protection from discrimination and hate crime can undermine integration and social inclusion policies, affecting the social cohesion of our societies'.<sup>137</sup> This suggests that we should perhaps not be as hopeful of the reduction in discrimination as the Eurobarometer may imply. It reinvigorates the need for strong

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<sup>134</sup> Geoffrey Brennan, Lina Eriksson, Robert Goodin and Nicholas Southwood, *Explaining Norms* (OUP 2013) ch 5. See further Edna Ullmann-Margalit, *The Emergence of Norms* (OUP 1977).

<sup>135</sup> Special Eurobarometer 437, *Discrimination in the EU in 2015: Report* (European Commission 2015) para 2.2.1.

<sup>136</sup> FRA, *Second European Union Minorities and Discrimination Survey: Main Results* (Publications Office of the European Union 2017).

<sup>137</sup> *ibid* 13.

legal action coupled with educational and awareness-raising programmes to ensure real equality for all in the Union.

Of final relevance is the fact that nationality is expressly included as a ground of discrimination in the anti-discrimination guarantees of almost every EU member state in some form, being variously described as 'nationality', 'national origin', 'national or social origin', 'origin', 'place of birth', etc, except in Greece, Ireland and Sweden, where the definitions of 'race' and 'ethnic' discrimination include discrimination on the grounds of nationality. Of course, immigration law is generally excluded from the scope of these laws. Accordingly, in the light of the relatively limited EU-wide empirical evidence presently available, we do have *some* reason to believe that assimilating the norms of discrimination into a single (or fewer) principle(s) would not necessarily undermine egalitarian goals. Nonetheless, the risk remains that total consolidation of these areas may undermine egalitarian aspirations, something which we should be loathe to do.

## **B. A Partial Unitary Conception of Equality**

If, as suggested, total assimilation of competing conceptions of equality may risk fracturing the concept of equality, then perhaps partial consolidation and assimilation could nonetheless be effective. Recall the General Court's observation in *Petrov* and *Voigt* that art 21 CFREU,

"is a particular expression of the principle of equal treatment (...) and both that principle and the prohibition of any discrimination are simply two labels for a single general principle of law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment"<sup>138</sup>

This statement provides the grounds for recognising, albeit at a highly abstract, constitutional level, the assimilation and consolidation of the prohibitions of

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<sup>138</sup> ECLI:EU:T:2017:821 [98]; ECLI:EU:T:2017:822 [53].

discrimination on the ground of nationality in EU migration and asylum and free movement law, on the one hand, and EU equality and anti-discrimination law, on the other hand, into a single prohibition of discrimination. This is, or should be, the fundamental implication of the analysis so far. What other evidence is there of this phenomenon and how might it support a partial unitary conception of equality? In addition to the empirical evidence provided at the end of the previous section, which suggested that nationality, immigration status and ethnicity tend to be considered together, the case law of the ECtHR discussed previously certainly points to increasing convergence on a single conception of equality. There are, however, other signals of this shift elsewhere in the respective courts' case law too. At times, both the CJEU and ECtHR have been willing to blur the lines between the grounds of nationality, ethnicity, race and social origin.<sup>139</sup>

In *CHEZ*, the Court of Justice observed that 'the concept of ethnicity (...) has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'.<sup>140</sup> In so observing, the Court referred to and endorsed several judgments of the ECtHR on this issue, namely, *Nachova v Bulgaria*<sup>141</sup> and *Sejdić and Finci v Bosnia and Herzegovina*.<sup>142</sup> In *CHEZ*, the applicant, a Bulgarian national, claimed that she had been discriminated against on the basis of her nationality or Bulgarian ethnicity in an area where electricity metres were raised higher than in other areas due to concerns of criminal activity by members of the Roma community in the area. Even though the discriminatory conduct appears to have detrimentally affected Roma people more, the fact that the applicant was resident in an area mainly populated by Roma people implied that she too suffered. This was sufficient for the Court of Justice to consider the applicant a victim of discrimination.

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<sup>139</sup> Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187; Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] 1 CMLR 14; and Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnaevnet* [2017] 3 CMLR 29. See further Shreya Atrey, 'Redefining Frontiers in EU Discrimination Law' [2017] PL 185; Shreya Atrey, 'Race discrimination in EU Law after *Jyska Finans*' (2018) 55 CML Rev 625; and generally Shreya Atrey, *Intersectional Discrimination* (OUP 2019).

<sup>140</sup> [2016] 1 CMLR 14 [46].

<sup>141</sup> [2004] ECHR 90. See also *Timishev v Russia* App no 55974/00 (ECtHR, 13 December 2005) [55].

<sup>142</sup> App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009) [45]-[50].



*Firma Feryn* concerned an action by a Belgian public authority, empowered to promote equal treatment, against a private company which sought to recruit fitters. One of the directors of the latter publicly commented that it could not recruit 'immigrants' because its customers would not permit such person's access to their premises. While the Court of Justice did not directly address the question of whether the reference to 'immigrants' constituted a type or ground of discrimination, it can be inferred from the judgment that it assimilated such comments with ethnic discrimination. Specifically, the Court noted that

"public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory."<sup>143</sup>

This appears to suggest that discrimination on the grounds of immigration status can, at least in some cases, be assimilated to, or overlap with, ethnic discrimination.<sup>144</sup> Finally, in *Jyska Finans A/S*, a credit institution required further identification documents from an applicant for a loan who was born in Bosnia and Herzegovina, notwithstanding that the applicant had subsequently acquired Danish nationality. By contrast, it was not the practice of the credit institution to request such further identification documentation from persons born in the EU. The question for the Court of Justice was whether such a practice constituted prohibited discrimination, direct or indirect, under the terms of the Racial Equality Directive. The comments of the Advocate General and the judgment of the Court itself offer some interesting points of reflection.

Beginning with the former's views, AG Wahl adopted a somewhat conservative interpretation of the CJEU's previous case law. Notwithstanding the position of the Court in *CHEZ* noted above, the AG held that discrimination on the grounds of

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<sup>143</sup> [2008] ECR I-5187 [34].

<sup>144</sup> Sandra Fredman 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (OUP 2001); and *Racism and Equality in the European Union* (n 118) ch 1.

nationality was not prohibited under the Racial Equality Directive and such discrimination, as well as discrimination on the grounds of ethnic origin or birth, should not be conflated.<sup>145</sup> But AG Wahl did see *some* connection between discrimination on the grounds of ethnic origin and discrimination on the grounds of nationality; as he observed, 'nationality in the 'ethnic' sense of the word (...) is merely one factor which distinguishes a given ethnicity'.<sup>146</sup> Similarly, he acknowledged that there was no automatic connection between a place of birth and ethnicity but nonetheless birth may be a factor going to ethnicity.<sup>147</sup> Turning thence to the views of the Court of Justice, the views of AG Wahl were bolstered. According to the Court, '[e]thnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors'.<sup>148</sup>

It therefore seems possible that a person's nationality could be constitutive of their ethnicity and, given that ethnic discrimination is prohibited in EU law, this may be a way of indirectly prohibiting nationality discrimination. Given that these courts are willing, on occasion, to assimilate, in part, different grounds of discrimination, then the fuller extension of this trend seems not only possible (as outlined here) but even necessary and beneficial (as outlined in sections I and II).

## Conclusion

This chapter concluded the response to the first sub-question this thesis investigates, namely, according to what theory shall the well-being of third-country nationals be assessed? The argument made in this chapter, which forms part of the response to that sub-question, can be summarised as follows.

First, it clarified the relationship between neorepublicanism, equality and non-citizens. It was argued that anti-discrimination norms should apply to at least some non-citizens due to the risk of domination they face. Specifically, it was argued that nationality could be made a protected ground of discrimination. Reducing

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<sup>145</sup> [2017] 3 CMLR 29 [AG39]-[AG40].

<sup>146</sup> [2017] 3 CMLR 29 [AG40].

<sup>147</sup> [2017] 3 CMLR 29 [AG43]-[AG44].

<sup>148</sup> [2017] 3 CMLR 29 [19].

discrimination on the ground of nationality could not only guard against the risk of domination faced by third-country nationals, it would also be a significant contribution to the project of EU integration more generally.

Second, it was clarified that, at present, third-country nationals are not generally entitled to equal treatment with member state nationals in EU law. The default position in EU law is that third-country nationals are only guaranteed equal treatment with member state nationals in specific circumstances. However, it was argued that third-country nationals should generally be entitled to equal treatment with member state nationals in EU law as a matter of legal doctrine and the majority of views under international and European law, subject to reasoned exceptions. An approach based on such legal reasons is consistent with the demands of the republican doctrine of freedom as non-domination.

Finally, several other types of reasons relevant to the claim that third-country nationals should generally be afforded equal treatment with member state nationals were outlined. These reasons weighed in favour of consolidating existing egalitarian norms in the EU through further entrenchment, thus raising the theme of governance quite directly. These reasons did not, however, conclusively suggest that courts should spearhead change but rather left open the role which courts may play. In the light of those reasons, section III.B considered to what extent the process of assimilating both conceptions of equal treatment is already evident. As this process is underway, it should continue in line with the views expressed in sections I and II. In sum, third-country nationals should generally be entitled to equal treatment with member state nationals, subject to reasoned exceptions. The reasons for or against such equal treatment will be particularly relevant in the analysis of the rules and standards applicable to third-country nationals currently in or coming to the EU. Accordingly, it is to these which we now turn in the practical application of the theoretical foundation developed thus far in this thesis.

## PART II: PRACTICAL APPLICATION

Part I of this thesis provided an outline of a partial neorepublican justification for two legal rights of relevance to third-country nationals seeking access to work in the EU. Those were the rights to work and to equal treatment or non-discrimination. The right to work facilitates people's access to the labour market but is generally contingent on one's entitlement to equal treatment with member state nationals. There is, however, another right which is a practical necessity to the effective implementation of the right to work and only comes to light as a result of this thesis' focus on people's skills. It is a derivative right of the (core) right to work:<sup>1</sup> namely, that the qualifications—that is, the formal expression of the people's skills—be recognised so that, in practice, they are able to access their given profession or occupation. Indeed, without having one's qualifications recognised by appropriate authorities—those governing access to professions or employers within the labour market more generally—one would not be able to participate and move within the labour market effectively because one would not be valued as a person with certain skills. Nor would one be able to advertise and promote one's skills without effective recognition being given to them. To put it

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<sup>1</sup> On the relationship between core and derivative rights, see Joseph Raz, *The Morality of Freedom* (OUP 1986) 168-170.

another way, the use of one's skills frequently requires recognition of them. A failure to have one's qualifications adequately recognised would result in an inability to take up work commensurate therewith, thereby inhabiting one's well-being. Part II of this thesis concerns the implementation of this right in EU law and policy.

There are at least two types or groups of authorities which may require that one's qualifications are recognised for the purposes of exercising one's right to work. The first are employers.<sup>2</sup> As noted in chapter 4.1.A, employers are amongst the authorities acting in the labour market which seek to differentiate between people on the ground of their skills. If, for example, an employer refuses to hire me on the basis that I am inadequately qualified, the employer is restricting my right to work—my ability to access and participate in the labour market—in a manner which could be challenged on procedural grounds. Such procedural grounds are largely a matter of domestic employment law.

The more prominent authorities and the ones this Part is primarily concerned with are those governing access to and participation in professions, such as professional regulatory bodies. Suppose, for example, a person holding a medical qualification obtained outside the EU seeks to obtain employment within the Single Market. It is almost invariably the case that doing so will require recognition of their qualification as at least equivalent to a similar qualification obtained in the EU by a local, regional or national medical council. Accordingly, what this chapter and the next are primarily concerned with is the extent to which third-country nationals can have their qualifications recognised by appropriate regulatory authorities when moving to the Single Market. Chapter 7 deals with the circumstances in which third-country nationals may have their qualifications recognised when moving within the Single Market. In sum, in analysing the implementation of the right to have one's qualifications recognised in EU law, Part II of this thesis should provide at least a partial remedial response to the inadequate qualification recognition third-country nationals habitually experience in the EU. The analysis provided herein may also have

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<sup>2</sup> See, eg, Chris Selby Smith and Lee Ridoutt, 'The importance employers attach to employee qualifications' (2007) 45 *Asia Pacific Journal of Human Resources* 180.

implications for the way in which employers consider the qualifications of third-country nationals, but those implications will not be fully spelled out.

## 5. The External Dimension: I

### Introduction

Part I of this thesis provided an outline of a partial neorepublican justification for two fundamental rights of relevance to third-country nationals seeking access to work in the EU. Those were the rights to work and to equal treatment or non-discrimination. There is, however, another right which is a practical necessity to the effective implementation of the right to work and only comes to light as a result of this thesis' focus on people's skills. It is a derivative right of the (core) right to work:<sup>1</sup> that the qualifications, that is, the formal expression of the skills of third-country nationals, be recognised so that, in practice, they are able to access their given profession or occupation. Indeed, without having one's qualifications recognised by appropriate authorities—those governing access to professions or employers within the labour market more generally—one would not be able to participate and move within the labour market effectively because one would not be valued as a person with certain

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<sup>1</sup> On the relationship between core and derivative rights, see Joseph Raz, *The Morality of Freedom* (OUP 1986) 168-170.

skills. Nor would one be able to advertise and promote one's skills without effective recognition being given to them. To put it another way, the use of one's skills frequently requires recognition of them. A failure to have one's qualifications adequately recognised would result in an inability to take up work commensurate therewith, thereby hindering one's freedom of choice—well-being. Part II of this thesis concerns the implementation of this right in EU law and policy.

This chapter is structured as follows. It first sets out the position in international and European law on qualification recognition in general (section I). The chapter then commences the substantial critical analysis which Part II seeks to undertake. It first considers EU migration and asylum law (section II). These measures have already been raised in passing in chapter 4 but have thus far escaped the full force of the theoretical lenses developed herein. There is then EU external relations law, as found in particular in the EU's partnership, association and trade agreements, which complements EU migration and asylum law insofar as it gives third-country nationals rights in EU law when entering the EU. Also discussed are the EU's recently developed Mobility Partnerships (section III). All of these measures are largely concerned with the recognition of formal qualifications. Accordingly, consistently with the concept of skills and the broad concept of work adopted in chapter 1, consideration of the extent to which skills which have been acquired in informal settings may be recognised is undertaken (section IV). There is finally the body of EU measures adopted specifically to facilitate the integration of third-country nationals arriving in the EU, which should be viewed as catch-all measures covering those persons arriving through any form of the measures discussed in the previous two sections (section V). A short conclusion follows.



# I. International and European Law

## A. International Law<sup>2</sup>

### 1. International Human Rights Law

There are two sources of international human rights law of relevance, both of which provide relatively limited guidance. The first is the right to work as guaranteed by the ICESCR. As noted in the introduction to this chapter, the right to have one's qualifications recognised should be understood as a derivative right of the (core) right to work. Because the right to have one's qualifications recognised affects one's ability to participate in the labour market, that right can be understood as operating to facilitate people's access to and participation in the labour market. The right functions in a similar manner to the right to work when it is being used to challenge regulation (or a failure to regulate) to facilitate people's access to the labour market. The right to have one's qualifications recognised can therefore be understood as deriving from the access dimension of the right to work. But does the right to work, as provided for in the ICESCR, guarantee people's right to have their qualifications recognised? Expressly, there is no such guarantee. But it is plausible that the access dimension of the right to work in the ICESCR could be interpreted to include such a right. 'The labour market', for example, 'must be open to everyone under the jurisdiction of states parties'.<sup>3</sup> It is possible that such openness should require that states implement a recognition procedure, facilitating the effective participation of non-nationals in their labour market.

The point is merely one of plausibility. But the very plausibility of the point may be bolstered by the views of the CESCR that the principle of non-discrimination guaranteed in the ICESCR and ICRMW should apply equally to migrant workers.<sup>4</sup> Given that (home) state nationals do often have to undergo recognition procedures to certify

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<sup>2</sup> See generally Christof Roos and Natascha Zaun, 'Norms Matter! The Role of International Norms in EU Policies on Asylum and Immigration' (2014) 16 EJML 45.

<sup>3</sup> CESCR, 'The Right to Work: General Comment No 18' (24 November 2005) 4.

<sup>4</sup> *ibid* 6.

their qualification, even where these are simplified relative to those applied to non-nationals, it seems that non-nationals should have access to at least some qualification recognition procedure to facilitate their effective participation in the labour market. Only if this is the case could a state discharge its obligations of non-discrimination towards third-country nationals.

The second source of international human rights law worth considering is the ICRMW, art 52(2) of which states that the state of employment of a migrant worker may restrict the right to work in accordance with its legislation concerning the recognition of qualifications.<sup>5</sup> However, in doing so, states are nonetheless obliged to endeavour to provide for the recognition of qualifications which third-country nationals hold. In essence, then, third-country nationals ought to be able to have their qualifications considered through a recognition procedure, even if they are not recognised as being substantively equivalent to qualifications of workers of the host state.

Recall, furthermore, that labour migrants are entitled to equal treatment with host state nationals. But how extensive is the guarantee of equal treatment in international human rights law? According to art 25 ICRMW, labour migrants are entitled to equal treatment with persons in their state of employment in respect of working conditions and terms of employment. However, no targeted integration measures are envisaged as a matter of international human rights law. Moreover, it should be recalled that the EU and its member states are not bound by the ICRMW. Thus, while norms have been adopted at an international level consistently with the external dimension of Pettit's neorepublicanism, they are not strictly speaking binding.

## **2. International Labour Law**

Part VI of the ILO's Human Resources Development Recommendation 2004 (No 195), which replaced the Human Resources Development Recommendation 1975 (No 142),

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<sup>5</sup> The Committee on Migrant Workers has considered potential breaches of this article on two occasions only. See its Concluding observations on the initial report of Uruguay (2 May 2014) paras 37-38; and Concluding observations on the initial report of Turkey (31 May 2016) paras 11-12.

provides quite extensive guidance on the recognition of qualifications.<sup>6</sup> The guidance comes in three parts.

First, it recommends that states should adopt a transparent mechanism for the assessment, certification and recognition of skills regardless of where the qualifications have been obtained, whether formally or informally. The Recommendation thus covers the need to recognise formal qualifications, obtained after a period of training and/or education, and non-formal or informal qualifications, obtained through what was described as 'unpaid' work in chapter 3.II.B. In other words, the Recommendation is consistent with the broad concept of work adopted in this thesis.

Second, according to the Recommendation, the actual assessment of qualifications should be based on objective, non-discriminatory and standardised criteria. In other words, the procedure for recognising qualifications should be a fair and impartial one based on skills rather than other, irrelevant considerations. This is consistent with, say, permitting discrimination on the ground of skills but not on the basis of other irrelevant grounds, such as nationality, considered in the previous chapter.

Finally, the 2004 Recommendation sparsely suggests that 'special provisions' should be made to ensure the recognition of qualifications of migrant workers. Some guidance from what this provision may mean can be gleaned from a consideration of the equivalent provision in the 1975 Recommendation. The ILO, in its general survey of reports on, inter alia, the 1975 Recommendation, acknowledged that the reason the provisions of the Recommendation are so sparse in relation to migrant workers is that 'the question of migrant workers was a separate item on the agenda of the 59<sup>th</sup> and 60<sup>th</sup> Sessions of the Conference'. The ILO recognises that the most frequently used measure in respect of migrant workers are specialised language courses, although the recognition of qualifications is also facilitated by some states.<sup>7</sup>

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<sup>6</sup> See generally ILO, *General Survey of Reports on the Paid Educational Leave Convention (No 140) and Recommendation (No 148) 1974, and the Human Resources Development Convention (No 142) and Recommendation (No 150) 1975* (ILO 1991); and Vania Brino, 'ILO Conventions 122 and 142' in Edoardo Ales, Mark Bell, Olaf Deinert and Sophie Robin-Olivier (eds), *International and European Labour Law: A Commentary* (Nomos/Hart 2018).

<sup>7</sup> *General Survey of Reports* (n 6) paras 305-306.

There are a number of other measures of international labour law of relevance: the Migration for Employment Convention (Revised) 1949 (No 97); the Migration for Employment Recommendation (Revised) 1949 (No 86); the Migrant Workers (Supplementary Provisions) Convention 1975 (No 143); and the Migrant Workers Recommendation 1975 (No 151).<sup>8</sup> The rights guaranteed by these measures are very similar to those provided for under international human rights law. While not referring to qualification recognition specifically, they are of general relevance in considering the external dimension to qualification recognition, as will become clear throughout this chapter.

According to these measures, labour migrants must have their human rights guaranteed.<sup>9</sup> Second, labour migrants are entitled to equal treatment in respect of working conditions and terms of employment.<sup>10</sup> Third, states are required to facilitate the 'departure, journey and reception' of labour migrants.<sup>11</sup> This may provide grounds for developing integration measures targeted at labour migrants. A final element of international labour law of relevance is the availability of a model agreement for temporary or permanent labour migration in the Annex to the Migration for Employment Recommendation (Revised) 1949 (No 86). Of particular relevance to my project is the possibility of identifying 'the number, the categories and the occupational qualifications of the migrants desired',<sup>12</sup> as well determining the conditions to be met for the purposes of recognition of any document issued by the state of emigration, such as occupational qualifications.<sup>13</sup> And relatedly, parties to such agreements shall also stipulate any qualification requirements necessary on behalf of migrant workers and their families.<sup>14</sup> Such agreements were quite popular in the second half of the twentieth century<sup>15</sup> and the EU's Mobility Partnerships, about which more shall be said in section

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<sup>8</sup> Shauna Olney and Ryszard Cholewinski, 'Migrant Workers and the Right to Non-discrimination and Equality' in Cathryn Costello and Mark Freedland (ed), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

<sup>9</sup> Migrant Workers (Supplementary Provisions) Convention 1975 (No 143), art 1.

<sup>10</sup> Migration for Employment Convention (Revised) 1949 (No 97), art 6.

<sup>11</sup> Migration for Employment Convention (Revised) 1949 (No 97), art 4.

<sup>12</sup> Migration for Employment Recommendation (Revised) 1949 (No 86), Annex, art 1(1)(b).

<sup>13</sup> Migration for Employment Recommendation (Revised) 1949 (No 86), Annex, art 4(1)(c).

<sup>14</sup> Migration for Employment Recommendation (Revised) 1949 (No 86), Annex, art 5.

<sup>15</sup> Aderanti Adepoju, Femke van Noorloos and Annelies Zoomers, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review' (2010) 48 IM 42.

III.C below, now serve a similar function. However, they are generally non-binding and therefore do not afford individuals rights which they can rely on. Moreover, as with the ICRMW, these measures of international labour law are not binding on the EU or its member states, the majority of which have not ratified them.

### 3. International Economic Law

International economic law does not regulate labour in general, only certain types of service provision; and according to the concept of work developed in chapter 1.III.C, service provision is merely one type of work. Yet varying kinds of labour regulation are often found in international trade agreements. One increasingly relevant but perhaps controversial example is where states parties agree to cooperate to some extent in respect of their labour standards to support sustainable development.<sup>16</sup> Another, less well known source of labour regulation in international trade agreements is where states parties put in place measures to facilitate labour mobility, such as qualification recognition systems and guarantees of equal treatment.<sup>17</sup>

International trade law does provide default rules concerning qualification recognition in respect of service providers. According to art VII GATS, WTO members are entitled to recognise the licences or certifications of service providers of other

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<sup>16</sup> See, inter alia, Tonia Novitz, 'Legal Power and Normative Sources in the Field of Social Policy: Normative Power Europe at Work?' in Jan Orbie (ed), *Europe's Global Role: External Policies of the European Union* (Ashgate 2008); the articles on labour standards and sustainable development in (2015) 31 IJCLLR 233-349; Axel Marx, Brecht Lein and Nicolás Brando, 'The Protection of Labour Rights in Trade Agreements: The Case of the EU-Columbia Agreement' (2016) 50 *JWT* 587; the articles on labour rights in international agreements in (2016) 155 *Int'l Lab Rev* 339-475; the articles on labour standards in a global environment in (2017) 5 *Politics and Governance* 1-105; Billy Melo Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality' (2018) 67 *ICLQ* 233; Jonas Aissi, Rafael Peels and Daniel Samaan, 'Evaluating the effectiveness of labour provisions in trade agreements: An analytical and methodological framework' (2018) 157 *Int'l Lab Rev* 671; James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2019) 57 *JCMS* 260; and Clair Gammage, '(Re)Imagining the Trade-Labour Linkage: The Capabilities Approach' in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019).

<sup>17</sup> See, inter alia, Jacques Poot and Anna Strutt, 'International Trade Agreements and International Migration' (2010) 33 *The World Economy* 1923; the essays in Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (eds), *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (Palgrave Macmillan 2015) part I; and Åsa Odin Ekman and Samuel Engblom, 'Expanding the Movement of Natural Persons Through Free Trade Agreements? A Review of CETA, TPP and ChAFTA' (2019) 35 *IJCLLR* 163.

members for the purposes of satisfying their own market standards. Recognition of foreign qualifications may be provided through agreement or independently of any prior agreement. Importantly, WTO members are not obliged to treat each other equally or on the basis of the most favoured nation principle in this area. Rather, WTO members may recognise foreign standards but must offer all WTO members the opportunity to negotiate an agreement, or accession to an existing agreement, covering the recognition of professional qualifications. However, this is subject to the general condition that members must not grant recognition in a discriminatory manner nor in a way which would constitute a disguised restriction on trade in services. According to art VI.6, if WTO members have made a commitment to service liberalisation in a given sector, then they must implement a procedure by which to review the professional qualifications of foreign service providers. Article VI.4 provides that all measures affecting service trade are applied in a 'reasonable, objective and impartial manner'. Specific disciplines have also been developed for the accountancy professions, but these do not expressly endorse the recognition of professional qualifications as such. Rather, they require member states to 'take account of' accountancy qualifications.<sup>18</sup>

## **B. European Law**

### **1. The Convention on the Recognition of Qualifications concerning Higher Education in the European Region 1997 ('Lisbon Convention')**

The Lisbon Convention is the flagship measure of the Council of Europe on qualification recognition and is binding on those states party to it. At present, the EU and all its member states except Greece have ratified the Lisbon Convention. In addition, the terms of the Convention are generally confined to holders of qualifications 'issued in

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<sup>18</sup> This paragraph draws on Julia Nielson, 'Trade Agreements and Recognition' in *Quality and Recognition in Higher Education* (OECD 2004); and Wolfgang Kerber and Roger Van den Bergh, 'Mutual Recognition in the Global Trade Regime: Lessons from the EU Experience' in Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012).

one of the Parties' to the Convention.<sup>19</sup> In other words, the Lisbon Convention does not apply to holders of qualifications issued in a state which is not a party to it. However, that does not mean that third-country nationals are automatically excluded from the scope of application of the Lisbon Convention. Indeed, art III.1.2 thereof prohibits any discrimination on the grounds of, *inter alia*, nationality. Rather, recognition is to be based 'solely on the basis of the knowledge and skills achieved'.

So, what are the key requirements of the Lisbon Convention?<sup>20</sup> First, holders of a qualification issued in one of the parties to the Convention must have 'adequate access' to an assessment of their qualifications when in the territory of another state party. What 'adequate access' requires is, strictly speaking, undefined. However, it is possible to glean some understanding of the requirement of adequacy from other provisions of the Convention. For example, states party must instruct or encourage educational systems to comply with any reasonable request for information for the purpose of assessing qualifications earned at those same institutions.<sup>21</sup> Each state party must also ensure that adequate and clear information concerning its education system is provided.<sup>22</sup> Second, such assessment and recognition procedures must be transparent, coherent and reliable.<sup>23</sup> Third, assessment decisions must themselves be made within a reasonable time limit.<sup>24</sup>

What are the implications of recognition? What does recognition mean? As noted above, recognition may facilitate access to the labour market. And given the increasing transnationalisation of the labour market—in other words, the creation of a single labour market across the European Union—'[e]mployers will increasingly need reliable information on foreign qualifications'.<sup>25</sup> This is surely the most pressing implication in the context of this thesis. But there are two other implications. First,

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<sup>19</sup> The Lisbon Convention, art III.1.1.

<sup>20</sup> See also Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 'Revised Recommendation on Criteria for the Assessment of Foreign Qualifications' (Strasbourg, 23 June 2010).

<sup>21</sup> The Lisbon Convention, art III.3.4.

<sup>22</sup> The Lisbon Convention, art III.4.

<sup>23</sup> The Lisbon Convention, art III.2.

<sup>24</sup> The Lisbon Convention, art III.5.

<sup>25</sup> Steering Committee for Higher Education and Research, 'Policies and Instruments for Recognition of Qualifications and Mobility: Reference Document' (Strasbourg, 21-22 September 2004) para 17.

recognition may facilitate access to further higher education studies. And second, recognition may permit the use of an academic title.

## **2. Recommendation on the Recognition of Refugees' Qualifications under the Lisbon Convention**

The Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region—the Committee empowered to oversee, promote and facilitate the implementation of the Lisbon Convention—is empowered to issue recommendations concerning the application of the Convention. One such recent recommendation is that concerning refugees' qualifications, issued sometime after the European Migrant Crisis.<sup>26</sup> Given that most refugees—indeed, most third-country nationals—hold qualifications from outside the European Union and Europe generally, this recommendation goes somewhat further than the Lisbon Convention, requiring states parties to recognise qualifications obtained in third-countries.

That is not to say that states parties are obliged to recognise them as equivalent, but '[s]uch qualifications should be recognised unless a substantial difference can be shown between the refugees' qualification for which recognition is sought and the comparable qualification in the Party in which recognition is sought'.<sup>27</sup> The primary emphasis, therefore, is on facilitating the recognition of refugees' skills to enable them to access further education and training or, in some cases, to participate in the labour market. The procedures applicable to refugees are much the same as those under the Lisbon Convention, except that the possibility of recognising refugees' qualifications even in the absence of documentation is envisaged. Paragraph 9 of the Recommendation provides that refugees, displaced persons and 'persons in a refugee-like situation', as the Recommendation defines it, are entitled to have their qualifications recognised even in the absence of any documentation providing proof of those qualifications. Such recognition mechanisms should also be affordable for

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<sup>26</sup> Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 'Recommendation on the Recognition of Refugees' Qualifications under the Lisbon Recognition Convention and Explanatory Memorandum' (Strasbourg, 14 November 2017).

<sup>27</sup> *ibid* 1.



refugees; refugees should not be prevented from seeking recognition because of the costs involved.<sup>28</sup>

## II. EU Migration and Asylum Law

### A. Overview

The rights of third-country nationals migrating to the EU have largely been constructed under the terms of Part Three, Title V, Chapter 3 TFEU, particularly arts 78-79 thereof. Interestingly, no specific legislative form is envisaged by these provisions. It is therefore possible that regulations may be adopted. Furthermore, the reader should recall that art 79(1) TFEU obliges the Union to develop a common immigration policy which facilitates the 'fair treatment' of third-country nationals. Notwithstanding this language, in chapter 4.III it was argued that it would be inegalitarian for the EU not to generally guarantee third-country nationals' equal treatment with member state nationals. In other words, it was argued that third-country nationals should generally be entitled to equal treatment with member state nationals on the ground of nationality. In chapter 3.I it was argued that because the EU is bound by the internal and external dimensions of neorepublicanism, it should neither dominate people within its jurisdiction nor dominate peoples outside the EU.

Accordingly, this section describes (section II.B) and critiques (section II.C) the circumstances in which three categories of third-country national can have their qualification recognised in the EU, namely, regular migrants, forced migrants and irregular migrants. Such migrants may wish to have their qualifications recognised in either and/or both of two scenarios: (a) before departing their country of origin; or (b) on arrival and during their stay in the EU. A table summarising the law follows this subsection. It is important to note that this section does not consider whether, say, temporary labour migration is itself right or wrong, a question which some scholars do

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<sup>28</sup> *ibid* 6.

seek to address.<sup>29</sup> Rather, this section is only concerned with what rights and entitlements third-country nationals have on admission.

## B. Categories of Migrant

### 1. Regular Migrants

#### (i) Labour Migrants<sup>30</sup>

Labour migrants enter the EU on the basis of one of the EU's labour migration schemes, namely: the Single Permit Directive;<sup>31</sup> the Blue Card Directive;<sup>32</sup> the Seasonal Workers' Directive;<sup>33</sup> the ICT Directive;<sup>34</sup> as posted workers under art 56 TFEU;<sup>35</sup> association and/or trade agreements between the EU, the member states and third-countries;<sup>36</sup> or researchers, students, trainees, volunteers or au pairs.<sup>37</sup> In respect of scenario (a), no such procedure generally exists at present. In respect of scenario (b), by contrast, any recognition procedure applied to a member state's own nationals must also be applied to all labour migrants, except for some trainees, volunteers or au pairs who are not

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<sup>29</sup> See, eg, David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (HUP 2016) 95-96.

<sup>30</sup> Elaine Dewhurst, 'Labour Rights of Third-Country National Workers in the European Union' in *International and European Labour Law: A Commentary* (n 6); and Herwig Verschueren, 'Employment and Social Security Rights of Third-Country Nationals under the EU Labour Migration Directives' (2018) 20 EJSS 100.

<sup>31</sup> Parliament and Council Directive 2011/98/EU 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] OJ L343/1 (Single Permit Directive).

<sup>32</sup> Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17 (Blue Card Directive).

<sup>33</sup> Parliament and Council Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375 (Seasonal Workers' Directive).

<sup>34</sup> Parliament and Council Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1 (ICT Directive).

<sup>35</sup> Case C-43/93 *Van der Elst* [1994] ECR I-3803; Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761.

<sup>36</sup> TFEU, arts 207 & 217.

<sup>37</sup> Parliament and Council Directive 2016/801/EU 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 (recast) [2016] OJ L132/21 (Researchers', Students', Volunteers' and Au Pairs' Directive).

working or students without the right to work, by virtue of a guarantee of equal treatment.<sup>38</sup>

(ii) *Voluntary Migrants*

Voluntary migrants enter the EU on the basis of one of the EU's family reunification schemes.<sup>39</sup> The same reasoning which applies to labour migrants in respect of scenarios (a) and (b) roughly applies to voluntary migrants. Strictly speaking, voluntary migrants are not afforded equal treatment with member state nationals in respect of their access to qualification recognition procedures, but it is likely implicit in the guarantee of their equal access to employment and self-employment with their sponsor that they too shall have access to qualification recognition procedures.<sup>40</sup> Voluntary migrants are also entitled to access education on equal terms with their sponsor.<sup>41</sup> Furthermore, member states may require third-country nationals to comply with 'integration measures'.<sup>42</sup> Such integration measures generally include language proficiency, as well as knowledge of the history, legal order and values of the host country.

Of course, this is not to say that the application of all integration requirements by the member states to date has been appropriate. In *P and S*,<sup>43</sup> discussed briefly in chapter 4.II.C.4, a Dutch requirement for long-term residents to partake in mandatory civic integration courses was challenged by two long-term residents on the basis that failure to pass the course resulted in the imposition of a fine. The Court of Justice held that while the obligation to take such a course was consistent with the spirit of the LTR

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<sup>38</sup> Single Permit Directive, art 12(1)(d); Blue Card Directive, art 14(1)(d); Seasonal Workers' Directive, art 23(1)(h); ICT Directive, art 18(1)(b); and Researchers', Students', Volunteers' and Au Pairs' Directive, art 22.

<sup>39</sup> The primary scheme is embodied in Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12 (Family Reunification Directive). However, Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 is an essential companion to the Family Reunification Directive. In addition, some association agreements, such as the EEA Agreement, may provide for family reunification schemes.

<sup>40</sup> Family Reunification Directive, art 14(1)(b).

<sup>41</sup> Family Reunification Directive, art 14(1)(a).

<sup>42</sup> Family Reunification Directive, art 7(2).

<sup>43</sup> Case C-579/13 *P and S* [2015] 3 CMLR 44. See further Daniel Thym, 'Towards a contextual conception of social integration in EU immigration law. Comments on *P and S* and *K and A*' (2016) 18 EJML 89; and Moritz Jesse, 'Integration measures, integration exams and immigration control: *P and S* and *K and A*' (2016) 53 CML Rev 1065.

Directive, the payment of a fine (€1,000), in addition to the costs incurred in relation to the course, was liable to jeopardise the achievement of the integration objectives of the Directive.

*(iii) Long-Term Residents<sup>44</sup>*

For such migrants, only scenario (b) is relevant. Long-term residents are entitled to equal treatment with member state nationals in respect of qualification recognition procedures,<sup>45</sup> education and training, including grants and loans,<sup>46</sup> and like the Family Reunification Directive, the LTR Directive provides that one of the conditions for acquiring long-term resident status which the member states may impose on migrants is that they 'comply with integration conditions'.<sup>47</sup>

## **2. Forced Migrants<sup>48</sup>**

*(i) Persons seeking Temporary Protection<sup>49</sup>*

No question of scenario (a) arises for persons seeking temporary protection, since the terms of the Temporary Protection Directive do not apply until they are in the EU. The only scenario of relevance is scenario (b). According to art 12 of the Temporary Protection Directive, member states must permit beneficiaries of temporary protection to access employment or self-employment, 'subject to rules applicable to the profession' and educational opportunities linked to employment, such as vocational education for the duration of the temporary protection given. Article 12 is,

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<sup>44</sup> Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 (LTR Directive).

<sup>45</sup> LTR Directive, art 11(1)(c).

<sup>46</sup> LTR Directive, art 11(1)(b).

<sup>47</sup> LTR Directive, art 5(2).

<sup>48</sup> See generally Franziska Weber, 'Labour Market Access for Asylum Seekers and Refugees under the Common European Asylum System' (2016) 18 EJML 34.

<sup>49</sup> Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive); and see Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhoff 2018). This measure has never been activated in practice.

however, ambiguous as to whether beneficiaries of temporary protection are entitled to such public goods on the basis of equal treatment. Member states are permitted to distinguish between member state nationals, certain other third-country nationals and beneficiaries of temporary protection in relation to their unemployment benefit policies 'for reasons of labour market policies'. Article 12 also states that the 'general law in force' concerning remuneration, access to social security systems and other employment conditions will apply. The only reference to non-discrimination in the Temporary Protection Directive is in recital 16, which provides that the member states are bound by obligations under international law which prohibit discrimination, but no reference is made to any specific measures of international law. And, according to art 14(2), member states 'may' allow adults enjoying temporary protection access to their general education system. This ambiguity may be a source of domination for such vulnerable third-country nationals insofar as it is unclear what their rights are and many enable member states to exercise arbitrary power over them.

*(ii) Asylum Seekers<sup>50</sup>*

Like persons seeking temporary protection, the only situation of relevance to asylum seekers is scenario (b). Asylum seekers must be given access to the labour market within nine months of the date of first application if a decision has not been made by the competent authority as to their asylum application. However, member states are free to decide the conditions for effective access to the labour market of asylum seekers 'in accordance with national law'.<sup>51</sup> Member states are entitled to differentiate between asylum seekers, EU citizens, nationals of EEA states and other legal migrants in their labour market policies.<sup>52</sup> Member states may also permit asylum seekers to access vocational education and training<sup>53</sup> but no integration measures are envisaged.

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<sup>50</sup> Parliament and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Directive).

<sup>51</sup> Reception Directive, art 15(1). The reference to 'national law' must include provisions of EU law which are directly effective too, but given that the terms of the Reception Directive provides member states with a power to distinguish between asylum seekers and other nationals, any more general EU equality guarantee must be displaced by this measure.

<sup>52</sup> Reception Directive, art 15(2).

<sup>53</sup> Reception Directive, art 16.

As with persons seeking temporary protection, this ambiguity as to the rights of asylum seekers may be a source of domination for them.

*(iii) Refugees and Persons eligible for Subsidiary Protection Status<sup>54</sup>*

As with persons seeking temporary protection and asylum seekers, only scenario (b) is of relevance for refugees and persons eligible for subsidiary protection. According to the Uniform Status Directive, refugees and persons eligible for subsidiary protection are expressly entitled, inter alia, to labour market access immediately after their status has been confirmed, access to employment-related education and skills training and upgrading opportunities on terms equivalent to nationals of the member state,<sup>55</sup> and equal treatment with member state nationals in relation to procedures for the recognition of their professional qualifications.<sup>56</sup> Specifically, art 28(2) provides that member states 'shall endeavour' to facilitate the former two categories of forced migrant to access assessment schemes for their prior learning and skills, especially for those who cannot provide the documentary evidence of their skills which is generally necessary. Article 34 also guarantees such beneficiaries of international protection access to integration programmes in the member states.

### **3. Irregular Migrants**

There are three categories of irregular migrant of relevance, namely, those who enter the EU unlawfully, certain victims of trafficking who enter the EU unlawfully<sup>57</sup> and those whose status as legal migrants becomes irregular whilst in the EU. Only scenario (b) is of relevance for irregular migrants. In respect of the first and third categories of

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<sup>54</sup> Parliament and Council Directive 2011/95/EU 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 (recast) [2011] OJ L337/9 (Uniform Status Directive).

<sup>55</sup> Uniform Status Directive, art 26.

<sup>56</sup> Uniform Status Directive, art 28.

<sup>57</sup> Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19 (Victims of Trafficking Resident Permit Directive).

irregular migrant, although the EU does not have the competence to regulate irregular employment, the EU has indirectly regulated irregular employment by prohibiting employers operating in the EU from employing irregular migrants.<sup>58</sup> Thus, under EU law it is not unlawful per se for an irregular migrant to work and potentially even benefit from the necessary guarantees surrounding work, such as the recognition of their professional qualifications. However, given that it is unlawful for employers to employ irregular migrants and the member states are under a duty to return irregular migrants to their country of origin, the chances of this happening are probably quite slim. This is the case regardless of the length of time spent in the jurisdiction prior to the migrant's status becoming irregular.

By contrast, victims of trafficking who have been granted a residence permit must be given access to the labour market,<sup>59</sup> and to professional skills enhancement courses.<sup>60</sup> However, as with certain categories of forced migrants, there is no general or specific equal treatment guarantee in respect of victims of trafficking, and so member states are entitled to define the conditions in which such irregular migrants may access the labour market and the recognition procedures and standards for their professional qualifications. In general, no equal treatment guarantee is provided for irregular migrants in respect of the recognition of their professional qualifications in scenario (b); they must rely on any available national procedure in those scenarios.

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<sup>58</sup> Parliament and Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24.

<sup>59</sup> Victims of Trafficking Resident Permit Directive, art 11.

<sup>60</sup> Victims of Trafficking Resident Permit Directive, art 12.

| Type of Migrant   | Rights | Recognition of Qualifications                                  | Integration Measures | Education and Training  |
|---|--------|--|----------------------|---|
| <i>Labour Migrants</i>  |        | Yes, except trainees, volunteers and au pairs when not working | No                   | All except ICTs; access to loans and grants can be restricted |
| <i>Voluntary Migrants</i>   |        | Yes  | Yes                  | Yes, depending on sponsor's rights                            |
| <i>Long-Term Residents</i>  |        | Yes  | Yes                  | Yes, including grants and loans                               |
| <i>Persons seeking Temporary Protection</i>                           |        | Unclear on the basis of the Directive                          | No                   | Limited access  |
| <i>Asylum Seekers</i>   |        | Unclear on the basis of the Directive                          | No                   | Limited access  |
| <i>Refugees and Persons eligible for Subsidiary Protection Status</i> |        | Yes, even if documentary evidence is unavailable               | Yes                  | Yes, including grants and loans                               |
| <i>Irregular Migrants (generally)</i>                                 |        | No   | No                   | No  |
| <i>Victims of Human Trafficking</i>                                   |        | Yes  | Yes                  | Yes   |

## C. Critical Reflections

### 1. Regular Migrants

In respect of scenario (a), as the Commission quite damningly admitted in its recent *Fitness Check on EU Legislation on legal migration*, '[d]epending on the laws of the country of destination, TCNs may (...) face more onerous requirements for recognition of their qualifications than EU citizens holding a similar EU or non-EU qualification'.<sup>61</sup> This seems like an obvious instance of unequal treatment which is inconsistent in principle with the egalitarian requirements of neorepublicanism, subject to the

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<sup>61</sup> Commission, 'Fitness Check on EU Legislation on legal migration' (Staff Working Document) SWD(2019) 1055 final, 128.



arguments which follow below. Further, in a lengthy but insightful passage, the Commission observed,

“Recognition of diplomas is a widely posed requirement, especially for work-related permits, but its existence and the related guidance are relatively difficult to find. This, together with the complex process of recognition itself and the multitude of requirements especially concerning regulated professions make recognition one of the more burdensome requirements for TCNs. It has been documented that when there are requirements in terms of qualification level in order to be eligible to a work-related residence permit, some potential highly skilled migrant workers are sometimes excluded because of the excessive requirements or procedures, the impossibility to have access to recognition procedures from outside the country or the lack of knowledge in the destination country (by the administration or by the employer) about the value of the non-EU qualification.”<sup>62</sup>

In respect of scenario (b), it seems that the EU should ensure that its migration and asylum acquis is at least compliant with the external dimension of Pettit’s neorepublicanism; that is, EU migration and asylum law must be at least consistent with the EU’s humanitarian obligations to other countries and peoples. However, if and when third-country nationals are entitled to equal treatment with member state nationals, which it was argued they should be in general in chapter 4, then they should be equally entitled to avail of sufficientarian measures with member state nationals. In other words, when third-country nationals enter the Union, they should generally be entitled to equal treatment with member state nationals in respect of neorepublican measures ensuring justice at work, such as labour rights, working conditions, access to social welfare, labour market integration measures, education and training and so forth.

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<sup>62</sup> *ibid*, citing European Commission, *Obstacles to Recognition of Qualifications* (2017); and OECD and EU, *Recruiting Immigrant Workers: Europe 2016* (2016).

At this point, a number of very powerful objections arise. First, while it may be conceded that third-country nationals are generally entitled to equal treatment with member state nationals, that does not mean that no discrimination between third-country nationals and member state nationals and amongst third-country nationals is permitted. Indeed, as noted in chapter 4, discrimination on the ground of nationality can be justified and discrimination on other grounds, such as immigration status, is permitted. One obvious source of permitted discrimination, it could be argued, is to ensure that third-country nationals do not benefit from public goods, such as social welfare or assistance, on equal terms with member state nationals. It is one thing for some third-country nationals to so benefit from welfare measures after they have lived and worked in the jurisdiction for some time; it is quite another for third-country nationals to be immediately afforded access to such welfare schemes.<sup>63</sup> Moreover, as is well known, member state nationals migrating within the EU are themselves restricted in access to social welfare schemes, with such restrictions being reduced, until removed completely, over time.

There are at least three ways of responding to this objection. The first is to argue, like political philosophers Joseph Carens and David Miller, that third-country nationals should, nevertheless, have their human rights guaranteed. In other words, the EU is always bound by its humanitarian obligations to third-country nationals which may be as or more onerous than its obligations of justice towards its own citizens. Accordingly, given the fundamental nature of the rights to work and equal treatment and the right to have one's qualifications recognised as a derivative right of the right to work in international and European law, as outlined in the previous section, it may be arguable that effective protection of those rights for third-country nationals requires additional measures to secure their human rights similar to those granted to EU citizens as a matter of justice. Recall, for example, that, as a matter of international labour law migrants should have opportunities to have their qualifications recognised on objective, non-discriminatory grounds and that 'special measures' should be taken to provide for the recognition of qualifications of migrant nationals.

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<sup>63</sup> See Joseph Carens, *The Ethics of Immigration* (OUP 2013) chs 5-7; and *Strangers in Our Midst* (n 29) chs 5-7.

The problem with this response, however, is that the EU and its member states are not bound by many of the instruments discussed in the previous section. Moreover, many of the instruments there discussed are sufficiently vague so as to provide the EU and its member states with a significant degree of discretion in their implementation to justify the status quo as satisfying the requirements thereof. The fact that the right to have one's qualifications recognised has not attracted a great degree of juridical attention in international and European law to date means that the law in this area is somewhat underdeveloped. Without wishing to set up a straw man, it is probably fair to say that a significant degree creative legal interpretation would be needed to justify the imposition of sufficientarian measures on the basis of international and European law alone. What is needed is not a restricted legal interpretation but a political one.

The second response to the objection is theoretical. Partially conceding the point, it accepts that some distinctions between third-country nationals and EU citizens are necessary and appropriate. But the existence of unequal residence statuses and the correlate differences in rights highlights a tension between the need to treat migrants equally, on the one hand, and the need to establish exclusive, exclusionary categories of citizenship, on the other hand. And the way to resolve this tension at the level of principle is to appeal to some higher political theory. As is by now clear, neorepublicanism is the normative political theory relied on in this thesis to critique existing EU law and practice.

Neorepublicanism does not logically entail a commitment to full equality of treatment between non-citizens and citizens in access to and the provision of sufficientarian measures. While requiring equal treatment with member state nationals in general, it can permit partial or specific equality of treatment in access to sufficientarian measures. In this context, partial equal treatment with member state nationals in access to sufficientarian measures translates to third-country nationals benefiting from partial sufficientarianism. In other words, third-country nationals should be given access to some, but not all, sufficientarian measures. Such partially sufficientarian measures can be tiered so that migrants resident and working temporarily in the EU have less rights than those permanently resident non-citizens. Overtime, migrants should then be able to acquire more rights, ultimately

approximating with citizens, given the increasing contribution they make to shared social schemes, such as general taxation.<sup>64</sup>

The problem with this approach, however, is that it is largely consistent with the status quo and is, once again, sufficiently vague to provide the EU and its member states with a significant degree of discretion in affording third-country nationals additional resources. Consistently with affording third-country nationals equal treatment with member state nationals in general, it gives the EU great discretion to discriminate against third-country nationals in specific circumstances. But are there any alternative approaches available which are at least consistent with a commitment to neorepublicanism?

The alternative here favoured comes in two parts, one theoretical and one practical. Theoretically, it recognises that while neorepublicanism does not necessitate full equality, same is consistent with neorepublicanism. In other words, it is consistent with neorepublicanism to afford additional resources and measures to third-country nationals on an equal basis with member state nationals. This means that third-country nationals can be afforded the full panoply of rights member state nationals benefit from in a manner consistent with at least one version of neorepublicanism. Practically, one could then consider the equal treatment of third-country nationals with respect to such measures as a matter of policy.<sup>65</sup> Accordingly, if it could be empirically demonstrated that third-country nationals were less likely to be affected by inadequate qualification recognition by immediately affording them equal treatment with member state nationals in access to sufficientarian measures, then there would be a strong policy case in favour of affording third-country nationals equal treatment with member state nationals in respect of such measures immediately. To make the point more concrete, one can provide at least two relevant examples. If it could be demonstrated that, by affording third-country nationals equal treatment with member state nationals in respect of qualification recognition procedures in scenarios (a) and (b), they were less likely to be affected by inadequate skills' recognition, then there would be a compelling policy case in favour of such a change. Similarly, if it could be demonstrated that by

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<sup>64</sup> Marit Hovdal-Moan, 'Unequal residence statuses and the ideal of non-domination' in Iseult Honohan and Marit Hovdal-Moan (eds), *Domination, Migration and Non-Citizens* (Routledge 2015).

<sup>65</sup> *Strangers in Our Midst* (n 29) 124-125.

affording third-country nationals equal treatment with member state nationals in respect of sufficientarian measures generally, such as integration measures and opportunities for education and training, they were less likely to experience inadequate skills' recognition, then there would be a compelling policy case in favour of such a change.

But even accepting this response to the objection, the question which naturally arises is, what precise measures are actually necessary to ensure that third-country nationals have sufficient resources and opportunities to secure their well-being? This question appears to pose a significant problem for Pettit's neorepublicanism insofar as one implication of its vagueness is that it cannot provide a clear solution for the plight of third-country nationals. In fact, however, this vagueness is a strength. For, neorepublicanism is a normative political theory; it requires the development, through conceptual stipulation, of measures necessary to secure people's well-being. And, as noted in chapter 2.1.A, the republican ideal of freedom as non-domination aims to reduce both direct and indirect invasions to people's well-being. Accordingly, what follows is an outline of one policy argument, informed by and based upon a rigorous commitment to neorepublicanism, to secure an aspect of the well-being of third-country nationals coming to the EU. It is not the only possible response consistent with neorepublicanism nor is it necessarily the strongest (or the weakest, for that matter), but it is the one here supported.

Third-country nationals should generally be provided with equal treatment in access to qualification recognition measures either before entering or on arrival in the EU: this simply means that they should be entitled to have their qualifications assessed in the same manner as member state nationals. If third-country nationals' qualifications are not assessed in the same or a similar manner to member state nationals' qualifications, then this constitutes a direct invasion to their autonomy which must be alleviated. In other words, third-country nationals are entitled to strict procedural equality in respect of the recognition of their qualifications when moving to the EU. National procedures must not assume that the qualifications of third-country nationals are of a lesser quality than member state nationals' qualifications; rigorous procedural equality must be provided. That is not to say that member state authorities must recognise the qualifications of third-country nationals as at least equivalent to the

qualifications of member state nationals, but it does suggest that non-recognition on arbitrary grounds should not be permitted.

By contrast, as suggested in chapter 4.I.A, while differentiating between people on the ground of their skills is not problematic, it may become so when it indirectly discriminates on some protected ground, such as nationality. From the data available, it seems plausible to assume that third-country nationals are being indirectly discriminated against on the ground of their nationality insofar as they are not able to participate in the Single Market in a manner commensurate with their qualifications. To put the point another way, by systematically treating third-country nationals as inadequately skilled for the purposes of participation in the labour market, the EU and/or its member states wrongfully discriminates indirectly on the ground of nationality. Such indirect discrimination constitutes an indirect or structural invasion to third-country nationals' autonomy which neorepublicanism also requires reduction and it can legitimise redistributive remedies designed to reduce such domination.

The matter thus becomes a policy question of what redistributive remedy is most likely to alleviate the indirect or structural domination which third-country nationals habitually experience. Given that the question is essentially a policy one, only some highly general and somewhat speculative reflections can be provided here as to the nature and extent of such policies. First, the availability of targeted integration measures designed to ensure that third-country nationals have an opportunity to participate in the labour market will be vital. These could include mandatory language and cultural training. No such measures are made available in the EU's labour migration acquis although the EU does have an independent competence to develop such measures which is the subject of section V of this chapter. Such integration measures may be similar to those currently required for voluntary migrants and long-term residents.

Second, the availability of education and training to upskill and reskill is also likely to be vital for third-country nationals whose qualifications are inadequate to meet market demands in the EU. At present, most labour migrants are entitled to equal

treatment with member state nationals in respect of access to education and training,<sup>66</sup> but member states are nonetheless empowered to restrict third-country nationals' access to study and maintenance grants and loans.<sup>67</sup> In the light of the argument made in chapter 4 for the equal treatment of third-country nationals with member state nationals in general and the argument in chapter 2 for neorepublican social justice in the EU, the normative political theory relied on in this thesis requires a holistic reconsideration of the balance of reasons as currently struck in the EU's labour migration acquis. If it could be empirically demonstrated that third-country nationals were less likely to experience inadequate skills recognition if they were granted access to loans and maintenance grants for education and training, for example, then there would be a strong policy case in favour of such a change. Whether such a policy would actually be adopted in practice, however, is a further question concerning the possibility of change in the EU's political culture based on the response of its people to the values of republicanism. Finally, it is necessary to recall the distinction between the availability of a right or opportunity and the exercise of it. Affording third-country nationals additional rights or opportunities may not result in change if these are not exercised or taken up. Only if such additional sufficientarian measures are actually taken up by third-country nationals are we likely to see a change in culture consistent with the demands of neorepublicanism as here interpreted.

It is, however, plausible that such domination would be justifiable on the basis of, paradigmatically, economic considerations, namely, that third-country nationals lack the skills necessary to satisfy market demand in the EU. But this will only be the case where it can be shown, on a case-by-case basis, that third-country nationals lack the necessary skills employers demand. Accordingly, while neorepublicanism does not guarantee equality of outcome or results for third-country nationals in having their qualifications recognised, it nonetheless suggests that third-country nationals should not have their qualifications recognised only where it is clear that they lack sufficiently

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<sup>66</sup> Single Permit Directive, art 12(1)(c); Blue Card Directive, art 14(1)(c); Seasonal Workers' Directive, art 23(1)(g); and Researchers', Students', Volunteers' and Au Pairs' Directive, art 22.

<sup>67</sup> Single Permit Directive, art 12(2)(a); Blue Card Directive, art 14(2); Seasonal Workers' Directive, art 23(2)(ii); and Researchers', Students', Volunteers' and Au Pairs' Directive, art 22.

comparable skills to those of member state nationals and have nonetheless been given opportunities to upskill and reskill in such circumstances.

There is another objection to the analysis here led which runs as follows. The fact that most of the EU's labour migration directives are minimum harmonisation measures implies that the member states can afford third-country nationals more favourable treatment. Strictly speaking, therefore, it could be argued that the EU and the member states together satisfy the sufficientarian demands of Pettit's republicanism insofar as the member states, in their discretion, go beyond what is necessary as a matter of EU migration and asylum law. This objection is part of a broader objection to the role of the EU in general. It is the member states, so the objection goes, which should retain the primary competence in respect of sufficientarian measures for their own nationals, EU citizens and third-country nationals, not the EU's institutions.

Admittedly, as noted in chapter 2.III.B, Pettit's neorepublicanism does not clearly envisage a precise division of labour between different authorities within a multi-level polity such as the EU. That is, it does not clearly delineate all of the competences which different authorities should bear in a federal-type community like the EU. It is therefore possible that the authority to legitimate sufficientarian measures could be at least somewhat diffuse subject to the overall requirements of democratic control Pettit develops, something which is beyond the scope of this thesis.<sup>68</sup> As suggested in chapter 2.III.B, there are two responses to such a scenario, empirical and normative. The empirical response consists of the unverified hypothesis that the EU could better secure the well-being of its peoples if it were granted greater redistributive powers, while the normative response claims that the EU is most likely to be successful to the extent that it mimics nation states and should, accordingly, be given greater redistributive competences like its member states. Both of these responses require further reflection beyond the scope of this thesis to come to a conclusive view on the strength of the objection to the analysis here provided.

There is another objection to the analysis here provided which runs as follows. So much for EU migration and asylum law as it stands. But any further changes or

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<sup>68</sup> Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012).



liberalisation of the EU's migration and asylum acquis would be so politically controversial and such a radical change in the EU as to fracture the fairly delicate political stability which currently exists. This objection seems attractive insofar as it encapsulates a somewhat realistic perspective on EU affairs, realising that the political change necessary to bring about some of the suggested amendments to EU migration and asylum law would be very significant. It also exposes an important explanatory gap in the argument thus far. The gap is that while neorepublicanism provides us with an end-state theory—a theory of what outcomes are just or legitimate and how to achieve them—it does not provide us with a transitional theory—that is, a theory of how to achieve or reach just or legitimate outcomes from a position of present injustice or illegitimacy. The argument here provided, therefore, needs further explanation. It requires at least an outline of a theory or doctrine which can convince people to shift away from injustice towards a position of justice. In the absence of such a theory or doctrine which is capable of convincing people to move away from the status quo, the changes here suggested are unlikely to be adopted. Much depends, therefore, on some further argument to make these changes politically palatable.

There is yet another and final objection to the policy-based analysis led here which runs as follows. As was noted in chapter 2.I and III.B, the internal and external dimensions of the ideal of freedom as non-domination entail different distributive principles. In respect of the internal dimension, the standard of distribution is the sufficientarian 'eyeball test', while in respect of the external dimension, the standard of distribution is the 'straight talk test'. However, the analysis led in this sub-section thus far collapses the distinction between these two distributive principles, equating the eyeball test with the straight talk test, by applying the same distributive principle to third-country nationals entering the EU as to EU nationals generally.

To respond to this objection, it is important to recall that in some circumstances a political community's humanitarian obligations may be as or even more onerous than its obligations of justice. In other words, at times the same distributive principle may apply in respect of the internal and external dimensions of a commitment to the ideal of freedom as non-domination. The question then becomes, when do duties of justice (the internal dimension) and human rights (the external dimension) coalesce? The answer provided by this thesis is that if third-country nationals are entitled to equal

treatment in general with member state nationals (chapter 4), then it follows that third-country nationals can be entitled to equal treatment in distributive terms with member state nationals. It is an implication (but not the only one) of the argument for equal treatment in general that third-country nationals be generally entitled to equal treatment in distributive terms with member state nationals. They do not need to be treated equally in distributive terms, but they can be. The argument is, thus, extremely limited: it exists only in the realm of logical possibility rather than logical necessity. Moreover, the argument is not conclusive: it merely advances a series of reasons to be weighed in the balance of reasons to come to an all-things-considered judgment of neorepublican social justice for migrants at work in the EU. In other words, the policy argument made in this sub-section is but one policy argument to be weighed against other conflicting policy arguments.

## **2. Forced Migrants**

In respect of persons seeking temporary protection, notwithstanding the ambiguity in the Temporary Protection Directive, it is highly unlikely that they would not be entitled to have their qualifications recognised on the same basis as member state nationals. If that were so, it would involve a most obvious and gross violation of equality before the law, perhaps the most basic form of equality. Furthermore, in the absence of an express equality guarantee, it is helpful to draw on the analysis in chapter 4 concerning equality, where it was argued that discrimination on the grounds of nationality should be prohibited for doctrinal, political, conceptual and sociological reasons. Of particular relevance here is the fact that the EU and its member states are currently in breach of binding international and European human rights and labour law in this respect, namely, those parts thereof discussed in chapter 4. Accordingly, in general, persons seeking temporary protection should be entitled to equal treatment with member state nationals in respect of those public goods listed above, viz qualification recognition procedures, integration measures and education and training facilities. There is, furthermore, a second dimension to the need to treat persons seeking temporary protection equally. That is the obligation to make at least some additional measures available to some or all third-country nationals. This obligation is particularly

relevant to all categories of forced migrant because they are perhaps the most vulnerable of the vulnerable—the most marginalised and the most susceptible to social exclusion. While third-country nationals are to be given access to suitable accommodation, other measures are not made available by default in the Temporary Protection Directive.

It may, however, be objected that no such measures should be provided for forced migrants because they are not owed any obligations of justice. Rather, they are merely owed humanitarian obligations of rescue.<sup>69</sup> While it is conceded that forced migrants are indeed not owed any duties of justice and are instead owed humanitarian duties, that does not mean that the content of these duties is different. In the case of forced migrants, while the ground of the duty to act is different, the content of the duty is the same if not even greater. In other words, a political community's humanitarian duties to forced migrants are the same or even greater than its general obligations of justice.

In respect of asylum seekers, in the absence of an express guarantee of equal treatment in the relevant legislation, the egalitarian elements of a commitment to neorepublicanism require us to reflect on the status quo. First, third-country nationals should in general be entitled to equal treatment with member state nationals; and, second, third-country nationals should consequently have access to additional measures on an equal basis with member state nationals. In chapter 1.II-III, I argued that skills played a vital role in people's well-being; and that work—the productive use of one's skills—is perhaps the primary site for participation in our culture. Clearly, then, a prohibition, even of a temporary nature, on working is a very significant obstacle to asylum seekers' ability to integrate or participate in society. The range of options over which to exercise their autonomy is greatly reduced. They are not even guaranteed the basic liberty to work.

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<sup>69</sup> *The Ethics of Immigration* (n 65) ch 10; *Strangers in Our Midst* (n 29) ch 5; and Michael Gibney, 'The ethics of refugees' (2018) 13 *Philosophy Compass* 1. Various theorists alternate between describing such obligations as being 'humanitarian' or 'human rights' obligations. For example, David Miller, *National Responsibility and Global Justice* (OUP 2007) ch 7 and David Miller, *Justice for Earthlings: Essays in Political Philosophy* (CUP 2013) ch 7 suggests that states have obligations of global justice which consist of their human rights obligations.

Perhaps the most common argument in favour of restricting asylum seekers' access to the labour market is that if the right to work were granted to asylum seekers generally and without limitation, then the number of applications for asylum might surge dramatically. The reason justifying this consideration appears to be one of immigration control, an area traditionally lying within the remit of the executive and legislature of the state. Indeed, the power to control the number of migrants accessing the territory remains a distinctive competence of the member states of the EU. Whether this is, at root, a legitimate consideration does raise a difficult issue. Certainly, this consideration is in one way autonomy-reducing since it views some of the most vulnerable group of migrants—forced migrants—as mere threats or costs to the economy and state. But in another way, this consideration is so entangled with the nature of community and the nation state that the weight of the relevant reasons is not entirely clear either way.<sup>70</sup>

This thesis does not question the legitimacy of states' entitlement to restrict entry to their jurisdiction. This is not the place to determine criteria according to which states are to discriminate in access to their territory; that question is for political philosophers to continue to debate. However, as with labour migrants, if it could be established empirically that asylum seekers were less likely to face discrimination and inadequate skills recognition if they were immediately afforded access to sufficientarian measures on the same basis as member state nationals, then there would be a strong policy case in favour of affording them immediate access thereto.

Finally, refugees and beneficiaries of subsidiary protection are offered what might be considered the 'gold standard' in terms of measures designed to facilitate the use, development and recognition of their skills. They are guaranteed equality of treatment in respect of access to and participation in the labour market, procedures for the recognition of their skills, even in the context of loss of documentary evidence of qualifications and are to be given access to integration programmes designed to facilitate their needs. Importantly, they are also given opportunities to train and upskill on equal terms with member state nationals. In the light of the argument made above

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<sup>70</sup> See my 'Asylum Seekers and the Right to Work in Irish Law: *NvH v Minister for Justice and Equality*' (2019) 61 IJ (ns) 174, 184.

in respect of regular migrants, it is submitted that it would be appropriate for such measures to be extended to all those other categories of third-country national already considered. While it may be argued that it is legitimate to provide additional resources and opportunities to forced migrants over other categories of migrant in general, the relevant difference is in the ground of the duty. And at times, the content of both our humanitarian obligations and obligations of justice may be the same.

### **3. Irregular Migrants**

This thesis does not challenge political communities' rights to restrict or regulate migration in general. But given the general absence of equal treatment guarantees in the legislation on irregular migration discussed earlier, this section echoes the conclusions of the earlier ones in calling for equal treatment in general in respect of irregular migrants who are seeking to have their qualifications recognised, avail of integration measures and education or training schemes.

## **III. EU External Relations Law**

### **A. Overview**

Part Five, Title V TFEU governs the EU's external relations. According to art 205 TFEU, Part Five, Title V TFEU is guided by the principles established in Title V, Chapter 1 TEU, the fundamentals of which are

“democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.<sup>71</sup>

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<sup>71</sup> TEU, art 21(1). See generally Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011); Bart van Vooren and Ramses Wessel (eds), *EU External Relations Law: Text, Cases and Materials* (CUP 2014); and Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert de Baere and Thomas Ramopoulos (eds), *The*

Accordingly, the EU should respect, protect and promote those principles in its external relations. As was demonstrated in chapter 5, however, the EU's member states are in breach of their international and European human rights and labour law obligations insofar as nationality discrimination is not generally prohibited under EU law. To improve coherence in the EU's external relations, therefore, this breach should be remedied as there suggested. According to art 3(2) TFEU, the EU is competent to complete international agreements when it is necessary to do so for the purposes of the functioning of the EU's internal competences, eg, the effective operation of the Single Market and the implementation of a common commercial policy, or on the basis of a legislative act. This competence is essentially repeated in art 216 TFEU. In this vein, the Union shall develop close relations with its neighbours in an effort to foster its values.<sup>72</sup> This section accordingly considers the place of qualification recognition and equal treatment in EU external relations law through an analysis of the EU's partnership, association and trade agreements and mobility partnerships with third-countries.

## **B. Partnership, Association and Trade Agreements<sup>73</sup>**

### **1. Overview**

In its Communication, *Trade for All: Towards a more responsible trade and investment policy*, the Commission noted the need to improve synergies between EU trade and migration policies, referring in particular to the *European Agenda on Migration*

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*Law of EU External Relations: Cases, Materials and Commentary on the EU as an International Legal Actor* (2nd edn, OUP 2015).

<sup>72</sup> TEU, art 8.

<sup>73</sup> See Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004); Christopher Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010); Katharina Eisele, *The External Dimensions of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill Nijhoff 2014); Daniel Thym and Margarite Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015); and Steve Peers, *EU Justice and Home Affairs Law Volume I: EU Immigration and Asylum Law* (4th edn, OUP 2016).

previously discussed in section I.C.2 of the introductory chapter. Specifically, the Commission concluded that it would promote the recognition of qualifications in trade agreements negotiated with third-countries so as to reduce market access costs for service providers and improve external migration flows.<sup>74</sup> In this sub-section, the EU's current association and trade agreements are considered to assess what the current role of qualification recognition and equal treatment is in the EU's external relations. It is significant that, in these agreements, discrimination on the basis of nationality is often prohibited and equal treatment with EU nationals is therefore guaranteed. However, it is important to bear in mind that if third-country nationals do not have a right of entry to or residence in the EU, then a right to equal treatment or the recognition of qualifications will be of little, if any, value.<sup>75</sup>

## 2. (Almost) Full Mutual Recognition: EEA States and Switzerland

Part III of the EEA Agreement guarantees the free movement of persons, services and capital between the EU and EEA states.<sup>76</sup> Article 30 of the Agreement provides that the contracting parties thereto shall ensure, in accordance with measures contained in an annex to the Agreement, the mutual recognition of qualifications of workers and self-employed persons moving between jurisdictions. The relevant annex has been updated to incorporate the Recognition Directive<sup>77</sup> (the major subject of chapter 7 of this thesis) but no measure incorporating the Administrative Cooperation Directive<sup>78</sup> has yet been adopted. Thus, the terms of the un-amended Recognition Directive apply to EEA nationals. Their qualifications are recognised in roughly the same way as those of EU

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<sup>74</sup> Commission, 'Trade for All: Towards a more responsible trade and investment policy' (Communication) COM(2015) 497 final, 7-8, 11.

<sup>75</sup> *The Legal Elements of European Identity* (n 75) 153-159; and *The External Dimensions of the EU's Migration Policy* (n 75) 338.

<sup>76</sup> Agreement on the European Economic Area between the European Communities, their Member states and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1994] OJ L1/3.

<sup>77</sup> Parliament and Council Directive 2005/36/EC on the recognition of professional qualifications [2005] OJ L 255/22; EEA Joint Committee, 'Annual Report of the Joint Committee 2007: Functioning of the EEA Agreement' (22 February 2008) para 47.

<sup>78</sup> Parliament and Council Directive 2013/55/EU amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L 354/132.

nationals.

The EC-Swiss Confederation Free Movement of Persons Agreement similarly guarantees the free movement of persons, services and capital between the EU and Switzerland.<sup>79</sup> Specifically, Part I guarantees the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions<sup>80</sup> and imposes an obligation on the contracting parties to take all necessary measures to ensure the mutual recognition of qualifications.<sup>81</sup> Annex III to the Agreement, which has been amended on numerous occasions,<sup>82</sup> applies the Recognition Directive to Switzerland but the Administrative Cooperation Directive has not yet been applied. Swiss nationals are therefore in the same position as EEA nationals in respect of their skills and qualifications.

The fact that these agreements facilitate the free movement of persons and the mutual recognition of qualifications suggests a relatively high level of (economic) integration between the EU and these states. It suggests that there are increasing ties of cooperation, coordination and possibly even shared identity. And while the relationship between the EU and these states may not give rise to obligations of justice, it is plausible to think that one mutual obligation of the parties would be to facilitate the effective guarantee of the right to work for members of all states parties. In other words, one might expect that some additional measures would be made available to third-country nationals coming from these states to the EU to appropriately instantiate their right to work.

Of some relevance in this respect is the prohibition of discrimination on the ground of nationality and the obligation to coordinate their respective social security systems found in both the EEA Agreement<sup>83</sup> and the EC-Swiss Confederation Free Movement of Persons Agreement.<sup>84</sup> A general guarantee of equal treatment implies

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<sup>79</sup> Agreement between the European Community and its Member states, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

<sup>80</sup> EC-Swiss Confederation Free Movement of Persons Agreement, arts 7(a) and 9.

<sup>81</sup> *ibid* art 9.

<sup>82</sup> Decision No 2/2011 of the EU-Swiss Joint Committee established by Article 14 of the Agreement between the European Community and its Member states, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 30 September 2011 replacing Annex III (Mutual recognition of professional qualifications) thereto [2011] OJ L277/20.

<sup>83</sup> EEA Agreement, art 4 & Annex VI.

<sup>84</sup> EC-Swiss Confederation Free Movement of Persons Agreement, arts 2 & 8.



that EEA and Swiss nationals should be equally entitled to access education and training opportunities with member state nationals. EEA and Swiss nationals are therefore accorded treatment identical to member state nationals moving within the EU. While both the EEA Agreement and the EC-Swiss Confederation Free Movement of Persons Agreement abolish any discrimination on the grounds of nationality and provide for qualification recognition, no targeted integration measures are evident from the text of the documents. The agreements might be considered deficient in this respect.

However, there remain two potential remedial responses to this situation. As noted in respect of labour migrants in section II.C.1, the first response is to consider these measures as a matter of policy. If it could be established as a matter of policy that, as a result of additional measures, third-country nationals did not suffer discrimination or inadequate skills recognition, then there would be a strong policy case in favour of them. Such a policy argument, it might be thought, may not be compelling in the case of EEA and Swiss nationals because they are already quite highly integrated into the EU. This remains to be verified. The second response is interpretive: if the guarantee of equal treatment contained in the respective agreements could be interpreted broadly enough to enable EEA and Swiss nationals to benefit from additional measures necessary to instantiate their right to work, such as integration measures and education and training opportunities, then these agreements would withstand the force of the external dimension of neorepublicanism.

### **3. CETA and Mutual Recognition Agreements ('MRAs')**

CETA provides for the free movement of professionals between the EU and Canada for the purposes of temporary service provision.<sup>85</sup> Service providers are to be afforded national treatment or equal treatment with nationals of the states parties to CETA.<sup>86</sup> Chapter 11 thereof provides for the mutual recognition of qualifications which is designed to facilitate a 'fair, transparent and consistent regime for the mutual

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<sup>85</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member states, of the other part [2017] OJ L11/23, ch 9-10.

<sup>86</sup> CETA, art 9.3.

recognition of professional qualifications' by the parties and sets out the conditions for the negotiation of MRAs between the competent authorities of the parties. Article 11.2.3 provides that the parties will not adopt mutual recognition practises which are either discriminatory or disguised restrictions on trade in services. Furthermore, art 11.4.3 provides that an MRA cannot require recognition to be conditional upon the ability of a service supplier to meet any citizenship or residency requirement, nor the necessity to have completed or obtained education, training or professional qualifications in the party's jurisdiction.

Annex 11-A provides non-binding guidance on the negotiation of MRAs. Of particular interest is the four-step recognition process contained therein. According to this process, the following four steps should be adopted in every MRA to simplify the recognition process: (a) verification of equivalency; (b) evaluation of substantial differences; (c) compensatory measures; and (d) identification of the conditions for recognition. MRAs should also include, *inter alia*, certain requirements beyond professional qualifications, such as: having an office address, maintaining an establishment or being a resident; language skills; proof of good character; professional indemnity insurance; compliance with the host jurisdiction's requirements for use of trade or firm names; and compliance with the host jurisdiction ethics, for example, independence and good conduct.<sup>87</sup> At present, at least one MRA has been negotiated between the Architects' Council of Europe and its equivalent Canadian body.<sup>88</sup>

CETA is more limited than the EEA Agreement and the EC-Swiss Confederation Free Movement of Persons Agreement. It reflects a more fragmented degree of integration between the EU and Canada. For example, the free movement of persons is limited to temporary service providers alone and the guarantee of equal treatment under art 9.3 is afforded to service providers, giving them equal treatment with nationals of the host state. Given this limited degree of economic integration, the sorts of measures one would generally envisage as being necessary to secure the well-being

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<sup>87</sup> CETA, Annex 11A(6).

<sup>88</sup> ACE, 'ACE signed an agreement with the Canadian Architectural Licensing Authority to facilitate the mobility of Architects between the EU and Canada' (23 April 2018) <[https://www.ace-cae.eu/services/news/?tx\\_ttnews%5BbackPid%5D=1&tx\\_ttnews%5Btt\\_news%5D=1684&cHash=c8f538fe489e5af7ed6fd9b40b18ff8b](https://www.ace-cae.eu/services/news/?tx_ttnews%5BbackPid%5D=1&tx_ttnews%5Btt_news%5D=1684&cHash=c8f538fe489e5af7ed6fd9b40b18ff8b)> (accessed 5 December 2019).

of third-country nationals may not be considered necessary. However, recall from chapter 3.I.A.3 that there are different types of service providers, some of which may be employed workers. Specifically, intra-corporate transferees are generally employees. These people may benefit from the additional measures envisaged earlier, namely, integration measures, as well as education and training opportunities. Unlike the EEA Agreement and EC-Swiss Confederation Free Movement of Persons Agreement, however, it does not seem possible to interpret such measures into CETA in the absence of an equal treatment guarantee, but the argument from policy remains sound.

#### 4. 'CETA-minus' Arrangements

A number of other association and trade agreements provide potential avenues for the recognition of qualifications of certain third-country nationals. Specifically, the following agreements make provision for the (eventual) establishment of mutual recognition agreements: EU-Andean Trade Agreement;<sup>89</sup> EU-Armenia CEPA;<sup>90</sup> Bosnia and Herzegovina Stabilisation and Association Agreement;<sup>91</sup> Economic Partnership Agreement with CARIFORUM states;<sup>92</sup> Central America-EU Association Agreement;<sup>93</sup> EU-Chile Association Agreement;<sup>94</sup> EC-Georgia Association Agreement;<sup>95</sup> EU-Japan

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<sup>89</sup> Trade Agreement between the European Union and its member states, of the one part, and Columbia and Peru, of the other part [2012] OJ L353/3, art 129.

<sup>90</sup> Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L23/4, art 161.

<sup>91</sup> Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2, art 55.

<sup>92</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member states, of the other part [2008] OJ L289/1/3, arts 85 & 114.

<sup>93</sup> Agreement establishing an Association between Central America, on the one hand, and the European Union and its Member states, on the other [2012] OJ L363/3, art 177.

<sup>94</sup> Agreement establishing an association between the European Community and its Member states, of the one part, and the Republic of Chile, of the other part [2002] OJ L352/3, art 103.

<sup>95</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and Georgia, of the other part [2014] OJ L261/4, art 96.

Economic Partnership Agreement;<sup>96</sup> Euro-Mediterranean Agreement with Jordan;<sup>97</sup> EU-Korea Free Trade Agreement;<sup>98</sup> EC-Kosovo Stabilisation and Association Agreement;<sup>99</sup> EC-Macedonia Stabilisation and Association Agreement;<sup>100</sup> EC-Moldova Association Agreement;<sup>101</sup> EC-Montenegro Stabilisation and Association Agreement;<sup>102</sup> EU-Singapore Free Trade Agreement;<sup>103</sup> and EU-Ukraine Association Agreement.<sup>104</sup>

Many of the above-mentioned agreements require national authorities to encourage professional regulatory authorities to enter into discussion with their counterparts in the other contracting party and consider the possibility of mutual recognition. This is, however, a weak obligation. Like CETA, these agreements lack an equal treatment guarantee. However, as previously suggested, if it could be established empirically that workers (of any kind) from these countries are less likely to be affected by discrimination and inadequate skills recognition by affording them additional opportunities to have their qualifications recognised, integrate into the labour market and upskill or reskill, then there would be a compelling policy argument in favour of affording them equal treatment with member state nationals immediately.

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<sup>96</sup> Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L330/3, art 8.35(2).

<sup>97</sup> Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member states, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3, art 35.

<sup>98</sup> Free Trade Agreement between the European Union and its Member states, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, art 7.21.

<sup>99</sup> Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2006] OJ L71/3, art 56.

<sup>100</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13, art 52.

<sup>101</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, art 222.

<sup>102</sup> Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3, art 57.

<sup>103</sup> Free Trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3, art 8.16.

<sup>104</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3, art 106.

## 5. Equal Treatment Clauses

A final potential avenue facilitating access to qualification recognition, integration measures and education and training opportunities may be the guarantee of equality and non-discrimination made in many such agreements.

This possibility was first raised in *Razanatsimba*, in which the applicant, a Madagascan national, sought admission to the Lille Bar having met all other qualification requirements except that of nationality.<sup>105</sup> The applicant relied on art 62 of the EEC-African Caribbean and Pacific (ACP) States Convention (now art 13, annex II of the Cotonou Agreement<sup>106</sup>), which provided that the respective parties to the Convention must treat nationals and firms on a non-discriminatory basis in matters of establishment and the provision of services. According to the Court of Justice, art 62 did not require of member states or ACP states to treat nationals of the other group equally. Rather, 'the wording of the article does not purport to provide equality of treatment between nationals of an ACP state and those of a Member State of the EEC'.<sup>107</sup> In particular, 'that articles does not oblige either the ACP States or the Member States of the EEC to give to the nationals of a State belonging to the other group treatment identical to that reserved to their own nationals'.<sup>108</sup> Instead, 'that wording refers to the two groups of States bound by the Lomé Convention, the ACP States and the Member States of the EEC, and provides that any State belonging to one of the two groups shall treat nationals of any State belonging to the other group on a non-discriminatory basis'.<sup>109</sup> The Court went on to consider whether ACP nationals may be entitled to equality of treatment in respect of particular advantages accorded by member states to nationals of ACP states and concluded that it was acceptable for member states to provide preferential treatment to nationals of certain ACP states which did not benefit nationals of all ACP states equally.

Compare the result in *Razantsimba*, however, with the more recent decision in

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<sup>105</sup> Case 65/77 *Razanatsimba* [1977] ECR 2229.

<sup>106</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part [2013] OJ L173/1.  
<sup>107</sup> [1977] ECR 2229 [13].

<sup>108</sup> [1977] ECR 2229 [14].

<sup>109</sup> [1977] ECR 2229 [12].

*Simutenkov*, in which the applicant, a Russian national and football player resident and working in Spain, was required to hold a 'non-Community' football licence.<sup>110</sup> The applicant applied for a Community licence but was refused. Relying on the equal treatment guarantee in the EC-Russia Partnership and Cooperation Agreement,<sup>111</sup> the applicant challenged this decision. According to the Court of Justice, the equal treatment guarantee contained therein was directly effective. The rule concerning the non-Community licence was consequently found to be invalid.

However, in *Pavlov*, the Court held that equal treatment in working conditions does not include access to a profession itself.<sup>112</sup> In that case, the applicant, a Bulgarian national, completed his legal studies in Vienna and then worked as an employee in a lawyer's office in Vienna. The applicant held a residence permit and establishment permit in Austria authorising him to work therein. The applicant applied to be included on the list of trainee lawyers and to be issued with a certificate of entitlement to appear in court as required under Austrian law. However, it was a requirement of Austrian law that person concerned meet a nationality requirement; that is, that they be Austrian, an EU citizen or a citizen of an EEA State or the Swiss Confederation. The applicant, accordingly, failed to meet that criterion. Challenging the decision, the applicant relied on an equal treatment clause in the EC-Bulgaria Association Agreement<sup>113</sup> which provided that workers of Bulgarian nationality resident in the EU must not be discriminated against on the ground of nationality, in particular as regards working conditions. However, that agreement further provided that, inter alia, the parties to the EC-Bulgaria Association Agreement will examine what steps are necessary to provide for the mutual recognition of qualifications.<sup>114</sup> In the light of this provision, the CJEU held that the EC-Bulgaria Association Agreement did not provide for the total abolition of discrimination on the ground of nationality, in particular as it relates to access to regulated professions rather than working conditions. In other words, the conditions

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<sup>110</sup> Case C-265/03 *Simutenkov* [2005] ECR I-2579.

<sup>111</sup> Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3, art 23.

<sup>112</sup> Case C-101/10 *Pavlov* [2011] ECR I-05951.

<sup>113</sup> Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L358/1, art 38.

<sup>114</sup> EC-Bulgaria Association Agreement, art 47.

for access to a profession did not constitute working conditions but rather fell to be considered separately under the provisions of the Agreement on establishment.

Non-discrimination clauses concerning the treatment of workers are also contained in the: Ankara Agreement;<sup>115</sup> Euro Mediterranean Agreement with Algeria;<sup>116</sup> EC-Azerbaijan Agreement;<sup>117</sup> Bosnia and Herzegovina Stabilisation and Association Agreement;<sup>118</sup> EC-Macedonia Stabilisation and Association Agreement;<sup>119</sup> EC-Montenegro Stabilisation and Association Agreement;<sup>120</sup> Euro-Mediterranean Agreement with Morocco;<sup>121</sup> EC-Serbia Stabilisation and Association Agreement;<sup>122</sup> Euro-Mediterranean Agreement with Tunisia;<sup>123</sup> and EU-Ukraine Association Agreement.<sup>124</sup>

It is plausible that the equal treatment guarantees in these agreements could be used to apply the same procedure for the recognition of qualifications as applies to nationals of the member states but, in the light of *Pavlov*, equal treatment in working conditions may not include within its scope access to a profession. However, it is possible to partially distinguish the judgment in *Pavlov* insofar as it was based on a particular interpretation of the EC-Bulgaria Association Agreement<sup>125</sup> which is unlikely to apply with full rigour to all of the agreements noted above. According to the CJEU in that case, '[n]othing in the Association Agreement (...) allows it to be deduced (...) that the contracting parties intended to eliminate all discrimination based on nationality as

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<sup>115</sup> Agreement establishing an Association between the European Economic Community and Turkey [1977] OJ L361/1, art 9.

<sup>116</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member states, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2, art 67.

<sup>117</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L246/3, art 20.

<sup>118</sup> Bosnia and Herzegovina Stabilisation and Association Agreement, art 47.

<sup>119</sup> EC-Macedonia Stabilisation and Association Agreement, art 44.

<sup>120</sup> EC-Montenegro Stabilisation and Association Agreement, art 49.

<sup>121</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member states, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2, art 64.

<sup>122</sup> Stabilisation and Association Agreement between the European Communities and their Member states of the one part, and the Republic of Serbia, on the other part [2013] OJ L278/16, art 49.

<sup>123</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member states, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2, art 64.

<sup>124</sup> EU-Ukraine Association Agreement, art 17.

<sup>125</sup> Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L358/1.

regards access to regulated professions by Bulgarian nationals'.<sup>126</sup> The Court also noted that the non-discrimination clause in that agreement was contained in the title on workers and no equivalent guarantee was provided in the title concerning establishment and service provision. It will thus only be in the light of a holistic interpretation of an equal treatment guarantee and its place within an association and trade agreement that we can judge with certainty whether or not it will extend to the recognition of qualifications on equal terms with member state nationals. The fact that the equal treatment guarantees found in these agreements are so open to varied interpretations may provide a source of domination for third-country nationals seeking to have their qualifications recognised.

Like the EEA Agreement and the EC-Swiss Confederation Free Movement of Persons Agreement, these agreements contain equal treatment clauses prohibiting discrimination on the grounds of nationality in respect of working conditions. It is therefore plausible that a broad interpretation of the equal treatment guarantees contained therein could be used to afford third-country nationals entering the EU on the basis of these agreements the sorts of measures identified as being necessary, viz, qualification recognition procedures, integration measures and education and training facilities. The argument from policy also remains sound.

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<sup>126</sup> [2011] ECR I-05951 [27].



## C. Mobility Partnerships<sup>127</sup>

Mobility Partnerships between the EU, some of its member states and third-countries are non-binding arrangements, primarily targeted at countries in the EU Neighbourhood, which facilitate mobility, visa facilitation and readmission agreements and pre-departure measures. Such arrangements are currently in place between the EU and Moldova (2008), Cape Verde (2008), Georgia (2009), Armenia (2011), Morocco (2013), Azerbaijan (2013), Tunisia (2014), Jordan (2014) and Belarus (2016). These arrangements facilitate the creation of dedicated 'Migration and Mobility Resource Centres' which serve as a one-stop shop for individuals seeking information and support on validation of their qualifications, skills upgrading and skills needs at national or regional levels or in the EU and provide pre-departure, return and reintegration measures.<sup>128</sup> For example, the Belarussian Mobility Partnership envisages that cooperation will entail 'pre-departure training' as well as the facilitation of 'mutual recognition of vocational and academic qualifications' with specific reference to the Lisbon Convention, including the development 'of curricula in such a manner as to enhance recognition of respective qualifications'. Similarly, the Georgian Mobility

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<sup>127</sup> See, inter alia, Roderick Parkes, 'EU Mobility Partnerships: A Model of Policy Coordination?' (2009) 11 EJML 327; Natasja Reslow, 'Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships' (2012) 34 European Integration 223; Natasja Reslow, 'The Role of Third-Countries in EU Migration Policy: The Mobility Partnerships' (2012) 14 EJML 393; Stefan Angenendt, 'Mobility Partnerships – The Future of European Migration Policy?' (2012) 1 Migration and Development 216; Paula García Andrade, 'The Legal Feasibility of the EU's External Action on Legal Migration: The Internal and the External Intertwined' (2013) 15 EJML 263; Julia Maisenbacher, 'The Political Economy of Mobility Partnerships – Structural Power in the EU's External Migration Policy' (2015) 20 New Political Economy 871; Natasja Reslow, 'EU 'Mobility' Partnerships: An Initial Assessment of Implementation Dynamics' (2015) 3 Politics and Governance 117; Stefan Brocza and Katharina Paulhart, 'EU Mobility Partnerships: A Smart Instrument for the Externalisation of Migration Control' (2015) 3 European Journal of Futures Research 15; Leonhard den Hertog, 'Funding the EU-Morocco 'Mobility Partnership': Of Implementation and Competences' (2016) 18 EJML 275; Natasja Reslow, "Not everything that counts can be counted": Assessing 'success' of EU external migration policy' (2017) 55 IM 156; Fanny Tittel-Mosser, 'The Unintended Legal and Policy Relevance of EU Mobility Partnerships: A Comparative Implementation Analysis of Morocco and Cape Verde' (2018) 20 EJML 314; Natasja Reslow, 'Making and Implementing Multi-Actor EU External Migration Policy: The Mobility Partnerships' in Sergio Carrera, Arie Pieter Leonhard den Hertog, Marion Panizzon and Dora Kostakopoulou (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff 2018); and Fanny Tittel-Mosser, 'Mobility Partnerships: A Tool for the Externalisation of EU Migration Policy? A Comparative Study of Morocco and Cape Verde' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policy in Times of Crisis* (Edward Elgar 2019).

<sup>128</sup> Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final 14.

Partnership envisages measures designed to tackle the 'brain drain and brain waste' by, inter alia, facilitating the recognition of qualifications, labour-matching tools and educational programmes.

In principle, these centres are beneficial and provide precisely the sort of measures here envisaged. It would, accordingly, be helpful if these centres were institutionalised throughout the EU's external relations. However, they are not without their drawbacks. First, these arrangements are simply that; arrangements, not legally binding agreements. They do not provide third-country nationals with rights which they can rely upon. This is not necessarily problematic but the point nonetheless merits noting. Second, most of these agreements are of relatively recent vintage and much research remains to be done in respect of their actual implementation in practice. The vast majority of the materials cited at note 130 are concerned with the extent to which the Mobility Partnerships have been negotiated and funded, while less of those materials are concerned with how successfully they have been implemented in practice. Of the literature which does address the implementation of the Mobility Partnerships, Nastaja Reslow and Fanny Tittel-Mosser's contributions stand out as meriting attention.

Across two papers, Reslow considers the implementation and success of the Mobility Partnerships agreed to date in a general way.<sup>129</sup> In other words, Reslow abstracts from specific Mobility Partnerships and identifies ways in which they can be implemented and adjudged successful. In terms of implementation, one point which emerges is that the fact that they are voluntary and non-binding may be of benefit; member states must choose to participate in the Mobility Partnerships. In terms of success, while the Commission noted in its exceptionally early review (2009) that the Mobility Partnerships are 'promising, innovative and comprehensive tools',<sup>130</sup> Reslow, rather than reaching a conclusion as to their success, develops an analytical framework which, going forward, may be used to assess their success. This framework emphasises 'goal achievement, political success, normative justification, costs, time and external

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<sup>129</sup> 'EU 'Mobility' Partnerships: An Initial Assessment of Implementation Dynamics' (n 127); and "Not everything that counts can be counted": Assessing 'success' of EU external migration policy' (n 127).

<sup>130</sup> Commission, 'Mobility Partnerships as a Tool of the Global Approach to Migration' SEC(2009) 1240, 8.

factors' as relevant to determining the success of the Mobility Partnerships in practice.<sup>131</sup> Such a framework, however, faces a number of obstacles. First, there is a significant lack of data available by which to judge the success of Mobility Partnerships in practice. Second, the analytical framework will itself require some amendment to function effectively. Third and relatedly, given the generality of such a framework, case studies may be necessary to apply it in practice.

Accordingly, and by contrast, Tittel-Mosser's analysis involves a more fine-grained case study approach. She focuses on the implementation of the Mobility Partnerships with Morocco and Cape Verde. Of particular relevance is her focus on the changes made in Moroccan and Cape Verdean law since the development of the Mobility Partnerships, such as the liberalisation of certain restrictions on access to and practise of some professions, as well as the development of national immigration and integration policies. As Tittel-Mosser notes, while there is, strictly speaking, not a causal relationship between the development of the Mobility Partnerships and these changes, there is at least a correlation.

To summarise this very limited overview of Mobility Partnerships: while offering some important benefits in principle, many of these remain to be proven empirically. There is some evidence in certain cases of a correlation between Mobility Partnerships and changes in the EU's external relations with some third-countries. Whether this is systematically the case remains to be empirically verified.

#### **IV. Recognition of Non-Formal and Informal Learning<sup>132</sup>**

The point of recognising skills obtained in non-formal and informal contexts is to institutionalise knowledge, competencies and skills which would otherwise remain informal. To put it another way, it provides the opportunity for productive activity—

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<sup>131</sup> "Not everything that counts can be counted': Assessing 'success' of EU external migration policy' (n 127) 165.

<sup>132</sup> See generally Patrick Werquin, *Recognising Non-Formal and Informal Learning: Outcomes, Policies and Practices* (OECD 2010) and Madhu Singh, *Global Perspectives on Recognising Non-Formal and Informal Learning: Why Recognition Matters* (Springer Open 2015).

work—which would otherwise be de-institutionalised and unpaid to become organised, institutionalised and, possibly, even paid. In the light of the concept of skills adopted in chapter 2.II.B.2 and the concept of work adopted in chapter 3.II.B, this is an important, welcome and necessary process. Recall that Part Three, Title XII TFEU provides for education and training in the Union. As we shall see in chapter 7, education and training in the EU is a shared competence; the Union’s competence is accordingly limited to ‘encouraging cooperation between member states’.<sup>133</sup> Any measures adopted by the Union in this area are therefore likely to be limited; indeed, harmonisation of laws is expressly excluded. Instead, the Council may adopt non-binding recommendations in respect of education policy.

The key measure in respect of the recognition and validation of non-formal and informal learning is the Council Recommendation on the validation of non-formal and informal learning (‘the Recommendation’).<sup>134</sup> In the recitals to the Recommendation, the Council notes that validating non-formal and informal learning can ‘play an important role in enhancing employability and mobility, as well as increasing motivation for lifelong learning, particularly in the case of socio-economically disadvantaged or the low-qualified’.<sup>135</sup> The Recommendation therefore acknowledges the need to recognise the skills of those who are likely to be most vulnerable and at risk of social exclusion and isolation. It gives such groups the opportunity to live their way of life through the recognition of the skills they have acquired, even though they may not be traditionally recognised as being of significant economic value in the community. And the breadth or scope of application of the Recommendation is significant. For example, the Recommendation defines ‘informal learning’ as ‘learning resulting from daily activities related to work, family or leisure and is not organised or structured in terms of objectives, time or learning support; it may be unintentional from the learner’s perspective’.<sup>136</sup> Expressly included in the definition of ‘informal learning’ is ‘activities at home (eg taking care of a child)’.<sup>137</sup> This is precisely the sort of activity

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<sup>133</sup> TFEU, art 165(1).

<sup>134</sup> [2012] OJ C398/1. See also CEDEFOP, *European guidelines for validating non-formal and informal learning* (Publications Office of the European Union 2015).

<sup>135</sup> The Recommendation, recital 1.

<sup>136</sup> The Recommendation, Annex (c).

<sup>137</sup> *ibid.*

which we mentioned in chapter 3.II.A that is often overlooked in assessing what work is and involves.

According to the Recommendation, the member states should have in place, no later than 2018, arrangements for the validation of non-formal and informal learning, providing candidates with the possibility of obtaining some sort of qualification, in whole or in part, in respect of their non-formal and informal learning. According to the Council, validating such learning through the provision of qualifications 'can increase (...) participation in lifelong learning and (...) access to the labour market'.<sup>138</sup> While much of the above is welcome, there are several drawbacks to the Recommendation. For one, it is only a recommendation. There is no obligation on the member states to implement its terms. Whether or not this measure is nonetheless successful depends on the extent to which it establishes norms guiding member states conduct. This is an empirical question beyond the scope of this thesis. In respect of this recommendation specifically, in 2016 Lilli Casano demonstrated that the member states have been slow to implement its terms and many member states have simply made no effort at all. In general, her research remains accurate to date. Moreover, where efforts have been made, key stakeholders such as employers' associations and trade unions have not been sufficiently involved. Furthermore, there has been a strong tendency towards 'formalisation', ie, validation of skills obtained in an informal context but without a correlate focus on ensuring that people can subsequently benefit from such validation, ie, obtaining paid employment.<sup>139</sup> Finally, no account is taken of the role which validation of non-formal or informal learning might play in respect of third-country nationals specifically, although they may be considered to be a 'disadvantaged' group as noted in the recitals. Indeed, as the Commission noted in its recent *Fitness Check on EU Legislation on legal migration*,

"there is no (...) automatic coverage by third-country nationals (already residing in the EU) by existing validation arrangements. Moreover, equal treatment under the legal migration directives refers to the 'recognition of diplomas,

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<sup>138</sup> *ibid*, art 1(3)(c).

<sup>139</sup> Lilli Casano, 'The Future of European Labour Law and the Right to Employability: Which Role for the Validation of Non-Formal and Informal Learning?' (2016) 7 ELLJ 498.

certificates and other professional qualifications' and not more specifically to equal access to 'schemes for the assessment, validation and accreditation of prior learning and experience'.<sup>140</sup>

## V. Integration Measures

### A. Overview

Article 79(4) TFEU, part of the Treaty provisions on migration and asylum law, provides that the Parliament and Council may adopt measures, excluding the harmonisation of laws, which provide 'incentives and support' to the Member states in facilitating the integration of third-country nationals legally resident in the EU.<sup>141</sup> There are a number of contemporary integration policy measures and funds which are relevant to the recognition of third-country nationals' qualifications here outlined and analysed.

### B. Policies and Initiatives concerning the Integration of Third-Country Nationals

A full background to all EU policies concerning the integration of third-country nationals is essentially extraneous to the purpose of this chapter; useful and detailed analyses are available elsewhere.<sup>142</sup> It is, however, necessary to note that the importance of qualification recognition was not recognised in the EU's earliest integration policies, namely the Tampere European Council Conclusions<sup>143</sup> and the

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<sup>140</sup> 'Fitness Check on EU Legislation on legal migration' (n 61) 133.

<sup>141</sup> Klára Fóti, 'The role of the EU in integrating asylum seekers and refugees: limitations and opportunities' (2019) 25 Transfer 121.

<sup>142</sup> Jan Niessen and Thomas Huddleston (eds), *Legal Frameworks for the Integration of Third-Country Nationals* (Nijhoff 2009); Micaela Malena and Sonia Morano-Foadi, 'Integration Policy at European Union Level' in Sonia Morano-Foadi and Micaela Malena (eds), *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (Edward Elgar 2012); Clíodhna Murphy, *Immigration, Integration and the Law: The Intersection of Domestic, EU and International Law Regimes* (Ashgate 2013) ch 6; Blanca Garcés-Mascreñas and Rinus Penninx (eds), *Integration Processes and Policies in Europe: Contexts, Levels and Actors* (SpringerOpen 2016); and Pierre Georges Van Wolleghem, *The EU's Policy on the Integration of Migrants: A Case of Soft-Europeanisation?* (Palgrave Macmillan 2019). In respect of asylum seekers and refugees specifically, see the special edition of (2019) 25 Transfer 13-129.

<sup>143</sup> Tampere Presidency Conclusions, 15-16 October 1999.

Hague Programme.<sup>144</sup> Although the recognition of the skills of third-country nationals was taken into account on numerous occasions,<sup>145</sup> it was not until the adoption of the Stockholm Programme in 2009 that the European Council fully recognised the need to adopt 'coherent immigration policies as well as better integration assessments of the skills in demand on the European labour markets'.<sup>146</sup>

In the Stockholm Programme, the European Council also invited the Commission and Council to evaluate existing policies that should 'improve skills recognition and labour matching between the European Union and third countries and the capacity to analyse labour market needs (...) and skills matching in the country of origin'.<sup>147</sup> Subsequently, in the *Conclusions of the Council and the Representatives of the Governments of the Member states on Integration as a Driver for Development and Social Cohesion*, the Council and Representatives recognised the need to 'find new ways to recognise qualifications, training or professional skills and work experience of immigrants'.<sup>148</sup> The immediate follow-up to the Council's analysis was the formulation of the *European Agenda for the Integration of Third-Country Nationals* by the Commission, which emphasised, inter alia, the need to recognise foreign qualifications and support pre-departure qualification recognition measures in the migrant's country of origin.<sup>149</sup> This theme was repeatedly echoed thereafter in the Commission's Communications on *Migration*,<sup>150</sup> *The Global Approach to Migration and Mobility* (the

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<sup>144</sup> Brussels Presidency Conclusions, 5-4 November 2004; Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' [2005] OJ C53/1.

<sup>145</sup> Justice and Home Affairs Council Conclusions, *Common Basic Principles on Immigrant Integration*, Council Document 14615/04, Brussels, 19 November 2004, Common Basic Principle 3; Commission, 'A Common Agenda for Integration: Framework for the Integration of Third Country Nationals in the European Union' (Communication) COM(2005) 389 final, 16; Commission, 'A Common Immigration Policy for Europe - Principles, Actions and Tools' (Communication) COM(2008) 359 final, 6; and Commission, 'Strengthening the Global Approach to Migration - Increasing Coordination, Coherence and Synergies' (Communication) COM(2008) 611 final, 4.

<sup>146</sup> European Council, *The Stockholm Programme—An Open and Secure Europe serving and protecting citizens* (Brussels, 2 December 2009) 63.

<sup>147</sup> *ibid.*

<sup>148</sup> Council of the European Union, *Conclusions of the Council and the Representatives of the Governments of the Member states on Integration as a Driver for Development and Social Cohesion* (Brussels, 4 May 2010) 4.

<sup>149</sup> Commission, 'European Agenda for the Integration of Third-Country Nationals' (Communication) COM(2011) 455 final, 7, 10-11.

<sup>150</sup> Commission, 'Migration' (Communication) COM(2011) 248 final, 16.

'GAMM', previously discussed in the introductory chapter)<sup>151</sup> and *An Open and Secure Europe*.<sup>152</sup>

A recent report for the International Organisation for Migration provides extensive reflections on the practical implementation of these policies.<sup>153</sup> It first notes that while there is, strictly speaking, no clear legal basis for pre-departure qualification recognition measures at EU level, at least one broad interpretation<sup>154</sup> of the provisions of the Family Reunification Directive and the LTR Directive concerning 'integration measures', previously discussed in section II.B.1(ii)-(iii) above, may permit the adoption of pre-departure qualification recognition measures by the member states. However, as previously suggested, it would be preferable if this were clarified so that there was a clear legal basis upon which pre-departure measures could be developed.<sup>155</sup>

Subsequent to the above-mentioned policies and the adoption of most of the Mobility Partnerships discussed in section III.C, in January 2015 the European Economic and Social Committee ('EESC') organised the first meeting of the European Migration Forum ('EMF'), 'a platform for dialogue between civil society and the European institutions, on issues relating to migration, asylum and the integration of third-country nationals'.<sup>156</sup> The EMF replaced the European Integration Forum ('EIF'), established in 2009 by the EESC, which met biannually. The EIF had briefly considered the issue of qualification recognition at its fourth,<sup>157</sup> eighth<sup>158</sup> and ninth<sup>159</sup> meetings—

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<sup>151</sup> Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final.

<sup>152</sup> Commission, 'An Open and Secure Europe: Making it Happen' (Communication) COM(2014) 154 final, 4.

<sup>153</sup> Alin Chindea, *Headstart to Integration: A Global Review of Pre-departure Support Measures for Migrants* (IOM 2015).

<sup>154</sup> That of Sergio Carrera and Anja Wiesbrock, *Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy* (Centre for European Policy Studies 2009).

<sup>155</sup> See generally Kees Gronendijk, 'Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?' (2011) 13 EJML 1.

<sup>156</sup> EESC, 'European Migration Forum' <<https://www.eesc.europa.eu/en/sections-other-bodies/other/european-migration-forum>> accessed 17 April 2018.

<sup>157</sup> EESC, 'Summary Report: Fourth Meeting of the European Integration Forum, Brussels, 6-7 December 2010' 2 available at <<https://ec.europa.eu/migrant-integration/eiforum/4th-european-integration-forum>> accessed 18 April 2018.

<sup>158</sup> EESC, 'Summary Report: Eighth Meeting of the European Integration Forum, Brussels, 16-17 October 2012' 6 available at <<https://ec.europa.eu/migrant-integration/eiforum/8th-european-integration-forum-the-contribution-of-migrants-to-economic-growth-in-the-eu>> accessed 18 April 2018.

<sup>159</sup> EESC, 'Summary Report: Ninth Meeting of the European Integration Forum, Brussels, 4-5 June 2013' 6 available at <<https://ec.europa.eu/migrant-integration/eiforum/8th-european-integration-forum-the-contribution-of-migrants-to-economic-growth-in-the-eu>> accessed 18 April 2018.



notwithstanding that it had been envisaged to constitute a significant aspect of its work from the outset<sup>160</sup>—but quite full consideration was given to the issue at the EMF’s meeting in 2018. Specifically, workshops at that meeting addressed, *inter alia*, (i) best practice in skills recognition and (ii) matching refugees’ skills with labour market needs.

In respect of the first issue, participants recognised the significance of supplying migrants with information concerning skills’ recognition processes. The availability of a range of validation tools was supported, including visual and multi-lingual tools. Mentoring was also seen as an important skills recognition and enhancement strategy; a third-country national may better understand and develop their own skills through dialogue with a colleague. In respect of the second workshop, participants emphasised the importance, actual and potential, of civil society organisations and digital tools in matching skills. Best practices identified by participants included the need to move to different areas within a single member state to obtain work; fast-track training schemes; mentoring; and the possibility of changing status or altering the residence rights of asylum seekers.<sup>161</sup> While the Forum is quite obviously discursive in nature, it may nonetheless play an important role in facilitating an exchange of ideas and best practices between member state authorities and national civil society organisations. And while it is understandable that the EMF’s discussions focussed on asylum seekers and refugees given the occurrence of the European Migrant Crisis at the time, it is unfortunate that it did not take the opportunity to address the skills’ recognition needs of third-country nationals more generally.

At the EMF’s meeting in April 2019, ten recommendations were adopted, some of which are of particular relevance. Specifically, at a workshop entitled, ‘What is the Future of EU Legal Migration Policy?’, the EMF concluded that a single directive should be adopted harmonising the admission conditions and rights for all third-country nationals, including equal treatment and intra-EU mobility rights. Establishing a structured process for consulting with NGOs, local authorities and the social partners

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<sup>160</sup> Commission, ‘An Area of Freedom, Security and Justice serving the Citizen’ (Communication) COM (2009) 262 final, 25.

<sup>161</sup> EESC, ‘European Migration Forum—4th Meeting’ <<https://www.eesc.europa.eu/en/agenda/our-events/events/european-migration-forum-4th-meeting>> accessed 17 April 2018; and see the downloads available on the same page which provide a summary of the event.

was also recommended at this workshop. At another workshop, entitled, 'From global to local governance of migration: the role of local authorities in managing migration', the possibility of collaboration and cooperation amongst local groups, such as NGOs and local authorities was also envisaged. Harmonising integration processes across the Union and providing targeted funding to facilitate same was also recommended.<sup>162</sup> Reference was further made in passing to the possibility of adopting a directive facilitating the recognition of qualifications of third-country nationals.<sup>163</sup> While it is clear that these recommendations are of value, it remains to be seen whether they will be acted upon by the EU and its member states.

The second measure of practical significance to be adopted was the *European Dialogue on Skills and Migration*, a platform for employers, public sector bodies and other stakeholders to discuss labour migration and labour market integration of third-country nationals. Thus far, two meetings have been held under the auspices of the *Dialogue*, at which two conclusions of relevance were reached. The first acknowledged that there is a need for improved qualification recognition across the EU. In particular, it was acknowledged that recognition of qualifications in one member state should be more easily recognised in another member state, without necessarily harmonising legislation on qualification recognition. The Dialogue emphasised the role that employers, public service providers and other stakeholders play in assessing qualifications, and the need for these stakeholders to create partnerships with equivalent third-country organisations. The possibility of compensation measures to make up for skills disparities between third-country nationals and member state standards was also recognised. The second key conclusion was the need to match employers' needs and migrants' skills and competences. While this conclusion was primarily targeted at refugees, company visits, orientation days, and 'speed-dating' arrangements between all third-country migrants and potential employers is

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<sup>162</sup> EESC, 'The 10 recommendations adopted by the Forum' <[https://www.eesc.europa.eu/sites/default/files/files/recommendations\\_adopted\\_by\\_the\\_european\\_migration\\_forum\\_5th\\_meeting.pdf](https://www.eesc.europa.eu/sites/default/files/files/recommendations_adopted_by_the_european_migration_forum_5th_meeting.pdf)> accessed 11 December 2019.

<sup>163</sup> EESC, 'European Migration Forum' (10 April 2019) available at <<https://dmsearch.eesc.europa.eu/search/public>> accessed 11 December 2019.

envisaged as a positive strategy.<sup>164</sup> In general, these suggestions should be welcomed, generalised, systematised and institutionalised across the Union.

One important development emerging from the Dialogue which does seem very practical is *Employers Together for Integration*, an initiative which places employers at the centre of integration processes. Several large north European companies are participating in the programme, and are offering internship, apprenticeship and corporate degree programmes and scholarship opportunities to refugees.<sup>165</sup> This sort of active engagement with migrants should, from the perspective of freedom as non-domination, be welcomed and expanded to other categories of third-country nationals, not merely refugees. Given that it is also not a systematic programme, it would however be better if a comprehensive approach were adopted.

A final and similar measure is the *European Partnership for Integration*,<sup>166</sup> a partnership between the Commission and the social and economic partners which aims to foster refugee integration as soon as possible, particularly through labour market access and participation. The Commission and social and economic partners agree to gather and share information concerning best practices in, inter alia, skills and qualification recognition and enhancement, providing feedback to public authorities on the success or failure of public policies in this area. The core activities of the partnership involve information exchanges, the establishment of networks and ensuring 'synergies' with other initiatives.

Of course, the major project undertaken by the Commission in this field of late is the *Action Plan on the integration of third country nationals*, issued after the beginning of the European Migrant Crisis in 2015.<sup>167</sup> The *Action Plan* sets out several tasks to be

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<sup>164</sup> This summary is based on information here: DG Migration and Home Affairs, 'European Dialogue on Skills and Migration' <[https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/european-dialogue-skills-and-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/european-dialogue-skills-and-migration_en)> accessed 16 April 2018.

<sup>165</sup> DG Migration and Home Affairs, 'Employers together for integration' <[https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/european-dialogue-skills-and-migration/integration-pact\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/european-dialogue-skills-and-migration/integration-pact_en)> accessed 16 April 2018.

<sup>166</sup> Commission, *A European Partnership for Integration: Offering opportunities for refugees to integrate into the European labour market* (20 December 2017) <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/integration/docs/20171220\\_european\\_partnership\\_for\\_integration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/integration/docs/20171220_european_partnership_for_integration_en.pdf)> accessed 18 April 2018.

<sup>167</sup> Commission, 'Action Plan on the Integration of Third Country Nationals' (Communication) COM(2016) 377 final.

undertaken by the Commission and the member states in relation to third-country nationals generally. These measures addressed all the main stages in the migration and employment process, namely, pre-departure education recognition, labour market participation, access to basic services, active participation and social inclusion, and tools for coordination, funding and monitoring. Under these headings, the most important and relevant actions and measures were the following:

- Launching projects to support effective pre-departure and pre-arrival measures under the Asylum, Migration and Integration Fund;
- Providing Erasmus+ online language assessment and learning for around 100,000 newly arrived third country nationals, in particular refugees;
- Promoting the upskilling of low-skilled and low-qualified persons in the context of the *New Skills Agenda for Europe* (previously discussed in the introductory chapter);
- Developing a 'Skills Toolkit for Third Country Nationals' under the *New Skills Agenda for Europe* to support timely identification of skills and qualifications for asylum seekers, refugees and other third country nationals;
- Improving transparency and understanding of qualifications acquired in third-countries, through the revision of the European Qualifications Framework ('EQF'), that will enhance its implementation and extend its scope to include the possibility to establish links with qualifications frameworks of other regions of the world; and
- Funding projects promoting 'fast track' insertion into labour market and vocational training.<sup>168</sup>

Setting aside funding for now, perhaps the most significant of these developments is the *New Skills Agenda for Europe*.<sup>169</sup> According to the Commission in its communication thereon, it shall take, inter alia, the following measures, namely,

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<sup>168</sup> *ibid* 18-21.

<sup>169</sup> Commission, 'A New Skills Agenda for Europe: Working together to strengthen human capital, employability and competitiveness' (Communication) COM(2016) 381 final.

- a revision of the EQF which promotes the comparability of qualifications between countries covered by the EQF and other countries, such as countries in the European Neighbourhood Policy;
- the development of a 'Skills Profile Tool for Third Country Nationals';
- cooperating with national authorities to support the recognition of third-country nationals' qualifications; and
- making online language learning modules available for newly arriving migrants.

As of May 2020, the EQF has been revised, and the Commission is now preparing to implement the changes.<sup>170</sup> The revised EQF recommendation makes little reference to professional qualifications, except to note that common training frameworks adopted under the Recognition Directive, the subject of chapter 8, are to be based on EQF levels.<sup>171</sup> However, it is possible that the EQF may touch on the recognition of professional qualifications in one other way. It recommends that the Commission, in cooperation with the Member states, and stakeholders, considers the 'development and application of criteria and procedures to enable, in accordance with international agreements, the comparison of third countries' national and regional qualifications frameworks with the EQF'.<sup>172</sup> While there is thus no duty undertaken by the Commission as such, nor any action on the part of the Commission on this issue as of yet, it does support the possibility of increased recognition of skills in the future. This possibility, explored further in chapter 6.II, may, eventually, provide a basis for third-country qualifications to be more easily compared and recognised with those obtained in the EU. Moreover, a number of comparative studies between the EQF and other

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<sup>170</sup> Council Recommendation on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2017] OJ C189/15.

<sup>171</sup> [2017] OJ C189/15, recital 20.

<sup>172</sup> [2017] OJ C189/15, art 13.

frameworks have recently been undertaken, including between Hong Kong, Australia and New Zealand.<sup>173</sup>

The second step proposed by the Commission, namely the development of a 'Skills Profile Tool for Third Country Nationals', has been implemented.<sup>174</sup> The fourth step—the provision of online language learning—has now been made available by the Commission through the Erasmus+ programme. This measure is actually targeted at EU migrants, but the Commission has ensured that special modules are available for refugees. The same provision should be made for third-country nationals shortly arriving and currently in the EU. The fact that these language modules have been made available to EU nationals highlights how the problem of integration is not confined to third-country nationals but also affects member state nationals. Indeed, many of my concerns for third-country nationals' integration in general can be mapped on to member state nationals when moving within the EU.

The third step—cooperating with national authorities—is underway. Thus far, a repository of promising practices in aid of the social and labour market integration of refugees has been established by DG Employment, Social Affairs and Inclusion, and several of these are quite insightful and relevant to the recognition of qualifications.<sup>175</sup> Examples include the pilot project of the Austrian Public Employment Service "Skills check for the vocational integration of refugees" (*AMS-Pilotprojekt "Kompetenzcheck zur beruflichen Integration von Asylberechtigten"*) which involves a skills assessment, assisting applicants for recognition in undertaking the recognition procedure, a verification of skills on the basis of field trials and the writing up of a detailed CV for the purposes of labour market access.

Similar processes have been adopted in Germany under the "Every person has potential – labour market integration of asylum seekers (Early Intervention)" (*"Jeder Mensch hat Potenzial – Arbeitsmarktintegration von Asylbewerberinnen und Asylbewerbern (Early Intervention)"*) and Prototyping Transfer – recognition of

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<sup>173</sup> See, for example, GHK, *Study on the (potential) role of qualifications frameworks in supporting mobility of workers and learners: European Commission and Australian Department of Education, Employment and Workplace Relations Joint EU-Australia Study* (DEEWR and DG EAC 2011).

<sup>174</sup> Commission, 'EU Skills Profile Tool for Third Country Nationals' <<https://ec.europa.eu/migrantskills/#/>> accessed 24 January 2018.

<sup>175</sup> DG Employment, Social Affairs and Inclusion, 'Repository of Promising Practices' <<http://ec.europa.eu/social/main.jsp?langId=en&catId=1208>> accessed 25 January 2018.

professional and vocational qualifications via qualification analyses ("*Prototyping Transfer-Berufsanerkennung mit Qualifikationsanalysen*") projects. A similar Dutch project is also quite advanced. "Recognition of Refugee Qualifications" ("*Diplomawaardering voor vluchtelingen*") provides a number of useful services such as producing descriptions of the educational systems and qualifications of refugees' countries of origin and organising workshops on the issue of qualification recognition for refugees. As these are pilot projects, however, we await a final, definitive systematic and institutionalised response by the EU and the member states. Indeed, while all of the above measures are laudable, they lack systematisation and institutionalisation, features which, as noted in chapter 1.V, the law as an institutional normative system can distinctively provide.

## C. Funds supporting the Integration of Third-Country Nationals

### 1. The European Social Fund ('ESF')<sup>176</sup>

According to art 2(1) of the instrument establishing the ESF, the fund is designed to, inter alia, 'promote high levels of employment and job quality, improve access to the labour market [and] support the geographical and occupational mobility of workers'. The ESF is based on a *regulation*, not a *directive*, as envisaged by art 164 TFEU. This is but another example of the diversity of regulatory approaches adopted by the EU in this area. Article 2(3) thereof states that the ESF should 'benefit people, including disadvantaged people such as the long-term unemployed, people with disabilities, *migrants, ethnic minorities* [and] *marginalised communities*' (my emphasis). Article 10 provides for transnational cooperation, 'with the aim of promoting mutual learning, thereby increasing the effectiveness of policies supported by the ESF'. In relation to migrants, this is currently achieved through the Thematic Network on Migrants, which facilitates discussion between the member states of their own integration projects, the coordination of projects between member states through the provision of online

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<sup>176</sup> Parliament and Council Regulation 1304/2013/EU on the European Social Fund [2013] OJ L347/470.

databases, networking and publications, as well as annual conferences.<sup>177</sup> The ESF also funds member state projects which further certain thematic objectives established in the Common Provisions Regulation, the most relevant of which are 'promoting sustainable and quality employment and supporting labour mobility', 'promoting social inclusion, combating poverty and any discrimination', and 'investing in education, training and vocational training for skills and life-long learning'.<sup>178</sup>

Some such projects appear to contribute to the recognition of qualifications. For example, *EPIC*, an Irish programme targeted at migrants based in Dublin, provides cultural and practical information on living and working in Ireland. EPIC works with Irish employers to deliver additional skills training, including social media training and participating in mock interviews, for migrants.<sup>179</sup> There are also a number of projects which are targeted directly at refugees. The Metal Engineering Qualifications programme in Germany, for example, provided an education programme for refugees, who, on successful completion of the programme, received a professional qualification, between May 2015 and October 2016.<sup>180</sup>

The ESF is clearly a welcome measure and while it may clearly supplement national measures, it cannot supplant the possibility of comprehensive sufficientarian measures, such as general taxation. This is, of course, not something the EU has competence to do. Nevertheless, targeted funding of this kind should be welcomed. Whether the funding allocated under the ESF is actually sufficient is another, empirical question which cannot be explored here. For to answer that question would require detailed empirical analysis of the impact of funded activities, their success, their failure and so forth.

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<sup>177</sup> Commission, 'ESF Transnational Cooperation: Migrants' <<https://ec.europa.eu/esf/transnationality/forums/migrants>> accessed 16 April 2018.

<sup>178</sup> Regulation 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320 (Common Provisions Regulation), art 9.

<sup>179</sup> Business in the Community, 'Are you a Jobseeker?' <<https://www.bitc.ie/business-action-programmes/business-action-on-employment/are-you-a-jobseeker/>> accessed 26 January 2018; Commission, 'Projects: 'EPIC' Outcomes for Migrant Jobseekers in Ireland' <<http://ec.europa.eu/esf/main.jsp?catId=46&langId=en&projectId=1997>> accessed 26 January 2018.

<sup>180</sup> Commission, 'Projects: Metalwork qualifications for young refugees' <<http://ec.europa.eu/esf/main.jsp?catId=46&langId=en&projectId=2197>> accessed 26 January 2018.



## 2. The Asylum, Migration and Integration Fund ('AMIF')<sup>181</sup>

The AMIF supports integration and other programmes for the period 2014-2020, taking over from the Refugee Fund,<sup>182</sup> the Integration Fund<sup>183</sup> and the Return Fund.<sup>184</sup> The AMIF provides funding for actions supporting different categories of migrants, primarily on the basis of national funding programmes drawn up by the member states. Thus, for regular migrants, the AMIF supports pre-departure measures in third-countries as well as integration measures in the member states. Specifically, the AMIF supports, inter alia,

- information packages and campaigns to raise awareness and promote intercultural dialogue, including via user-friendly communication and information technology and websites;
- the assessment of skills and qualifications, as well as enhancement of transparency and compatibility of skills and qualifications in a third country with those of a Member State;
- training enhancing employability in a Member State;
- comprehensive civic orientation courses and language tuition; and
- measures focusing on education, including language training and preparatory actions to facilitate access to the labour market.<sup>185</sup>

In relation to forced migrants, by contrast, the only relevant actions which the AMIF may support are: the provision of material aid, including assistance at the border, education, health and psychological care; and the provision of support services such as translation and interpretation, education, training, including language training, and other initiatives which are consistent with the status of the person concerned.<sup>186</sup> An

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<sup>181</sup> Regulation 516/2014/EU of the European Parliament and of the Council establishing the Asylum, Migration and Integration Fund [2014] OJ L150/168 (AMIF Regulation).

<sup>182</sup> Decision 573/2007/EC establishing the European Refugee Fund [2007] OJ L144/1.

<sup>183</sup> Decision 435/2007/EC establishing the European Integration Fund [2007] OJ L168/18.

<sup>184</sup> Decision 527/2007/EC establishing the European Return Fund [2007] OJ L144/45.

<sup>185</sup> AMIF Regulation, arts 8-9.

<sup>186</sup> AMIF Regulation, art 5.

example of a project targeted at forced migrants which was funded by the AMIF is the Skills2Work project, which promoted the labour market integration of the beneficiaries of international protection in nine member states. The project supported the asylum reception framework by providing information and services concerning skills recognition and validation.<sup>187</sup> Finally, in respect of irregular migrants, the AMIF envisages funding ‘measures to launch the progress of reintegration for the returnee’s personal development, such as cash-incentives, training, placement and employment assistance and start-up support for economic activities’.<sup>188</sup> Thus, consistently with the conclusions in section II.B.3 above, irregular migrants are not provided with opportunities for qualification recognition. The AMIF also part-funds the European Migration Network, a network which aims to provide the information demands of the EU’s institutions and the member states.<sup>189</sup>

Interestingly, it has been suggested that the European Integration Fund, a predecessor to the AMIF, ‘induced the creation of a systematic integration policy at national level’.<sup>190</sup> This is a good example of the theme of governance at work. While the EU’s competence in this area remains exceptionally limited, it is nonetheless possible that a ‘Europeanisation’ of national policies has occurred to some degree, even in the absence of hard legal measures. However, whether this conclusion can claim to be *comprehensively* accurate is doubtful. In its interim evaluation of the operation of the AMIF, for example, the Commission concluded that member states have prioritised short-term integration measures, such as civic integration policies—the kind of measures discussed under the terms of the Family Reunification and LTR Directives above—and, to a slightly lesser extent, medium-term integration measures, such as access to the labour market.<sup>191</sup> But, as the argument of this thesis thus far has suggested, effective access for third-country nationals requires more than a bare right to work. More is often necessary.

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<sup>187</sup> Skills2Work, ‘About the project’ <<http://www.fromskills2work.eu/About-the-project>> accessed 26 January 2018.

<sup>188</sup> AMIF Regulation, art 12(e).

<sup>189</sup> Council Decision 2008/381/EC establishing a European Migration Network [2008] OJ L131/7, art 1.

<sup>190</sup> *The EU’s Policy on the Integration of Migrants* (n 142) 4.

<sup>191</sup> Commission, *Interim Evaluation of the Asylum, Migration and Integration Fund: Final Report* (Publications Office of the European Union 2018) 41-42.

## Conclusion

Part I of this thesis established that the well-being of third-country nationals is to be assessed in the light of the perfectionist neorepublican conception of well-being as freedom as non-domination. A commitment to and pursuit of that ideal in the EU, internally and externally, justifies at least two legal rights, namely, to work and to equality or non-discrimination. Part I therefore laid the foundations, in value and normative theory, for one derivative right of the core right to work which Part II of this thesis addresses, namely, the right of third-country nationals to have their qualifications recognised for the purposes of accessing work in the EU. Accordingly, Part II attempts to provide a remedial response to the inadequate skills recognition third-country nationals habitually experience in the EU by analysing the extent to which that right is guaranteed in EU law and policy. Reflecting on the extent to which that right has been guaranteed in one dimension, namely, the external dimension, this chapter has reached the following five conclusions.

First, international and European law provides a very limited lens through which to understand and critique EU law and policy in respect of qualification recognition. The right to have one's qualifications recognised, formal or informal, can be understood as a derivative right of the fundamental human right to work. International labour law envisages the need for special measures to accommodate the recognition of qualifications of non-nationals while international economic law facilitates the mutual recognition of qualifications between states. European law goes so far as to acknowledge the needs of refugees to have their qualifications recognised. At present, however, these sources of law are almost intolerably vague and indeterminate in terms of the practical requirements states must comply with to implement their terms. This fact renders these provisions much less useful than other areas thereof already considered in Part I of this thesis in relation to the rights to work and to non-discrimination. Moreover, many of the provisions of international and European law considered in section I of this chapter are not currently binding on the EU and its member states. Accordingly, it is necessary to rely on a policy consistent with a

commitment to neorepublicanism in its internal and external dimensions to analyse and critique EU law and policy.

Second, EU migration and asylum law provides a number of different measures to facilitate the recognition of qualifications of third-country nationals coming to the EU. However, there is no harmonised pre-departure procedure for the recognition of the qualifications of persons coming to the EU. On arrival and residence in the EU, third-country nationals are afforded a complex patchwork of rights which varies greatly according to their status in EU law from being afforded no right to have their qualifications recognised to having their qualifications recognised in circumstances where they lack any verifying documentation. It is not clear why this is the case nor are the rights and entitlements of third-country nationals always clear on the face of the legislation. This variation and uncertainty may be a source of domination for some third-country nationals. It should then come as no wonder that, as noted in section V.B, the possibility of adopting a directive on the recognition of qualifications of third-country nationals has recently been mooted. Most pressingly, the majority of third-country nationals arriving in the EU are not afforded the 'gold standard' in terms of measures which could be made available as a matter of human rights and/or social justice, viz, qualification recognition, integration measures and education and training opportunities. These measures could be provided by way of policy change consistent with a commitment to neorepublicanism in its internal and external dimensions. The argument therefor is, however, a highly contingent one, being constrained by: the need to make a complete argument for neorepublican social justice at work in the EU (chapter 2.III.B); the need to determine which authorities are responsible for discharging such obligations in a multi-level polity such as the EU; the need to develop a transitional theory explaining how such change may come about; and the need to balance the policy here advanced against other conflicting policies in an all-things-considered judgment.

Third, to guarantee European peoples' well-being, it is necessary to pursue neorepublican freedom as non-domination internally and externally. Externally, this means that the EU should treat third-countries equally and ensure that they are in relations of non-domination with one another. Much of the EU's external relations are characterised by partial cooperation and integration with third-countries. This is fine;

the EU is not obliged to establish the free movement of persons in its external affairs. But, if it does so, in whole or in part, then it should at least consider affording third-country nationals the full panoply of rights discussed in section II. This is not currently the case for any of the agreements considered. Moreover, some are quite vague in the extent to which they provide for qualification recognition, integration measures and opportunities for education and training. This ambiguity may be a source of domination for third-country nationals seeking to rely on the terms thereof. This could potentially be remedied through interpretation or as a matter of policy. As it stands, the nationals of some third-countries, such as the EEA States and Switzerland, have greater rights than nationals from many other third-countries. In other words, the nationals of some third-countries are effectively privileged in EU law and policy over the nationals of other third-countries. This should not be confused with some sort of economic or first-world prioritisation: US nationals, for example, are not afforded an equivalent priority under EU law. Moreover, many third-countries which might be considered 'underdeveloped', such as certain Mediterranean countries, are afforded equal treatment with EU nationals in at least some circumstances.

So much for the recognition of formal qualifications; what about the recognition of informal and non-formal learning? Measures in this area are at an embryonic stage and require further development and entrenchment, possibly through the law; and third-country nationals are not even taken into account, notwithstanding that they frequently have skills, learned in non-formal or informal settings, which could benefit from recognition, thereby enabling them to participate in our culture.

Fifth and finally, while many of the specific measures adopted to facilitate the integration of third-country nationals in the EU are precisely of the kind which this thesis is most concerned with in this thesis, they lack the institutionalisation, systematisation and formalisation which legal regulation can bring.

In the absence of some of the significant reforms noted above being made, one might consider what else the EU is doing or could do better to improve third-country nationals' qualification recognition. Clearly, being entitled to have one's qualifications considered by relevant regulatory authorities is important, but it does not guarantee any particular outcome. As suggested in section II.C.1 above, third-country nationals should be entitled to strict procedural equality in having their qualifications recognised

and be able to avail of integration measures and education and training facilities to upskill and reskill. And while the latter such measures should help to overcome the inadequate qualification recognition which third-country nationals habitually experience, they will not solve the root of the problem. It is necessary, therefore, to consider, at least in outline, what makes qualification recognition work in practice. Doing so will help us to understand how to ensure that third-country nationals have opportunities to use the skills they have effectively. Accordingly, it is to this possibility which we now turn.

## 6. The External Dimension: II

### Introduction

The previous chapter considered the circumstances in which third-country nationals can have their formal and informal qualifications recognised when coming to the EU for the purposes of access to and participation in the EU's labour markets. Judging existing EU law and practice in the light of a commitment to Pettit's neorepublicanism, the chapter identified a number of deficiencies with the status quo. It confirmed that the entitlement of third-country nationals to have their qualifications considered by relevant authorities is and ought to be largely a guarantee of procedural equality and concluded by noting the importance of understanding what makes qualification recognition work in practice. For if third-country nationals had their qualifications recognised in practice, thereby permitting them to practise their profession, then they would not experience inadequate qualification recognition. In other words, if third-country nationals were actually able to have their qualifications recognised, then they would be able to use the skills they have and exercise their autonomy in and through their work. They would be able to access and undertake work commensurate with their

skills. Their well-being would be secured. Accordingly, this chapter considers one way in which qualification recognition could be improved to alleviate the inadequate skills' recognition third-country nationals habitually experience. It does so to continue the response to the final sub-question this thesis investigates, namely, what is the link between theory and praxis in this area and how, if at all, could our practice be improved to better cohere with theory? In the specific context of this chapter, therefore, the question is how the inadequate skills' recognition third-country nationals habitually face could be overcome.

This chapter is structured as follows. It first outlines a brief example which elucidates one way in which qualification recognition could be improved in practice. The example crudely suggests that prior coordination of education and training facilitates effective qualification recognition enabling people to access work which is commensurate with their actual skills. In other words, education and training prepares people for work. Consideration is given to the implications, positive and negative, which the example has for EU law and policy (section I). Extrapolating from the lessons learned from the example, the chapter considers how and to what extent the EU already cooperates with third-countries in respect of education and training. Such cooperation varies from facilitating comparisons between educational and training curricula and systems to giving humanitarian funding designed to provide educational facilities for the peoples of third-countries. The extent to which the EU risks dominating third-countries and their peoples and complies with its humanitarian obligations is considered in outline (section II). A short conclusion follows.

## **I. An Example**

### **A. Overview**

This section aims to demonstrate, by way of comparative functional analysis, the role which education can play in facilitating qualification recognition. For if qualification recognition facilitates effective access to and participation in the labour market, then education facilitates effective qualification recognition. In other words, education



prepares people for participation in the labour market. It may then be appropriate to consider what role the EU does and could play in relation to education to facilitate the more effective recognition of the skills of third-country nationals when coming to the EU.

## **B. The Comparative Method**

In adopting a functional comparative analysis, this section focuses, 'not on rules but on their effects, not on doctrinal structures and arguments, but on events'.<sup>1</sup> It is accordingly concerned first with an *outcome* or a series of social practices and thence the *process* which led to this outcome. The former is a specific, desired policy outcome or result whilst the latter is the process which leads to, or facilitates, this outcome. The approach is thus instrumental<sup>2</sup> in the sense that it (i) identifies a desired policy outcome, (ii) considers the process which facilitates that same outcome and (iii) extrapolates from and *generalises* the specific process under consideration, synthesising and consolidating the lessons which can be gained from it.

I am, however, aware of the limitations of such an approach. The ability to generalise lessons learned from a specific example may be limited. Problems will emerge when attempting to transplant specific processes to replicate policy outcomes in other jurisdictions or legal systems. Any lessons to be gained will therefore be of the most general and abstract kind. But I am comfortable with this level of indeterminacy because this section seeks only to reach a highly general (and perhaps obvious) conclusion: that education prepares people for work.

## **C. The Example**

### **1. Selection of Case**

Accordingly, a specific outcome or set of social practices must be identified. That

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<sup>1</sup> Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2007) 342.

<sup>2</sup> David Trubek, 'Towards a Social Theory of Law: An Essay on the Study of Law and Development' (1982) 82 Yale LJ 1.

particular outcome is the facilitation of labour mobility or access to the labour market and the process which facilitates or enables labour mobility is qualification recognition. The example of labour mobility selected is that in the medical profession, for the following reasons. First, the medical profession is heavily institutionalised and regulated, locally and globally. Second, the medical profession is characterised by a high degree of mobility—nationally, regionally and internationally. Unlike many professions, there is a wealth of publicly available data concerning health professionals' migration. And third, medical professionals are in constant demand: there is and always will be a demand for medical practitioners due to the universal nature of human suffering. Although some of these features seem unique to the medical profession—in particular, the universality of human suffering as constitutive of market demand—it nonetheless seems fitting to consider how the medical profession, and the recognition of medical qualifications, has been regulated so as to address the general goals for the EU mentioned in the introductory chapter, namely, to facilitate the contribution and participation of third-country nationals in the project of EU integration, one aspect of which being improved labour mobility and matching of supply and demand.

## **2. Selection of Jurisdictions**

This section focuses on Ireland and the UK for the following reasons. Figure 1 is based on the OECD's *Health Workforce Migration* statistics. The statistics detail the number of foreign-qualified doctors in OECD countries in the period 2016-2018. The table presented in Figure 1 extracts information on the ten OECD countries with the highest proportion of foreign-qualified medical doctors as a percentage of all doctors in the jurisdiction.

| Country                     | Australia | Canada | Ireland | Israel | New Zealand | Norway | Sweden | Switzerland | UK    | US    |
|-----------------------------|-----------|--------|---------|--------|-------------|--------|--------|-------------|-------|-------|
| % Foreign Qualified Doctors | 32.074    | 24.63  | 41.64   | 57.92  | 42.46       | 40.302 | 34.75  | 34.065      | 29.23 | 24.99 |

Figure 1. Source:

[http://stats.oecd.org/index.aspx?DataSetCode=HEALTH\\_STAT#](http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT#)

What is perhaps more interesting is where foreign-qualified doctors are coming from and where they are going to. Figure 2 assesses this in the context of the EU, Norway and Switzerland, selecting the five largest groups of foreign-qualified doctors which constitute the medical professions in these countries.

| Country                                   | Ireland            | Norway          | Sweden         | Switzerland     | UK               |
|---|--------------------|-----------------|----------------|-----------------|------------------|
| Total Number of Foreign Qualified Doctors | 9,583              | 10,248          | 14,195         | 12,570          | 51,115           |
| Country of Origin                         | Pakistan (2,037)   | Poland (2,113)  | Poland (1,445) | Germany (6,844) | India (15,870)   |
|   | Sudan (1,295)      | Germany (1,591) | Germany (955)  | Italy (1079)    | Pakistan (5,922) |
|   | UK (766)           | Hungary (1,193) | Hungary (812)  | France (818)    | Nigeria (2,831)  |
|   | South Africa (734) | Denmark (1,080) | Poland (769)   | Austria (768)   | Egypt (2,268)    |
|   | Romania (715)      | Sweden (585)    | Romania (728)  | Romania (305)   | Ireland (1,755)  |

Figure 2. Source:

[http://stats.oecd.org/index.aspx?DataSetCode=HEALTH\\_STAT#](http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT#)

It is interesting to note that Ireland and the UK stand out as being most dependent upon third-country nationals and not EU or EEA nationals to meet domestic labour market demand. The question which then arises is the extent to which the recognition of professional qualifications has an effect on the satisfaction of market demand in the medical profession. If this is the case, then qualification recognition must be understood as an important operative element in the global search for skilled labour. Furthermore, the EU may be able to learn some important lessons from this case study, insofar as Ireland and the UK have successfully satisfied domestic market

demands through external labour migration. It might even be possible to apply these lessons to other professions.

(i) *Ireland*

Doctors, amongst certain other medical professionals in Ireland, are governed by the Medical Practitioners Act 2007, as amended, a piece of primary legislation promulgated by the Oireachtas (Irish Parliament). The 2007 Act empowers the Medical Council—a non-profit corporate entity comprising of doctors, health sector professionals and public officials—as the responsible body for the regulation, education, training and disciplining of medical professionals in Ireland.<sup>3</sup> The Medical Council dispenses this function by, *inter alia*, setting professional education standards for doctors who seek to be *registered to practise* as a medical professional. Among the relevant criteria for the purposes of *registration*—professional qualifications, fitness to practise, language competence, insurance, etc—are that the medical practitioner in question hold certain *professional qualifications*. Professional qualifications therefore serve as one amongst several threshold conditions for access to and practise of the medical profession in Ireland. The Medical Council is thereby responsible for facilitating the mutual recognition of qualifications of doctors<sup>4</sup> and is empowered to issue rules (in the form of secondary legislation) implementing its functions in this respect.<sup>5</sup>

For the purposes of the recognition of professional qualifications, medical practitioners from the EU, EEA and Switzerland are governed by the relevant transposition of the terms of the Recognition Directive into Irish law. By contrast, medical professionals from third-countries are governed by rules issued directly by the Medical Council itself. According to the terms of these rules, it is for the Medical Council to determine whether the education, training and qualifications obtained by a third-country national are 'at least equivalent' to programmes completed in the jurisdiction of Ireland for the purposes of registration as a medical practitioner.<sup>6</sup> Little further

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<sup>3</sup> Medical Practitioners Act 2007, s 6.

<sup>4</sup> Medical Practitioners Act 2007, s 7.

<sup>5</sup> Medical Practitioners Act 2007, s 11.

<sup>6</sup> Medical Practitioners Act 2007, ss 46(b)(iv), 48(2)(c) and 88(7).

specific guidance is provided in the legislation as to what might be 'at least equivalent' to programmes completed and recognised in Ireland and so it may be helpful and appropriate to consider what the standards are for Irish programmes and what programmes have been recognised to be 'at least equivalent' in the past.

According to the rules, programmes in Ireland must, inter alia, comply with the basic requirements of the *World Federation for Medical Education Global Standards for Quality in Improvement in Medical Education: 2015 Revision* and the rules in the Recognition Directive on basic medical education.<sup>7</sup> These standards set down basic content requirements for medical education, and those contained in the *World Federation for Medical Education Global Standards for Quality in Improvement in Medical Education: 2015 Revision* espouse standards which are generally subscribed to globally. Certain professional qualifications obtained in other jurisdictions have been recognised as equivalent by the Medical Council by default, primarily higher specialist medical qualifications obtained in certain English-speaking countries or countries which have historical social, economic and cultural links with Ireland and the UK.<sup>8</sup> Thus, for example, qualifications in medicine offered by the Royal Colleges of Physicians in Ireland, London, Edinburgh, Australia, Canada and South Africa are all presumptively recognised as 'at least equivalent'. If a medical practitioner's qualifications are not found to be 'at least equivalent' to these standards, then that practitioner may take an examination, the successful completion of which will provide sufficient evidence of their skills and competences for the purposes of registration to practise as a medical practitioner.

The question that now arises in the light of the numbers presented in Figure 2 is the link, if any, between the recognition of professional qualifications, and the origins and numbers of medical practitioners who have come to Ireland. Why, for example, have so many Pakistani doctors come to Ireland? The answer lies partly in the recognition of qualifications and partly in advertising. The Health Service Executive

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<sup>7</sup> Medical Council Rules in respect of Training Bodies and Qualifications for the Purposes of the Specialist and Trainee Specialist Divisions (Section 89 of the Medical Practitioners Act 2007) SI 529/2010; Medical Council Registration Rules SI 417/2011; and Medical Council Rules in Respect of the Duties of the Council in relation to Medical Education and Training (Section 88 of the Medical Practitioners Act 2007) SI 685/2016.

<sup>8</sup> Medical Council Registration Rules SI 417/2011, Appendix A.

(‘HSE’), the statutory body responsible for the national health service in Ireland, sought to recruit foreign doctors to meet local labour market demands. The Medical Council had previously recognised the qualifications of certain Pakistani doctors as ‘at least equivalent’ and so the HSE targeted advertising at Pakistani doctors. This meant that Pakistani doctors could come to work in Ireland with relative ease.

Eventually, it was accepted by the HSE and the now responsible appointment body—the National Doctors Training and Planning (‘NDTP’) organisation—that such conduct was in breach of the *WHO Global Code of Practice on the International Recruitment of Health Personnel*. That code establishes voluntary principles and practices for the ethical international recruitment of health personnel. According to the terms thereof, states should facilitate circular migration to ensure that skills and knowledge acquired can benefit both the state of origin and the host state.<sup>9</sup> Moreover, ‘[a]ll member states should strive to meet their health personnel needs with their own human resources for health, as far as possible’.<sup>10</sup> Indeed, the health systems of both the state of origin and the host state should benefit from migration; the benefits should not be all one way.<sup>11</sup>

Notwithstanding the subsequent abandonment of this ethically questionable policy by the HSE and the NDTP, Pakistani doctors have continued to come to Ireland in light of the apparently attractive working conditions, high domestic demand and the implementation of a two-year exchange partnership arrangement between the HSE and the College of Physicians and Surgeons of Pakistan. This partnership enables postgraduate student doctors from Pakistan to work in Ireland for a period of two years and is supposed to result in mutual benefits for Ireland and Pakistan: the HSE receives the services of student doctors for a period of two years, while the students bring back enhanced knowledge and skills to Pakistan. Whether these benefits have been borne out in practice is an empirical question which remains to be investigated. Moreover, an increase in intra-EU mobility, particularly by Romanian doctors to Ireland after the revision of the Recognition Directive, has recently decreased the need to rely on the

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<sup>9</sup> WHO Global Code of Practice on the International Recruitment of Health Personnel, art 3.8.

<sup>10</sup> WHO Global Code of Practice on the International Recruitment of Health Personnel, art 5.4.

<sup>11</sup> WHO Global Code of Practice on the International Recruitment of Health Personnel, art 5.1.

skills of third-country nationals.<sup>12</sup>

(ii) *The UK*

The legal position in the UK is very similar to that in Ireland. The Medical Act 1983, as amended, a piece of primary legislation promulgated by the UK Parliament, governs the medical profession and empowers a body similar to the Medical Council in Ireland—the General Medical Council—to exercise all powers and functions necessary for that purpose. Doctors, amongst other medical practitioners, are required to *register* with the General Medical Council; *registration* entails the provision of a *licence to practise* as a medical practitioner.<sup>13</sup> For the purposes of the registration of third-country nationals, or UK and EEA nationals holding a third-country qualification, the General Medical Council is empowered to register persons with an ‘acceptable overseas qualification’, namely, ‘any qualification granted outside the United Kingdom, where that qualification is for the time being accepted by the General Council as qualifying a person to practise as a medical practitioner in the United Kingdom’.<sup>14</sup>

Like Ireland, then, holding an adequate professional qualification is a threshold condition for access to and participation in the medical profession. But what is an ‘acceptable overseas qualification’? The General Medical Council has developed criteria to assess overseas qualifications over many years and presently<sup>15</sup> requires, *inter alia*, that the qualification is listed in the World Directory of Medical Schools,<sup>16</sup> and was based on a programme of study that was made up of at least 5,500 hours and lasted at least three years. The General Medical Council also provides a list of specific

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<sup>12</sup> Thanks to the staff of the NDTP for their guidance in locating documentation on this matter. See Niamh Humphries, Ruairí Brugha and Hannah McGee, ‘Nurse migration and health workforce planning: Ireland as illustrative of international challenges’ (2012) 107 *Health Policy* 44; Posy Bidwell, Niamh Humphries, Patrick Dicker, Steve Thomas, Charles Normand and Ruairí Brugha, ‘The National and International Implications of a Decade of Doctor Migration in the Irish Context’ (2013) 110 *Health Policy* 29; HSE, ‘National Doctors Training and Planning’ <<https://www.hse.ie/eng/staff/leadership-education-development/met/>> accessed 16 May 2018.

<sup>13</sup> Medical Act 1983, s 29B.

<sup>14</sup> Medical Act 1983, s 21B(2).

<sup>15</sup> Currently available at General Medical Council, ‘Acceptable Overseas Qualifications’ <<https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/acceptable-overseas-qualifications>> accessed 17 May 2018.

<sup>16</sup> World Directory of Medical Schools <<https://www.wdoms.org/>> accessed 17 May 2018.

programmes and qualifications from certain countries and universities which it may accept<sup>17</sup> or does not accept<sup>18</sup> at present.

Again, as with the Irish case, what is it about these rules and systems of recognition which attracts workers from certain countries? Why are Indian qualified doctors overwhelmingly the largest constituent of foreign-qualified doctors in the UK? Unlike the Irish case, histories of imperialism are more relevant here. The National Health Service—the UK body responsible for staffing of the UK’s public health services—recruited doctors from British colonies since its inception. Indeed, ‘[i]n 1963, Tory health minister Enoch Powell, later a fierce opponent of immigration, led a recruitment drive to hire 18,000 doctors from India and Pakistan alone’.<sup>19</sup> Many African countries, former colonies or dependencies of the Crown, have also exported their doctors to the UK.<sup>20</sup> Once again, it seems that a shared history combined with effective advertising and recruitment policies operated to meet domestic labour market demands.

### 3. Lessons: The Externalisation of Education

One point which emerges from this example is that labour mobility and effective access to the labour market is premised on people’s qualifications actually being substantively equivalent. In other words, people’s qualifications must be the same or similar to some extent. And for qualifications to be the same or similar, education curricula must also

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<sup>17</sup> General Medical Council, ‘Overseas Medical Qualifications we may accept’ <<https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/acceptable-overseas-qualifications/overseas-medical-qualifications-we-may-accept>> accessed 17 May 2018.

<sup>18</sup> General Medical Council, ‘Overseas Medical Qualifications we do not accept’ <<https://www.gmc-uk.org/registration-and-licensing/join-the-register/before-you-apply/acceptable-overseas-qualifications/overseas-medical-qualifications-we-do-not-accept>> accessed 17 May 2018.

<sup>19</sup> ‘The Foreign Backbone of the NHS’ *The Week Magazine* (21 March 2015) <<http://try.theweek.co.uk/the-foreign-backbone-of-the-nhs/>> accessed 17 May 2018.

<sup>20</sup> See, inter alia, Maureen Mackintosh, Parvati Raghuram and Leroi Henry, ‘A Perverse Subsidy: African trained nurses and doctors in the NHS: What would constitute an ethical policy towards the recruitment of African-trained health professionals for the NHS?’ (2006) 34 *Soundings* 103; Ruth Young, Jenny Noble, Ann Mahon, Mairead Maxted, Janet Grant and Bonnie Sibbald, ‘Evaluation of international recruitment of health professionals in England’ (2010) 15 *Journal of Health Services Research and Policy* 195; and John Connell, ‘International Trade in Health Workers’ in Anthony Culyer (ed), *Encyclopaedia of Health Economics, Volume 2* (Elsevier 2014); Basant Kumer Potnuru and Vishishta Sam, ‘India-EU Engagement and International Migration: Historical Perspectives, Future Challenges and Policy Imperatives’ (2015) 27 *IIMB Management Review* 35.



be the same or similar. Notice that this transcends the role of qualification recognition in simply facilitating access to the labour market. Rather, it presupposes quite a high degree of cooperation and integration in respect of education as a necessary precursor not merely to access to the labour market but to effective participation therein. Education and training, in other words, prepares people for work.

Extrapolating and generalising this point, institutionalising educational links with third-countries might eventually provide the EU and its member states with fertile sources of human capital sufficient to satisfy the needs of employers and consumers in the Single Market. It might therefore be fruitful for the EU to place more emphasis in its external relations on cultivating trading relationships with third-countries with which the member states have common histories. Many of the agreements discussed in the previous chapter illustrate that the EU is already doing so. And as the next section shall demonstrate, what this and the remainder of the EU's external dimension to its education law policy emphasise is the *externalisation* of education in the EU; namely, the development of a robust external dimension to EU education and training law and policy, exporting the EU's institutionalised education forms to create new, future sources of human capital.<sup>21</sup>

#### 4. Problems

##### (i) *Neo-colonialism*

In respect of the first problem, neo-colonialism,<sup>22</sup> the argument runs roughly as follows. While it is true that many Western states eventually permitted most of their colonies and overseas territories to secede over the course of the twentieth century, thereby apparently facilitating their independence, the structures of the global economy today represent a new and more insidious form of colonialism, termed *neo-colonialism*.

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<sup>21</sup> Rong Ma and David Allen, 'Recruiting across cultures: A value-based model of recruitment' (2009) 19 *Human Resource Management Review* 334; and Chad Damro and Yoav Friedman, 'Market Power Europe and the Externalisation of Higher Education' (2018) 56 *JCMS* 1394.

<sup>22</sup> See, foundationally, Jean-Paul Sartre, *Colonialism and Neocolonialism* (Routledge 2001); Edward Said, *Culture and Imperialism* (Chatto & Windus 1993); Thomas Pogge, *Global Justice* (Blackwell 2001); and Thomas Pogge, *World Poverty and Human Rights* (Polity 2008).

Broadly understood, neo-colonialism is characterised by the contemporary imbalance of power between 'developed' and 'developing' countries in economic, social, cultural and political terms. The fact that these imbalances have not been addressed by appropriate schemes of redress and transitional justice is constitutive of neo-colonialism. And, in the case of the EU specifically, by exporting its products, values and norms through the exercise of its economic, social and cultural power,<sup>23</sup> the EU subjects third-countries to its will: in other words, it dominates them.

The response to this argument must be the demands of the neorepublican ideal of freedom as non-domination. Recall the analysis in chapter 3.I.C of the requirements of neorepublicanism in respect of the relationship between political communities. That doctrine has global implications. It requires that relations of freedom as non-domination hold globally as well as locally. And its conceptual armoury is particularly well designed to address and identify the problem of neo-colonialism. For a hallmark of imperialism and neo-colonialism is being subjected to the arbitrary will of another—in other words, to be dominated. Neorepublicanism should therefore be able to tackle such domination. And, as noted in chapter 2.II, such domination regularly comes in two kinds; it may be direct and overt or indirect and structural. It is perhaps the latter which is most invidious in our world today: the way our global institutions are set up and operate; the way wealthy countries seem to band together, pooling sovereignty and resources to intensify their wealth further; and the way powerful countries have and continue to withdraw from international organisations and focus on regional integration instead—the EU itself potentially serving as a paradigm example of such behaviour.<sup>24</sup>

In relation to cooperation in respect of education and training, what does neo-colonialism mean? It may entail the design of curricula and education and training

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<sup>23</sup> Theorists of international relations have developed various competing conceptions of the EU's global power. See, inter alia, Hedley Bull, 'Civilian Power Europe: A Contradiction in Terms?' (1982) 21 *JCMS* 149; Lisbeth Aggestam, 'Ethical Power Europe' (2008) 84 *International Affairs* 1; Laura Ferreira-Pereira, 'Human Rights, Peace and Democracy: Is 'Model Power Europe' a Contradiction in Terms?' in Federiga Bindi (ed), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (Brookings Institute 2010); Richard Whitman (ed), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave Macmillan 2011); Chad Damro, 'Market Power Europe' (2012) 19 *JEPP* 682; and Wolfgang Wagner, 'Liberal Power Europe' (2017) 55 *JCMS* 1398.

<sup>24</sup> See, eg, Clara Brandi, 'The Trade Regime Complex and Megaregionals - An Exploration from the Perspective of International Domination' (2017) 10 *Global Justice* 1.

institutions by former colonial powers. Or it may simply involve the obligation to use development funding for such purposes.<sup>25</sup> Thus, for example, if the EU and its member states require third-countries to adopt their educational systems, then it is certainly possible that those third-countries are being dominated.

In the context of migration, what does neo-colonialism mean? Neo-colonialism may manifest itself in the EU's apparent extraction of valuable human resources from third-countries to benefit its own people. In seeking to attract third-country nationals to the EU, the EU may dominate the peoples of those third-countries insofar as the EU disproportionately benefits from inward migration and the peoples of those third-countries suffer from losses of freedom because of a lack of valuable human resources necessary to create value in their culture. The well-being of the peoples of third-countries may be negatively affected by systematic and institutionalised emigration because of the loss of skills and autonomous persons to their community. Political communities outside the EU may consequently be left impoverished in many ways.

What, then, does the ideal of freedom as non-domination require in these circumstances? The only way to put an end to the exercise of dominating power by more powerful political communities is for those same political communities to restrict their own dominating conduct.<sup>26</sup> In the context of the EU's external relations, such restrictions may involve participating in international institutions effectively to develop norms which secure third-countries' freedom; ensuring that impoverished third-countries have sufficient resources to enjoy the sovereign liberties; and have the elementary infrastructure in place to become a free state.<sup>27</sup> In other words, the EU is bound by and must discharge its humanitarian obligations.

In sum, the EU cannot undermine the status of third-countries as free states. Whether the EU does so is essentially an empirical matter. Thus, for example, the extent to which the EU generally exports its values and norms successfully is up for

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<sup>25</sup> Philip Altbach, 'Education and Neocolonialism: A Note' (1971) 15 *Comparative Education Review* 237.

<sup>26</sup> Pettit does not explicitly say this anywhere but has accepted this as a necessary implication of his thesis in correspondence with the author (on file).

<sup>27</sup> Cécile Laborde, 'Republicanism and Global Justice: A Sketch' (2010) 9 *EJPT* 48; and Cécile Laborde and Miriam Ronzoni, 'What is a Free State? Republican Internationalism and Globalisation' (2016) 64 *Political Studies* 279.

debate.<sup>28</sup> And while a full analysis of the EU's external relations and its ability to export its values and norms is beyond the scope of this thesis, the point remains that the EU cannot systematically and institutionally rely on external migration if in doing so it undermines its humanitarian obligations to third-countries. The extent to which the EU exercises its will over third-countries and complies with and discharges its humanitarian obligations will therefore be key in considering whether the EU's conduct is neo-colonial.

(ii) 'Brain Drain'<sup>29</sup>

The latter part of the previous point naturally leads to a second. If the EU is reliant to some extent on third-country nationals to satisfy employer and consumer demand from within the Single Market, then to what extent does that reliance impact upon the human resources of the state of origin? If the EU draws on those human resources, then that may constitute dominating conduct. There are at least two responses to this issue.

The first is to clarify and expand upon the relevant duties of the parties in question. While political communities have duties not to dominate one another, individuals are also obliged, subject to limitations, not to leave their own political community without good reason.<sup>30</sup> Thus, for example, Kieran Oberman argues that, as many people rely on their state to fund their education to some extent, they owe a duty to at least cover the costs of that education and a duty of assistance to their

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<sup>28</sup> See, eg, Flavia Jurje and Sandra Lavenex, 'Trade Agreements as Venues for 'Market Power Europe'? The Case of Immigration Policy' (2014) 52 *JCMS* 320; and Alasdair Young, 'Liberalizing trade, not exporting rules: the limits to regulatory co-ordination in the EU's 'new generation' preferential trade agreements' (2015) 22 *JEPP* 1253.

<sup>29</sup> See, inter alia, Tim Martineau and Annie Willetts, 'The health workforce: Managing the crisis ethical international recruitment of health professionals: will codes of practice protect developing country health systems?' (2006) 75 *Health Policy* 358; Fernando Tesón, 'Brain Drain' (2008) 45 *San Diego L Rev* 899; Parvati Raghuram, 'Caring about 'brain drain' migration in a postcolonial world' (2009) 40 *Geoforum* 25; Tito Boeri, Herbert Brücker, Frédéric Docquier and Hillel Rapoport, *Brain Drain and Brain Gain: The Global Competition to Attract High-Skilled Migrants* (OUP 2012) part II; Kieran Oberman, 'Can Brain Drain Justify Immigration Restrictions?' (2013) 123 *Ethics* 427; Ruth Young, 'How effective is an ethical international recruitment policy? Reflections on a decade of experience in England' (2013) 111 *Health Policy* 184; Alex Sager, 'Reframing the brain drain' (2014) 17 *Critical Review of International Social and Political Philosophy* 560; Luara Ferracioli, 'Immigration, self-determination and the brain drain' (2015) 41 *Review of International Studies* 99; Gillian Brock and Michael Blake, *Debating Brain Drain: May Governments Restrict Emigration?* (OUP 2015); the articles the special issue of (2016) 9 *Ethics & Global Politics* 1; and the articles in the special issue of (2017) 36 *South African Journal of Philosophy* 1-176.

<sup>30</sup> David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (HUP 2016) 109-111.

compatriots, just as states owe obligations of justice towards their citizens. For Oberman, these conditions are almost always met, meaning that developed states are justified in placing restrictions on immigration on the basis of a concern to reduce the brain drain.

But that does not mean that restrictions on migration are always justified so as to reduce the risk of brain drain. Indeed, 'there are many things rich states could be doing to address global poverty in general and brain drain in particular which they are failing to do'.<sup>31</sup> Oberman therefore provides a series of factors which developed countries could use to justify immigration restrictions on the ground of the brain drain. First, it would be necessary to draw up a list of developing countries and sectors within those countries which suffer from a brain drain. Second, from this list, the developed state should then have to consider whether alternative means of addressing the problem of the brain drain, other than immigration restrictions, are unlikely to prove effective. Such other measures could include, for example, development funding. Third, the developed state should continue to offer all skilled workers the opportunity to apply for family reunification and asylum. Oberman's criteria therefore impose a significant burden on immigrant states to clarify their humanitarian obligations and the extent to and manner in which they discharge them. They also indicate that it is possible to rely on migration without same causing a brain drain in the country of origin. However, to be sure of this, all of Oberman's carefully designed criteria need to be met.

The second, related response to the brain drain is so-called 'ethical migration'. If an immigrant state establishes that measures other than immigration restrictions are unlikely to effectively discharge their humanitarian obligations, then it may impose immigration restrictions to avoid a brain drain occurring. And one potential form of such restriction is ethical migration, an approach roughly encapsulated in the example of the medical profession in Ireland. By emphasising circular migration, knowledge- and cultural-exchange rather than a one-way relationship, it facilitates, in principle at least, mutual learning and understanding and an absence of domination.

However, it is far from clear that ethical recruitment practices go far enough. For, first, the WHO's Code of Practice is only voluntary. Second, other sources show

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<sup>31</sup> 'Can Brain Drain Justify Immigration Restrictions?' (n 29) 453-454.

that codes of practice may not be enough in and of themselves. Ruth Young conducted a study, using evidence from a 2006 postal survey of NHS operations in the UK, plus additional case studies, to assess England's ethical recruitment practices since the 1990s. Her findings demonstrate that while an ethical recruitment code of practice, such as the WHO's Code of Practice, does positively influence recruitment behaviour, other actions are needed to mitigate the negative effects on source countries.

Young identifies three important additional changes necessary. First is a change in attitude. Migrant workers are not just that; they are people. And international migrant workers need to be respected and viewed, both publicly and professionally, as more than merely filling a gap. This may be achieved by appropriate advertising campaigns and cultural projects to integrate migrant workers into the labour market and culture of their host state. In other words, robust anti-discrimination norms need to be established. The proposal, encapsulated in chapter 4 of this thesis, to make nationality a prohibited ground of discrimination may therefore play an important role in facilitating ethical migration. A second change is designing, or attempting to design, domestic policy to meet and satisfy domestic labour demand, rather than ever having to rely on external sources of labour. While laudable, Young is here setting a high and perhaps unrealistic bar. Finally, the ethical recruitment of migrant workers needs to be seen and understood in the context of a broader scheme of ethical practices, such as institutionalising appropriate development policies in respect of countries from which migrant workers are sourced. Actively curtailing or limiting recruitment, in addition to measures assisting source countries to develop their own professions sufficiently, must form part of this process. In other words, the EU and its member states must comply with their humanitarian obligations towards third-countries by ensuring that the latter are entrenched in the basic and sovereign liberties. As noted in chapter 3.III.A.3, while Pettit does not identify what the sovereign liberties consist of, presumably providing education and training facilities to develop people's skills is among the conditions necessary for the realisation of the sovereign liberties as well as the basic liberties of the peoples of third-countries. We might, therefore, expect that, in seeking to develop an ethical migration scheme, the EU and the member states would provide funding and development programmes designed to facilitate the education and training of third-country nationals. This possibility is investigated in section II below.

A final point is the impact of the need for ethical migration on certain jobs and professions. It is unclear whether the agreement entered into between the HSE and the College of Physicians and Surgeons of Pakistan actually functions well for the medical profession in Ireland. For example, a recent report suggested that reliance on certain categories of doctors, the majority of whom come from outside the EU to work in Ireland, may compromise patient care.<sup>32</sup> It is, however, not clear from this report that the problem is the agreement between the HSE and the College of Physicians and Surgeons of Pakistan as such rather than poor pay and working conditions generally in the HSE. But what of other professions and jobs? Will ethical migration do enough to satisfy domestic labour shortages, where this involves only temporary rather than permanent migration of workers? If it could be established, in the light of Oberman's three-step test, that immigration restrictions were not needed—that is, if immigrant states discharged their humanitarian obligations in other ways—then permanent or indefinite migration could be permitted. In other words, where the EU does systematically rely on migration from third-countries, discharging its humanitarian obligations in other ways will be most pressing.

*(iii) Implications for Other Jobs and Professions*

This leads to the final problem with the above approach, namely, the implications such an approach has for other professions. As noted above, there are at least three distinctive features of the medical profession which mark it out from other professions. It is a heavily *institutionalised* and *mobile* profession in *constant demand*. By contrast, some professions and jobs lack adequate institutionalisation; many jobs and forms of work are largely performed on a semi-formal or informal basis. Many others, while mobile, are not fully globalised. While there are international qualification standards for accountants, for example, the same cannot be said for all kinds of work. Finally, not all professions and jobs are in demand around the world or are in demand to the same

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<sup>32</sup> See the report discussed in Paul Cullen and Martin Wall, 'Hospitals' reliance on junior doctors a threat to patient safety—report' *The Irish Times* (8 January 2020) <<https://www.irishtimes.com/news/health/hospitals-reliance-on-junior-doctors-a-threat-to-patient-safety-report-1.4133342>> (accessed 31 March 2020).

extent. This means that the approach advocated in respect of the medical profession is limited in its scope of application. It will only be relevant to those professions which are highly institutionalised, globalised and in demand.

Yet it seems that this may not be entirely true. Some professions may not have all of these features; some may have one or more features only. It may not be necessary for other professions to have all of these characteristics to benefit from the approach advocated above. Moreover, some jobs and professions may nonetheless put in place the necessary procedures even if they are not always relied upon. Take, as an example, the Seasonal Workers' Directive, which guarantees seasonal workers equal treatment in respect of the recognition of their qualifications.<sup>33</sup> It is difficult to imagine the need for seasonal workers to have their qualifications recognised yet the guarantee of equal treatment in respect thereof is in place. This suggests that while the medical profession is special amongst professions, it is nonetheless *possible* to formulate policies and procedures to *facilitate* and enable mobility in professions, even where, in practice, mobility is quite unlikely or minimal. Accordingly, in general it is submitted that we should try to replicate the model from the medical profession across other professions through increasing institutionalisation of norms which facilitate, inter alia, the coordination of education and the consequent labour mobility which such coordination facilitates.

## II. EU Law and Policy

### A. Overview

It was earlier noted that the only way to put an end to domination by more powerful political communities is for those same political communities to restrict their own power. In other words, in its external relations the EU is bound by and must discharge (at least) its humanitarian obligations, the minimum obligations it owes to third-countries and third-country nationals. And it was also noted that a political community must be careful to clearly delineate its humanitarian obligations in the context of

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<sup>33</sup> Parliament and Council Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375, art 23(1)(h).



cooperation in respect of education and migration. Specifically, the EU and its member states can only cooperate with third-countries in respect of education if they avoid dominating third-countries; and they may only rely on external immigration if in doing so they do not cause or contribute to a brain drain in third-countries. Whether they do so in relation to specific countries is an empirical question which should be assessed in the light of Oberman's criteria earlier outlined. In this section, the exercise of the Union's external competences in the light of its humanitarian obligations to third-countries and third-country nationals is examined. The point of doing so is to assess how and to what extent the EU dominates third-countries and third-country nationals while nonetheless endeavouring to secure the well-being of third-country nationals who might come to the EU.

The EU's external competences in relation to education are several. First is the competence under art 216 TFEU to reach international agreements with third-countries. The exercise of this competence was largely discussed in chapter 6.IV.B. The element of that competence which is of relevance here is the possibility of cooperating to facilitate skills' development. The second is the Union's competence to develop relationships with its neighbours under art 8 TEU, countries which are likely to be particularly close with the Union. Relations with neighbouring countries must be founded on the values of the Union. Given that imperative, it should be clear that countries in the EU's Neighbourhood are particularly at risk of domination. Third is the Union's competence to cooperate with third-countries specifically in relation to education and training under arts 165(3) and 166(3) TFEU. Finally, there is the Union's competence under Part Five, Title III TFEU concerning cooperation with third-countries and humanitarian aid. According to art 208(2) TFEU, the EU's concern in this area is poverty alleviation and eradication. This competence is, then, the most obvious manifestation and embodiment of the EU's efforts to discharge its humanitarian obligations. According to art 209(1) TFEU, the Parliament and Council shall adopt the necessary measures to implement the Union's development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach. However, the Union's competence in this area is a shared competence; as art 4(4) TFEU states, the exercise of the Union's

competence in this area is without prejudice to the exercise of the member states' competence. Each of these competences are addressed in turn.

## **B. Partnership, Association and Trade Agreements**

The EU and many of its international partners are obliged to cooperate in relation to education, human resource development and up-skilling. For example, many of the EU's partnership, association and trade agreements include clauses concerning cooperation to improve the living and working conditions of nationals of the EU's trading partners through improvements to their education system and investing in 'human resource development', thereby enabling the development of the skills of those nationals. By so cooperating with third-countries in the provision of education, the EU discharges its humanitarian obligations and contributes to what Pettit described as 'mutual understanding'.<sup>34</sup>

The following agreements contain clauses concerning cooperation, to varying degrees, in respect of education: the EEA Agreement;<sup>35</sup> Euro-Mediterranean Agreement with Algeria;<sup>36</sup> EU-Armenia CEPA;<sup>37</sup> EC-Azerbaijan Agreement;<sup>38</sup> EC-Bangladesh Agreement;<sup>39</sup> Bosnia and Herzegovina Stabilisation and Association Agreement;<sup>40</sup> Economic Partnership Agreement with CARIFORUM states;<sup>41</sup> the

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<sup>34</sup> Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Co 2014) 186.

<sup>35</sup> Agreement on the European Economic Area between the European Communities, their Member states and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1994] OJ L1/3, arts 1(2)(f) and 78.

<sup>36</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member states, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2, arts 74-78.

<sup>37</sup> Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L23/4, art 93.

<sup>38</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L246/3, arts 44, 53 and 62.

<sup>39</sup> Cooperation Agreement between the European Community and the People's Republic of Bangladesh on partnership and development [2001] OJ L118/48, art 10.

<sup>40</sup> Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2, art 100.

<sup>41</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member states, of the other part [2008] OJ L289/1/3, art 196(2)(c).

Cotonou Agreement;<sup>42</sup> Euro-Mediterranean Agreement with Egypt;<sup>43</sup> EU-Central America Agreement;<sup>44</sup> EC-Georgia Association Agreement;<sup>45</sup> EC-Indonesia Agreement;<sup>46</sup> EU-Iraq Partnership and Cooperation Agreement;<sup>47</sup> Euro-Mediterranean Agreement with Israel;<sup>48</sup> EU-Japan Agreement;<sup>49</sup> Euro-Mediterranean Agreement with Jordan;<sup>50</sup> EU-Kazakhstan Partnership and Cooperation Agreement;<sup>51</sup> EC-Kosovo Stabilisation and Association Agreement;<sup>52</sup> Euro-Mediterranean Agreement with Lebanon;<sup>53</sup> EC-Macedonia Stabilisation and Association Agreement;<sup>54</sup> EC-Mexico Economic Partnership, Political Coordination and Cooperation Agreement;<sup>55</sup> EC-Moldova Association Agreement;<sup>56</sup> EC-Montenegro Stabilisation and Association

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<sup>42</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part [2013] OJ L173/1, art 25.

<sup>43</sup> Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39, art 42.

<sup>44</sup> Agreement establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other [2012] OJ L363/3, art 42.

<sup>45</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and Georgia, of the other part [2014] OJ L261/4, arts 358-359.

<sup>46</sup> Framework Agreement on comprehensive partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part [2014] OJ L125/17, art 25.

<sup>47</sup> Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part [2012] OJ L204/20, arts 82-84.

<sup>48</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3, art 59.

<sup>49</sup> Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L330/3, art 16(1).

<sup>50</sup> Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member states, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3, art 63.

<sup>51</sup> Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member states, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/3, art 244.

<sup>52</sup> Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2006] OJ L71/3, art 107.

<sup>53</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2, art 43.

<sup>54</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13, art 91.

<sup>55</sup> Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2006] OJ L276/45, art 30.

<sup>56</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, arts 122-123.

Agreement;<sup>57</sup> Euro-Mediterranean Agreement with Morocco;<sup>58</sup> EU-New Zealand Partnership Agreement;<sup>59</sup> EC-Pakistan Cooperation Agreement;<sup>60</sup> Euro-Mediterranean Interim Association Agreement with the Palestine Liberation Organisation;<sup>61</sup> EC-Russia Partnership and Cooperation Agreement;<sup>62</sup> Serbia Stabilisation and Association Agreement;<sup>63</sup> EC-South Africa Trade, Development and Cooperation Agreement;<sup>64</sup> Euro-Mediterranean Agreement with Tunisia;<sup>65</sup> and EU-Ukraine Association Agreement.<sup>66</sup>

Of these agreements, several provisions stand out as meriting specific notation. First is that contained in the EU-Armenia CEPA which provides that the parties shall cooperate with a view to approximating the education systems of Armenia to those of the EU. This reflects a very high degree of cooperation and integration between the EU and Armenia in respect of education. But it also suggests that the EU may risk dominating Armenia and its people because and insofar as Armenia is subject to the will of the EU.<sup>67</sup> To establish this clearly, however, it would be necessary to demonstrate, at least, that the negotiations of the EU-Armenia CEPA were tilted in the

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<sup>57</sup> Stabilisation and Association Agreement between the European Communities and their Member states, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3, art 102.

<sup>58</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member states, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2, art 46.

<sup>59</sup> Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part [2016] OJ L321/3, art 40.

<sup>60</sup> Cooperation Agreement between the European Community and the Islamic Republic of Pakistan on partnership and development [2004] OJ L378/23, art 4.

<sup>61</sup> Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3, art 38.

<sup>62</sup> Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3, art 56(3).

<sup>63</sup> Stabilisation and Association Agreement between the European Communities and their Member states of the one part, and the Republic of Serbia, on the other part [2013] OJ L278/16, art 102.

<sup>64</sup> Agreement on Trade, Development and Cooperation between the European Community and its Member states, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/3, art 89.

<sup>65</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member states, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2, art 46.

<sup>66</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3, arts 430-436.

<sup>67</sup> See, eg, 'Market Power Europe and the Externalisation of Higher Education' (n 21).

EU's favour. Whether this hypothesis is valid is largely an empirical matter and remain open to question.<sup>68</sup>

Second is the clause contained in the EC-Mexico Economic Partnership, Political Coordination and Cooperation Agreement which states that the parties shall give 'special attention' to the education and training of the most disadvantaged social groups. This directly reflects a concern to establish, within third-countries, sufficientarian measures. In other words, the EU is seeking to assist third-countries become free states with well-functioning institutions of justice, at least to some extent. Of final interest are the clauses contained in the EC-Indonesia Agreement and the Euro-Mediterranean Agreement with Israel which both contain clauses which identify the role which education and training play in facilitating 'mutual understanding'. Specifically, these agreements oblige the parties to them to 'promote cooperation' in respect of education and training with particular regard to the manner in which education and training can facilitate mutual understanding. While certainly a weak obligation, this is at least somewhat consistent with Pettit's understanding of what the relations between free peoples might look like. While it would be beneficial if all of these provisions were generalised and institutionalised throughout the EU's external relations, none are strictly necessary and even go beyond the requirements of the external dimension of the republican ideal of freedom as non-domination.

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<sup>68</sup> See, inter alia, the essays in part II of Ole Elgeström and Christer Jönsson (eds), *European Union Negotiations: Processes, Networks and Institutions* (Routledge 2005); and the articles in the special issue of (2007) 45 *JCMS* 771-967.

## C. European Neighbourhood Policy and Enlargement

### 1. European Neighbourhood Policy ('ENP')<sup>69</sup>

The ENP is the EU's policy governing its relations with its southern and eastern neighbours, namely: Algeria, Egypt, Israel, Jordan, the Lebanon, Libya, Morocco, Palestine, Syria, Tunisia, Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. Among other things, the ENP requires the development and implementation of country-specific action plans on an annual basis. These action plans are developed by the particular council established under the relevant association and trade agreement between the EU and third-countries in the EU Neighbourhood. They are then formally adopted by the Commission on the basis of an implementing decision, the details of which are contained in annexes thereto, and are binding on the EU.<sup>70</sup>

Some of these action plans require that countries in the ENP develop, inter alia, national qualification frameworks ('NQFs') in line with the European Qualifications Framework ('EQF'), outlined in chapter 6.V; labour market skills matching tools, ie, qualification recognition systems; and educational exchanges between participating third-country students and EU students.<sup>71</sup> Finally, in terms of financing, in addition to the annual action plans which draw directly on the EU's budget, the EU has adopted a European Neighbourhood Instrument specifically designed to provide funding for

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<sup>69</sup> See, inter alia, Roland Dannreuther, 'Developing the Alternative to Enlargement: The European Neighbourhood Policy' (2006) 11 EFA Rev 183; Paul James Cardwell, *EU External Relations and Systems of Governance: The CFSP, Euro-Mediterranean Partnership and Migration* (Routledge 2009); Bart van Vooren, 'A case-study of "soft law" in EU external relations: the European Neighbourhood Policy' (2009) 34 EL Rev 696; Bart van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge 2012); Sieglinde Gstöhl (ed), *The European Neighbourhood Policy in Comparative Perspective: Models, Challenges, Lessons* (Routledge 2016); Sieglinde Gstöhl and Simon Schunz (eds), *Theorising the European Neighbourhood Policy* (Routledge 2016); Dimitris Bouris and Tobias Schumacher (eds), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy* (Palgrave Macmillan 2017); and Tobias Schumacher, Andreas Marchetti and Thomas Demmelhuber (eds), *The Routledge Handbook on the European Neighbourhood Policy* (Routledge 2018).

<sup>70</sup> Parliament and Council Regulation 232/2014/EU establishing a European Neighbourhood Instrument [2014] OJ L77/27; and 'A case-study of "soft law" in EU external relations: the European Neighbourhood Policy' (n 69) 709-710.

<sup>71</sup> See, eg, Commission Implementing Decision on the Annual Action Plan 2018 in favour of the Republic of Azerbaijan for 2018 C(2018) 8177 final, Annex; Commission Implementing Decision on the Annual Action Plan 2017 in favour of the Republic of Armenia to be financed from the general budget of the European Union C(2017) 8195 final, Annex 1.

certain measures in respect of countries in the neighbourhood, such as promoting capacity building in education and training through the improved use and development of skills.<sup>72</sup>

All of these steps seem welcome. Aligning third-country NQFs with the EQF will make education in those countries more comparable to that in the EU. As suggested earlier, this facilitates what can be described as the 'externalisation' of the Single Market, namely, the creation of a robust external dimension which ensures that the EU is better able to secure its internal goals. Creating similar education and training systems outside the EU may prepare third-country nationals to participate in the Single Market before they even arrive. It may even better facilitate the recognition of their qualifications and, consequently, their ability to work in the EU. The possibility of educational exchanges is to be welcome insofar as it facilitates the circulation of knowledge and the possibility for third-country nationals to bring greater knowledge and skills back to their country of origin. If such exchanges were institutionalised across the EU's partnership, trade and association agreements, they may serve to improve mutual understanding, reduce discrimination and alleviate the risks of any 'brain drain'.

I said that these steps seem welcome. That is because they have the appearance of satisfying the EU's humanitarian obligations. But they also seem largely self-serving. One wonders whether it would have been possible for the EU to simply provide funding to these third-countries to facilitate the further development of their own education systems rather than ones aligned with the EU. As noted earlier, if the EU exercises its power to export its products, values and norms, then it may be dominating third-countries. It was also earlier acknowledged that whether the EU generally does so is very much open to question. It will depend on a contextual analysis of all the relevant factors.

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<sup>72</sup> Parliament and Council Regulation 232/2014/EU establishing a European Neighbourhood Instrument [2014] OJ L77/27, Annex II.

## 2. Enlargement Policy<sup>73</sup>

The EU's enlargement policy concerns the potential accession of certain neighbouring countries in Europe, such as those in the Western Balkans (Bosnia and Herzegovina, Montenegro, Albania, Serbia, Kosovo, North Macedonia (formerly FYROM)) and Turkey, to the EU. It is necessary to clarify, at the outset, that the neo-colonial objection does not apply in respect of potential accession states insofar as these states freely decide that they want to become part of the EU. In that way, they openly accept that the EU should exercise its will over them to some degree. That is not to say that all such states have or do accede freely. For example, once the UK decided to join the EEC, it naturally followed that Ireland would too given the then largely structural economic dependency of Ireland on the UK. In its enlargement policy, the EU monitors the progress of such countries in meeting certain basic, minimum standards in relation to, amongst other things, their national institutions, education and training, fiscal stability and market rules. The Commission draws up reports on each country's progress towards compliance with such EU norms and standards on an annual basis.

Thus far, the development and recognition of qualifications have featured in these reports. Turkey, Kosovo, North Macedonia and Montenegro have adopted and implemented an NQF which references the EQF, an approach recommended in the updated Council Recommendation on the EQF in 2017. In respect of the recognition of skills and qualifications, the Commission reports that while some potential and actual candidate accession states have implemented a recognition scheme, obstacles to recognition, such as nationality and language requirements, remain.<sup>74</sup> Moreover, such recognition schemes have generally been quite partial, applying to a handful of professions only.<sup>75</sup> Several states, such as Montenegro and Serbia, have yet to adopt

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<sup>73</sup> See, inter alia, Helene Sjurjen (ed), *Questioning EU Enlargement: Europe in Search of Identity* (Routledge 2006).

<sup>74</sup> See, eg, Commission, 'Turkey 2018 Report accompanying the 2018 Communication on EU Enlargement Policy' (Staff Working Document) SWD(2018) 153 final, 65.

<sup>75</sup> See, eg, Commission, 'Bosnia and Herzegovina 2016 Report accompanying the 2016 Communication on EU Enlargement Policy' (Staff Working Document) SWD(2016) 365 final, 42; Commission, 'The former Yugoslav Republic of Macedonia 2018 Report accompanying the 2018 Communication on EU Enlargement Policy' (Staff Working Document) SWD(2018) 154 final, para 5.3; Commission, 'Albania 2018 Report accompanying the 2018 Communication on EU Enlargement Policy' (Staff Working Document) SWD(2018) 151 final, 56.



any legislation on the recognition of professional qualifications. Nonetheless, all states are encouraged to continue aligning their recognition frameworks with EU norms.

The Commission's reports also disclose an extensive concern for the quality of education available in these states and the relevance of such education for participation in the labour market. In most cases, the Commission has recommended more extensive investment in respect of the education systems of accession states, as well as increasing participation rates in education.<sup>76</sup> In terms of funding, the Parliament and Council has adopted two funding instruments specifically in respect of pre-accession states, one of which has since expired.<sup>77</sup> Accordingly, the current funding instrument of the Union, which is set to run from 2014-2020, envisages funding being provided for, inter alia, education, skills and lifelong learning, specifically through adapting vocational education and training to labour market demands and improving the quality and relevance of higher education and training.<sup>78</sup> The total budget for the period 2014-2020 under the instrument for all pre-accession states is €11.7bn. Whether that budgetary allocation constitutes a sufficient amount to bring about the improvements demanded by the EU, in terms of pre-accession states' alignment of national institutions and education systems, remains to be established.

#### **D. International Cooperation and Policy Dialogue**

Commission DG Education and Training cooperates in education and training with third-countries to prioritise, inter alia, the advancement of the EU as a centre of excellence in education and training; to support partner countries in the modernisation of their legal system; and to promote common values and closer understanding between different peoples and cultures. Such cooperation may thereby facilitate what

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<sup>76</sup> See, eg, Commission, 'Albania 2018 Report accompanying the 2018 Communication on EU Enlargement' (Staff Working Document) SWD(2018) 151 final, ch 26; Commission, 'Montenegro 2019 Report accompanying the 2019 Communication on EU Enlargement Policy' (Staff Working Document) SWD(2019) 217 final, ch 26.

<sup>77</sup> Council Regulation 1085/2006/EC establishing an Instrument for Pre-Accession Assistance [2006] OJ L210/82.

<sup>78</sup> Parliament and Council Regulation 231/2014/EU establishing an Instrument for Pre-accession Assistance (IPA II) [2014] OJ L77/11, Annex II(d); and see Wolfgang Koeth, 'The New Instrument for Pre-Accession Assistance (IPA II): Less Accession, More Assistance?' (EIPA Working Paper 2014/W/01).

Pettit described as 'mutual understanding' between free peoples. The EU has thus established a policy dialogue with several partner states and groups, namely with the countries in the EU Neighbourhood through the Eastern Partnership (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine), Southern Mediterranean Partnership and Western Balkans Platform on Education and Training (Albania, Bosnia and Herzegovina, North Macedonia, Kosovo, Montenegro and Serbia), with Africa through the EU-Africa Partnership, and with several countries in the Americas and Asia. These dialogues provide opportunities for EU and non-EU officials and member state representatives to meet, discuss competing goals, form joint agendas and goals and produce reports or evaluations on respective recognition methods, policies and cooperation.

An example of this is the joint study commissioned by the EU-Australia Partnership on the role of qualifications frameworks in facilitating the mobility of workers and learners in 2011. The study noted the significance of professional organisations in recognising qualifications, and several problems surrounding the lack of professional qualification recognition. These problems included the lack of professional networks, the great diversity of professional bodies and organisations, and the different qualification assessment and recognition methodologies adopted in respect of vocational, academic and professional qualifications.<sup>79</sup> The study was completed against the background of the European Commission—Government of Australia Joint Declaration on Cooperation in Education and Training in 2007, which required cooperation by both parties on, inter alia, 'facilitating the quality of student/learner and professional mobility by promoting transparent, mutual recognition of qualifications and periods of study, training, and where appropriate, portability of credits'. Since the report in 2011, the EU-Australia Partnership has agreed to foster linkages between the EQF and the Australian Qualifications Framework for the purposes of better facilitating the recognition of qualifications.<sup>80</sup> As suggested

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<sup>79</sup> GHK, *Study on the (potential) role of qualifications frameworks in supporting mobility of workers and learners: European Commission and Australian Department of Education, Employment and Workplace Relations Joint EU-Australia Study* (DEEWR and DG EAC 2011).

<sup>80</sup> EU-Australia Education and Training Policy Dialogue, 'Fourth European Union-Australia Education and Training Policy Dialogue: Joint Statement' (Brussels, 12 March 2012); EU-Australia Education and Training Policy Dialogue, 'Fifth European Union-Australia Education and Training Policy Dialogue: Joint Statement' (Melbourne, 4 March 2013).

earlier in respect of other third-countries, whether, in reaching this position, the EU dominated Australia is largely an empirical question, depending primarily on how the negotiations between the two political communities operated.

Similarly, in its third Policy Dialogue with Southern Mediterranean Countries on Higher Education as part of the Southern Mediterranean Partnership, the Commission encouraged participating partner countries to adopt the EQF in the development of their national qualification frameworks,<sup>81</sup> and the Astana Declaration of the Second Meeting of Ministers for Education of the member states of the European Union and of the Central Asian Countries encouraged members of the EU's Education Initiative for Central Asia to consider the recent Council Recommendation on the EQF and take it into account in forming and updating their respective national qualification frameworks.<sup>82</sup> In addition, the EQF has been, or soon will be, adopted by a number of countries participating in the Western Partnership<sup>83</sup> and the Eastern Partnership.<sup>84</sup> As with the ENP more generally, whether these countries are being dominated by the EU insofar as it is suggested that they should adopt the EQF is a largely empirical matter beyond the scope of this chapter.

## **E. International Cooperation and Development**

Commission DG International Cooperation and Development ('DG DEVCO') reaches out to many countries across the world in a wide variety of ways through the EU's trade relationships and the provision of technical and financial assistance and grants to developing countries for the development of their national and regional political, economic, social and cultural institutions. The EU's work in this area is vast and

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<sup>81</sup> Commission, *Report on the Third Policy Dialogue with Southern Mediterranean Countries on Higher Education* (Brussels, 12-13 July 2016) 12.

<sup>82</sup> Astana Declaration of the Second Meeting of Ministers for Education of the Member states of the European Union and of the Central Asian Countries (Astana, 23 June 2017).

<sup>83</sup> DG Education and Culture, *From University to Employment: Higher Education Provision and Labour Market Needs in the Western Balkans Synthesis Report* (European Commission 2016).

<sup>84</sup> 'Mutual Learning for Better Qualifications Regional Conference October 2015: Conference Conclusions and Follow-up Actions' (6-8 October 2015).

significant.<sup>85</sup> Any comments I make here should therefore be considered introductory and relevant solely to the recognition of the skills of third-country nationals. More specifically, it is worth considering briefly some of the measures which have been adopted in this area that are of relevance to recognition of skills because the work of DG DEVCO is the most obvious manifestation of the EU's efforts to discharge its humanitarian obligations.

Perhaps the key measure in this area is the Development Cooperation Instrument ('DCI').<sup>86</sup> Currently set to run for the period 2014-2020, the DCI took over from an earlier measure which ran for the period 2006-2013.<sup>87</sup> It funds thematic programmes, such as the development of education and training, through, inter alia, the development and implementation of annual action plans ('AAPs'). AAPs are financing decisions adopted by the Commission in respect of the EU's external relations under the auspices of the DCI; and several of these have addressed skills development and recognition.

The first is the 2016 AAP for Africa, which provided funding for the recognition of educational qualifications obtained in different African educational institutions. Specifically, the funding aimed to promote the recognition of qualifications and skills obtained during periods of study abroad. By facilitating recognition between educational institutions in Africa, it is hoped that this will lead to greater internationalisation and harmonisation of educational curricula across Africa.<sup>88</sup> This may even eventually lead to the mutual recognition of qualifications between African professional bodies. This issue was also recognised in a recent Joint Communication, in which the Commission noted the need to 'better organise intra- and inter-regional

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<sup>85</sup> See, eg, Wil Hout (ed), *EU Development Policy and Poverty Reduction: Enhancing Effectiveness* (Ashgate 2007); Martin Holland and Matthew Doidge, *Developing Policy of the European Union* (Red Globe Press 2012); Stefan Gänzle, Sven Grimm and Davina Makhani (eds), *The European Union and Global Development: An 'Enlightened Superpower' in the Making?* (Palgrave Macmillan 2012); Robert Schütze, 'EU Development Policy: Constitutional and Legislative Foundation(s)' (2013) 15 *CYELS* 699; and Sarah Beringer, Sylvia Maier and Markus Thiel (eds), *EU Development Policies: Between Norms and Geopolitics* (Palgrave Macmillan 2019).

<sup>86</sup> Parliament and Council Regulation 233/2014/EU establishing a financial instrument for development cooperation for the period 2014-2020 [2014] OJ L77/44.

<sup>87</sup> Parliament and Council Regulation 1905/2006/EC establishing a financial instrument for development cooperation [2006] OJ L378/41.

<sup>88</sup> Commission, 'Implementing Decision on the Annual Action Programme 2016 of the DCI Pan-Africa Programme' (Implementing Decision) C(2016) 4513 final, Annex I.

labour mobility, facilitating institutional dialogue and cooperation along the migratory routes, and facilitating 'brain circulation' through recognition of skills and qualification, dialogue on visas, and promotion of students, researchers and academic mobility'.<sup>89</sup>

Several other AAPs have noted the need to implement national qualifications frameworks in the context of higher education, but in general no link has yet been made between educational qualifications and professional qualifications.<sup>90</sup> Given that coordinate education and training is an important precursor to effective qualification recognition, only after education reforms have been institutionalised and entrenched is the issue of qualification recognition likely to arise.

The European Development Fund ('EDF') is the primary financing instrument for the EU's development policy with ACP countries under the Cotonou Agreement. The 11th EDF, which operates from 2014-2020, provides approximately €32billion for development activities in ACP states.<sup>91</sup> Historically, the EDF has mainly provided targeted development aid in the areas of agriculture and infrastructure, which have been key to decreasing poverty in ACP states. However, increasingly, funding has shifted towards developing human capital through enhancing skills and education of persons in ACP states.<sup>92</sup> Whether the funding provided by the EDF is sufficient to

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<sup>89</sup> Commission, 'A renewed partnership with the countries of Africa, the Caribbean and the Pacific' (Joint Communication) JOIN(2016) 52 final, 17.

<sup>90</sup> See, for example, Commission, 'Implementing Decision on the Annual Action Programme 2014 in favour of Belarus to be financed from the general budget of the European Union' (Implementing Decision) C(2014) 6937 final, Annex III; Commission, 'Implementing Decision on the Annual Action Plan 2015 in favour of Pakistan to be financed from the general budget of the European Union' (Implementing Decision) C(2015) 9335 final, Annex I; Commission, 'Implementing Decision on the Annual Action Plan 2016 Part III in favour of the Asia region to be financed from the general budget of the European Union' (Implementing Decision) C(2016) 5218 final, Annex I; Commission, 'Implementing Decision on the Annual Action Plan 2016 in favour of the Caribbean Region to be financed from the 11th European Development Fund' (Implementing Decision) C(2016) 6434 final, Annex III; Commission, 'Implementing Decision on the Annual Action Programme 2014 in favour of Belarus to be financed from the general budget of the European Union' (Implementing Decision) C(2014) 6937 final, Annex III; Commission, 'Decision on the Annual Action Programme 2017 in favour of Angola to be financed from the 11th European Development Fund' (Implementing Decision) C(2016) 7077 final, Annex; Commission, 'Decision on the Annual Action Programme 2017 part 2 in favour of the Pacific Region to be financed from the 11th European Development Fund' (Implementing Decision) C(2017) 4903 final, Annex I.

<sup>91</sup> Cotonou Agreement, Annex IC; Council Regulation 2015/323/EU on the financial regulation applicable to the 11th European Development Fund [2015] OJ L58/17; and Council Regulation 2018/1877/EU on the financial regulation applicable to the 11th European Development Fund [2018] OJ L307/1.

<sup>92</sup> See Roman Grynberg and Alice Clarke (eds), *The European Development Fund and Economic Partnership Agreements* (Commonwealth Secretariat 2006); Alisa Herrero, Anna Knoll, Cecilia Gregersen & Willy Kokolo, 'Implementing the Agenda for Change: An Independent Analysis of the 11th EDF Programming' European Centre for Development Policy Management Discussion Paper No 180 (September 2015).

discharge the EU's humanitarian obligations and to secure the right to education for the peoples of countries which benefit from the EDF remains open to question.

## Conclusion

This chapter continued and concluded the analysis of the external dimension of the EU's response to the inadequate skills' recognition which third-country nationals coming to the EU habitually face. It continued to judge and consider EU law and practice in the light of the external dimension of the neorepublican ideal of freedom as non-domination with a view to understanding and critiquing the relationship between theory and praxis. While the previous chapter outlined in detail the circumstances and manner in which third-country nationals can have their qualifications recognised either before coming to or on arrival and residence in the EU, this chapter considered how to overcome the inadequate skills' recognition third-country nationals face by analysing one way in which qualification recognition works successfully in practice. That analysis led to a discussion of the role of education and training in the EU's external relations generally. The conclusions which that discussion led to are essentially twofold.

First, a limited analysis of mobility in a highly institutionalised profession suggests that coordination of education aligns workers' skills with jobs, thereby matching supply with demand. In other words, education prepares people for work. This suggests that we should focus at least some of our attention on the regulation of education. Institutionalising coordinated education systems between the EU's member states and third-countries could improve the matching of supply and demand, thereby contributing to people's well-being through making it easier for people to exercise their autonomy in and through their work. However, doing so risks dominating third-countries insofar as it involves externalising the EU and its member states' education and training systems and causing or contributing to a 'brain drain' in third-countries. The manner in and extent to which the EU discharges its humanitarian obligations to third-countries will therefore be most pressing.

Second, the EU has generally developed positive relations with third-countries, in some circumstances going beyond the fairly minimalistic requirements of the

external dimension of the neorepublican ideal of freedom as non-domination. It cooperates in respect of education and training with numerous countries to various degrees. However, occasionally, in so doing it risks dominating certain third-countries. Whether it does so dominate those countries is an empirical question which remains to be established. The same can be said in respect of countries in the EU's Neighbourhood but generally not those pre-accession who seek to become members of the EU. For the sake of completeness, the reader was also introduced to the EU's cooperation in respect of education and training more generally, which seems to be facilitating convergence between the education systems of the EU and certain third-countries, and the EU's humanitarian work. Whether the EU's funding for such humanitarian projects is sufficient to discharge its humanitarian obligations remains open to question.

## 7. The Internal Dimension

### Introduction

This chapter discusses the internal dimension to qualification recognition, namely, in what circumstances can third-country nationals have their qualifications recognised when moving within the EU? It transcends the spatial limitations of the external dimension to qualification recognition, being concerned not with recognition procedures within single member states but rather with an aspect of the substantive law of the EU; in other words, EU free movement law. Accordingly, this chapter considers the primary tool for the recognition of qualifications within the Single Market, namely, Parliament and Council Directive 2005/36/EC on the recognition of professional qualifications, as amended ('Recognition Directive').<sup>1</sup> A prefatory point about the Recognition Directive merits noting. That is its consistency with the concept of work adopted in chapter 1.III.C. For it recognises that workers and the self-employed

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<sup>1</sup> [2005] OJ L255/22. And see the amendments made thereto in Parliament and Council Directive 2013/55/EU on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L354/132 (Administrative Cooperation Directive).



will need to have their qualifications recognised because both carry out productive activity. The Recognition Directive is addressed and discussed in detail. The chapter considers what effect the application of the Recognition Directive has on regulated professions, thereby highlighting the role which mutual recognition plays in the creation of a transnational competitive culture and the theme of governance in this thesis. The circumstances in which third-country nationals can benefit from the terms of the Recognition Directive are also discussed in detail. A short conclusion follows.

## I. Overview

According to the European Commission, there are 590 different professions across the EU, of which 576 are regulated in at least one member state.<sup>2</sup> The vast majority of these are addressed under the Recognition Directive. A select number of professions are specifically addressed under separate legislation.<sup>3</sup> For present purposes, these are set aside. The analysis below may well have implications for those professions, but they are not directly addressed here.

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<sup>2</sup> Commission, 'Regulated Professions Database' <[http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=professions&quid=1&mode=asc&maxRows=\\*#top](http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=professions&quid=1&mode=asc&maxRows=*#top)> accessed 16 November 2017. See Tinne Heremans, *Professional Services in the EU Internal Market* (Hart 2012) and Vassilis Hatzopoulos, *Regulating Services in the European Union* (OUP 2012).

<sup>3</sup> These are statutory auditors, governed by Parliament and Council Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts [2006] OJ L157/87; seafarers, governed by Parliament and Council Directive 2008/106/EC on the minimum level of training of seafarers (recast) [2008] OJ L323/33; insurance intermediaries, governed by Parliament and Council Directive 2002/92/EC on insurance mediation [2003] OJ L9/3; certain transport operators, under Council Directive 96/26/EC on admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations [1996] OJ L124/1; professionals handling toxic products, under Council Directive 74/557/EEC on the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons and of intermediaries engaging in the trade and distribution of toxic products [1974] OJ L307/5 and Council Directive 74/556/EEC laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries [1974] OJ L307/1; lawyers, governed by Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L78/17 (First Lawyers' Directive) and Parliament and Council Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L77/36 (Second Lawyers' Directive); and commercial agents, governed by Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

The most important legal provision for this section is the foundation for qualification recognition in EU law, embodied in art 53 TFEU, which empowers the EU to issue directives, not regulations, in this area. This may itself suggest a lack of sufficient coordination between the member states in respect of the establishment of a true political community with a functioning market in the European Union. But recall that Pettit's neorepublicanism requires instantiation primarily through the law; not solely through the law nor solely through law of a specific type or kind. Although it is likely that Pettit had in mind statute and case law traditional to nation states, directives have similar, albeit not precisely the same, effects across the EU.

## II. The Principle of Mutual Recognition

### A. Origins

Mutual recognition is an important tool in the project of European integration.<sup>4</sup> But what is it? The starting point in understanding mutual recognition is *Cassis de Dijon* in which the Court of Justice first stated the now infamous principle that if a good is lawfully produced and marketed in one member state, then it should in principle be permitted to circulate in any other member state.<sup>5</sup> The only limitations to this principle evinced at the time were restrictions based on certain 'mandatory requirements' such as 'the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.<sup>6</sup> Unfortunately, this bare statement does not greatly enlighten this fundamental principle.

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<sup>4</sup> Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, OUP 2019) 583-585; Paul Craig, 'The Evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart 2002) 7; Susanne Schmidt, 'Mutual Recognition as a New Mode of Governance' (2007) 14 JEPP 667; Kalypto Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 JEPP 682; Christine Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013); and Kalypto Nicolaïdis, 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' (2017) 70 CLP 227.

<sup>5</sup> Case 120/78 *Cassis de Dijon* [1979] ECR 650 [14]; and see Commission, Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('*Cassis de Dijon*') [1980] OJ C256/2.

<sup>6</sup> Kenneth Armstrong, 'Mutual Recognition' in *The Law of the Single European Market* (n 4) and Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 CML Rev 405 agree.

## B. The Principle

The best way to strengthen our view on what mutual recognition is and requires is to clarify our principles. A thought experiment may help to do so. Thus, consider the following scenario. Suppose that two nation states are generally characterised—socially, economically, culturally—by the following starting position relative to each other, and desire to transition to the following end state relative to each other:

Starting State: (Partial or Total) Diversity

End State: (Partial or Total) Uniformity<sup>7</sup>

When transitioning from the starting state to the end state, there are at least two approaches we could take. Put briefly, they are (partial or total) competitive federalism and (partial or total) harmonisation. Harmonisation is the more challenging of these two methods because it requires the parties to agree, quite specifically and forthrightly, on the formation of one or several uniform standards. When transitioning from a state of (partial or total) diversity to one of (partial or total) uniformity, harmonisation is an obvious choice, but it is practically difficult to implement. Competitive federalism, by contrast, puts diverse systems of value—social, economic, regulatory—into competition.<sup>8</sup> To say that two or more systems of value are in competition is not to guarantee that uniformity will emerge, but competitive pluralism is at least consistent with the eventual emergence of one or several uniform standards by any given community.

The benefits of this approach lie in its subtlety. There need not be an agreement to create uniform standards, but the competition engendered may result in a desire amongst the parties to create uniform standards due to converging standards and

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<sup>7</sup> Cf 'Mutual Recognition as a New Mode of Governance' (n 4).

<sup>8</sup> 'Mutual Recognition' (n 6) 243-244; Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' in *The Law of the Single European Market* (n 4); Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 38; Charles Tiebout, 'A Pure Theory of Local Expenditure' (1956) 64 *Journal of Political Economy* 416; Akiko Suwa Eisenmann and Thierry Verdier, 'Reciprocity and the Political Economy of Harmonisation and Mutual Recognition of Regulatory Measures' Centre for Economic Policy Research Discussion Paper Series No 3147 (January 2002).

values. Competitive federalism is well-captured by mutual recognition as outlined in *Cassis de Dijon*. There is a general agreement or rule that goods must freely circulate, subject to relatively minimal exceptions. Over time, consumer tastes and demands then adjust, and patterns of uniformity emerge in markets for goods, services and labour. It is often suggested, however, that mutual recognition may engender a 'race to the bottom' in regulatory standards, but it is by no means clear that this would occur.<sup>9</sup> Indeed, some research suggests that the very opposite might happen, namely, a 'race to the top'.<sup>10</sup> Ultimately, it will depend on a large variety of factors in the market in question.<sup>11</sup>

What, then, does the principle of mutual recognition demand? Competing accounts are available, but Kalypso Nicolaïdis offers perhaps the most intuitive and relevant.<sup>12</sup> According to Nicolaïdis, in a regulatory context mutual recognition is a process which involves mutual comparative assessments of rules, standards and norms, in selected areas, by respective national public institutions and regulatory authorities, according to prior agreement. This comparative analysis involves the acquisition of knowledge and information of foreign regulatory regimes by the respective national institutions and authorities. As a result of this mutual learning, national regulators may adapt their own administrative, regulatory and legislative techniques to make their regulatory systems more attractive. It may also result in the

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<sup>9</sup> See, inter alia, Catherine Barnard, 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?' (2000) 25 *EL Rev* 57; Hanne Søndergård Birkmose, 'A 'Race to the Bottom' in the EU?' (2006) 13 *MJ* 35; and Gareth Davies, 'Trust and Mutual Recognition in the Services Directive' in Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012).

<sup>10</sup> See Susanne Schmidt, 'The Impact of Mutual Recognition: Inbuilt Limits and Domestic Responses to the Single Market' (2002) 9 *JEPP* 935 and Jacques Pelkmans, 'Mutual Recognition in Goods and Services' in Fiorella Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005).

<sup>11</sup> See Kalypso Nicolaïdis, 'Globalisation with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals' in *The Principle of Mutual Recognition in the European Integration Process* (n 10) 169 et seq; and Daniel Esty and Damien Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (OUP 2001).

<sup>12</sup> See Kalypso Nicolaïdis and Michelle Egan, 'Transnational Market Governance and Regional Policy Externality: Why Recognise Foreign Standards?' (2001) 8 *JEPP* 454; Kalypso Nicolaïdis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2004) 68 *Law and Contemporary Problems* 263; 'Globalisation with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals' (n 11); 'Trusting the Poles? Constructing Europe through Mutual Recognition' (n 4); Kalypso Nicolaïdis and Susanne Schmidt, 'Mutual Recognition 'on Trial': the Long Road to Services Liberalisation' (2007) 14 *JEPP* 717; and 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' (n 4).

production of harmonised standards between the parties in areas of mutual interest and comparability.<sup>13</sup>

Ultimately, the successful operation of this process results in an embedded relationship of mutual trust, confidence and respect between administrators and national authorities across borders for their respective laws, policies and administrative decisions.<sup>14</sup> But this does not entail an absolute acceptance of such laws, policies or decisions. Indeed, as the exceptions to *Cassis de Dijon* suggest, there are limits to mutual recognition. Rather than engage in conflict or ignore the other side, it suggests that if a conflict between regulation arises or differences in regulatory approach emerge, then national administrators and law-makers should instead engage in dialogue over the coherence and sensibility of maintaining potentially self-interested regulations which are likely to negatively affect such a relationship of trust.

However, it is not clear that regulations which are blatantly self-interested and not 'other-regarding' in the Single Market are always withdrawn or reviewed peaceably over dialogue between member state authorities.<sup>15</sup> Nonetheless, Nicolaïdis' account provides a useful lens through which we can understand mutual recognition. Indeed, as will become clear, the right to have one's qualifications recognised promotes freedom as non-domination by enabling people to challenge over- or under-regulation, thereby enhancing competition in our culture and better facilitating the use of people's skills.

### III. The Recognition Directive

There are three cumulative threshold questions for applying the mutual recognition schemes under the Recognition Directive, each of which shall be addressed in turn.

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<sup>13</sup> See Wolfgang Kerber and Roger Van den Bergh, 'Mutual Recognition in the Global Trade Regime: Lessons from the EU Experience' in *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (n 9).

<sup>14</sup> See Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* [2006] ECR I-801 [21].

<sup>15</sup> See the cases discussed in Stephen Weatherill, 'Why there is no Principle of Mutual Recognition in EU Law (and why that matters to consumer lawyers)' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014) and Stephen Weatherill, 'The Principle of Mutual Recognition: it Doesn't Work, because it Doesn't Exist' (2018) 43 *EL Rev* 224.

## A. Does the national of a member state concerned have a professional qualification?<sup>16</sup>

According to art 3(1)(b), 'professional qualifications' are qualifications attested by evidence of formal qualifications; an attestation of competence referred to in art 11(a)(i); or professional experience. Evidence of formal qualifications includes 'diplomas, certificates and other evidence' issued by the competent authority of a member state which certifies the successful completion of training, completed primarily in the EU.<sup>17</sup> This automatically excludes the possibility of qualification recognition for many third-country nationals. However, art 3(3) states that evidence of formal qualifications obtained in a third-country shall be regarded as a formal qualification for the purposes of the Recognition Directive if the person in question has three years professional experience in the member state in question. The Recognition Directive therefore charges the national competent authorities with primary responsibility for the recognition of qualifications of third-country nationals.

But what if a qualification obtained outside the EU is recognised in at least one member state; is another member state obliged to recognise it? In *Tawil-Albertini*<sup>18</sup> and *Haim*<sup>19</sup> the Court of Justice held that the national competent authorities of the host member state are not bound by the prior recognition of other member states. However, in *Hocsman* the Court of Justice narrowed the scope of its previous holding, stating that national competent authorities must nonetheless 'take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by the national rules'.<sup>20</sup> This may require the national competent authority of the host member state to verify whether prior recognition of a professional qualification by another member state as equivalent 'was given on the basis of criteria comparable to

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<sup>16</sup> Recognition Directive, arts 2(1), 2(2), 3(1)(b), 3(1)(c), 3(1)(f), 3(3), 11(a)(i).

<sup>17</sup> Recognition Directive, art 3(1)(c).

<sup>18</sup> Case C-154/93 *Tawil-Albertini* [1994] ECR I-451.

<sup>19</sup> Case C-319/92 *Haim* [1994] ECR I-425.

<sup>20</sup> Case C-238/98 *Hocsman* [2000] ECR I-6623 [35].

those whose purpose (...) is to ensure that Member States may rely on the quality of the diplomas (...) awarded by the other Member States'.<sup>21</sup> By analogy, the same reasoning must hold for third-country nationals who obtained a qualification outside the EU, are lawfully working in the territory of a member state in that profession, exercise free movement rights to work in another member state and seek to have that qualification recognised there.

According to art 11(a)(i) of the Recognition Directive, an attestation of competence is proof of qualification, issued by a competent authority of a member state, on the basis of the completion of certain training courses, exams, pursuit of the profession in question for three consecutive years or an equivalent duration on a part-time basis in the past ten years or attesting that the holder has acquired certain general knowledge. Finally, professional experience is full-time, or equivalent part-time, lawful practice of the profession in question. The education, training and experience constituting the professional qualification must have been obtained mainly, but not wholly, in the EU.<sup>22</sup> The same reasoning applied to formal qualifications above should, in principle, apply to professional experience. The potential range of qualifications which might be recognised is therefore quite broad.

Persons seeking to have their qualifications recognised must be fully qualified.<sup>23</sup> In *Morgenbesser*, the applicant had obtained a master's degree in law in Paris and worked in a Parisian law firm for some time, before seeking recognition of her degree for the purposes of working as a *praticante* in Italy.<sup>24</sup> However, her application for recognition at the Bar of Genoa was rejected as she did not hold a law degree issued or recognised by an Italian university. The applicant then sought to have her master's degree in law recognised as equivalent to an Italian law degree by an Italian university. The university required the applicant to sit thirteen examinations and prepare a thesis during an accelerated course of study. According to the Court, the profession of *praticanti* in Italy did not constitute a regulated profession but rather formed part of the course of training to become an *avocat* in Italy. The fact that many Italian *praticanti*

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<sup>21</sup> [2000] ECR I-6623 [39].

<sup>22</sup> Case C-286/06 *Commission v Spain* [2008] ECR I-8025.

<sup>23</sup> Tinne Heremans, *Professional Services in the EU Internal Market* (Hart 2012) 216-217.

<sup>24</sup> Case C-313/01 *Morgenbesser* [2003] ECR I-13493.

failed to qualify as *avvocati* but nonetheless continued to work as *praticanti* did not mean that it constituted a profession independent of the profession of *avvocati* but rather constituted, by necessary implication, poor regulation. Moreover, as the applicant had failed to obtain the *certificat d'aptitude à la profession d'avocat* necessary to become a *stagiaire* at the French Bar, she did not have the relevant equivalent qualification. However, the authorities of the host state were nonetheless required to undertake a comparative analysis of the qualifications of the applicant for the purposes of admission to the training process in Italy.<sup>25</sup> Thus, while those professionals who are not fully qualified are not guaranteed recognition of equivalence, the competent authorities are nonetheless required to undertake an assessment of their qualifications.

## **B. Has that national moved from one member state to another for the purpose of pursuing their profession?<sup>26</sup>**

This question concerns the distinction between the free movement of services, on the one hand, and the freedom of establishment and the free movement of workers, on the other hand. If a national of a member state moves to another member state to provide services on a temporary or occasional basis, then no question of the recognition of professional qualifications arises.<sup>27</sup> In general, member state nationals exercising their right to provide services on a temporary or occasional basis do not need to have their qualifications recognised by the host member state. However, in certain circumstances, the host member state may require the submission of evidence of professional qualifications, such as on the first occasion on which services are to be provided.<sup>28</sup> In addition, if the regulated profession in question in the host member state involves certain public health or safety implications, then the competent authority of the host member state may check the professional qualifications of the service provider insofar as doing so pursues the purpose of avoiding serious damage to the health or

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<sup>25</sup> [2003] ECR I-13493 [50]-[59].

<sup>26</sup> Recognition Directive, art 2(1); Case C-152/94 *van Buydner* [1995] ECR I-3985; Cases C-225/95, C-226/95 and C-227/95 *Kapasakalis, Skiathitis and Kougiankas* [1998] ECR I-4243; Case C-342/14 *X-Steuerberatungsgesellschaft* [2016] 2 CMLR 39.

<sup>27</sup> Recognition Directive, Title II; Case C-39/07 *Commission v Spain* [2008] ECR I-3435 [37].

<sup>28</sup> Recognition Directive, art 7(2)(c).



safety of service recipients. On the basis of this check, if the host member state concludes that there are substantial differences between the qualifications required of its nationals and the service provider, then the service provider may be required to pass an aptitude test.<sup>29</sup> The administrative cooperation of home and host state authorities is also guaranteed in the case of justified doubts on behalf of the host state authority, where the host state authority requires certain information or documents, concerning the qualifications and integrity of the professional in question.<sup>30</sup>

Professionals exercising their free movement rights for the purposes of providing services must comply with the rules governing the profession of the host member state insofar as they are directly related to professional qualifications. In *Konstantinides*, the CJEU confirmed that rules concerning the calculation of fees and advertising were not directly related to the actual professional practice of medicine and thus the applicant, a Greek medical doctor who provided services in Germany on a temporary and occasional basis, was not required to adhere to those rules.<sup>31</sup> The Court noted that the types of rules which are directly related to a profession include the definition of the profession, the use of titles—a point referred to earlier—and ‘serious professional malpractice which is directly and specifically linked to consumer protection and safety’.<sup>32</sup> Rules such as those in *Konstantinides*, which were only indirectly related to a profession, are instead considered as restrictions on the free movement of services under art 56 TFEU.

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<sup>29</sup> Recognition Directive, art 7(4).

<sup>30</sup> Recognition Directive, art 8.

<sup>31</sup> Case C-475/11 *Konstantinides* [2014] 1 CMLR 33.

<sup>32</sup> [2014] 1 CMLR 33 [38].

### C. Is that profession a regulated profession in the host member state?<sup>33</sup>

According to art 3(1)(a) of the Recognition Directive, a 'regulated profession' is

“a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession [practised by the members of an association or organisation listed in Annex I to the Directive] shall be treated as a regulated profession”

This concept is an EU law concept and its parameters are to be determined by the CJEU.<sup>34</sup> In *Aranitis*, the question for the Court of Justice was whether the profession of geologist was a regulated profession in Germany where, although there were no administrative provisions, laws or regulations governing the profession, in practice, only persons holding the title 'Diplom-Geologe'—which could only be obtained in Germany—sought employment as a geologist.<sup>35</sup> The Court confirmed that, notwithstanding that German employers would, in practice, only employ persons holding the above title, that profession could not be considered to be directly or indirectly regulated, as there were no laws, regulations or administrative provisions concerning the profession nor was de facto market regulation sufficient to constitute the indirect regulation of a profession. *Aranitis* nonetheless leaves open the possibility of indirectly regulating a profession in some other way.

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<sup>33</sup> Recognition Directive, art 3(1)(a).

<sup>34</sup> Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773; Case C-285/07 *Burbaud* [2003] ECR I-8219; Case C-586/08 *Rubino* [2009] ECR I-12013; Cases C-372 & 373/09 *Peñarroja Fa* [2011] ECR I-1785; Case C-298/14 *Brouillard* [2016] 2 CMLR 7.

<sup>35</sup> Case C-164/94 *Aranitis* [1996] ECR I-135. See also Cases C-372 & 373/09 *Peñarroja Fa* [2011] ECR I-1785 concerning court translators.

What does a person do if their profession is not considered a 'regulated profession', as in *Aranitis*? In *Vlassopoulou*, the Court of Justice confirmed that an independent duty to apply the principle of mutual recognition arises directly from art 53 TFEU.<sup>36</sup> Accordingly, on application by a professional, the competent authority must take into account and assess, comparatively, the diplomas, certificates and any other evidence of qualifications of that professional. The purpose of such an assessment is to consider whether, and to what extent, the qualifications of that person are identical, or at least equivalent, to the qualifications so certified by the host state's requirements. The competent national authority is permitted to take into account objective differences between the respective legal frameworks and fields of activity in the professional's home member state and the host member state. If the national competent authority concludes that the professional's qualifications are either identical or equivalent to those required by the profession in the host member state, then the authority must recognise them for the purposes of access to and exercise of that profession. However, if the authority concludes that there is only partial correspondence between the qualifications held by the professional and those required by the authorities of the host member state, then the host Member State may require that professional to demonstrate proof of the qualifications which are necessary.<sup>37</sup> According to the Court, an applicant may do so by demonstrating proof of the acquisition of knowledge or practical experience in the host member state, or the acquisition of professional experience in the home member state. National authorities must provide reasoned decisions for the outcome of this process.<sup>38</sup>

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<sup>36</sup> Case C-340/89 *Vlassopoulou* [1991] ECR I-2357; Case C-104/91 *Borrell* [1992] ECR I-3003; Case C-19/92 *Kraus* [1993] ECR I-1663; Case C-319/92 *Haim* [1994] ECR I-425; Case C-164/94 *Aranitis* [1996] ECR I-135; Case C-238/98 *Hocsmann* [2000] ECR I-6623; Case C-313/01 *Morgenbesser* [2003] ECR I-13493; Case C-298/14 *Brouillard* [2016] 2 CMLR 7.

<sup>37</sup> [1991] ECR I-2357 [15]-[19].

<sup>38</sup> [1991] ECR I-2357 [20]-[22].

## **IV. Mutual Recognition in the Recognition Directive**

### **A. The Methods of Recognition**

The Recognition Directive consolidates and expands the methods of recognition previously adopted in the transitional,<sup>39</sup> sectoral<sup>40</sup> and horizontal<sup>41</sup> directives. The Recognition Directive consists of a general recognition scheme<sup>42</sup> and the automatic

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<sup>39</sup> Council Directive 64/222/EEC laying down detailed provisions concerning transitional measures in respect of activities in wholesale trade and activities of intermediaries in commerce, industry and small craft industries [1965] OJ L56/857; Council Directive 64/427/EEC laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) [1964] OJ L117/1863; Council Directive 68/364/EEC in respect of activities of self-employed persons in retail trade [1968] OJ L260/6; Council Directive 68/366/EEC in respect of activities of self-employed persons in the food manufacturing and beverage industries [1968] OJ L260/12; Council Directive 68/368/EEC in respect of activities of self-employed persons in the personal services sector [1968] OJ L260/19; Council Directive 70/523/EEC in respect of activities of self-employed persons in the wholesale coal trade and in respect of activities of intermediaries in the coal trade [1970] OJ L267/18; Council Directive 74/556/EEC relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries [1974] OJ L307/1; Council Directive 75/368/EEC in respect of various activities and, in particular, transitional measures in respect of those activities [1975] OJ L167/22; and Council Directive 75/369/EEC in respect of itinerant activities and, in particular, transitional measures in respect of those activities [1975] OJ L167/29.

<sup>40</sup> See First Lawyers' Directive and Second Lawyers' Directive; Council Directive 77/452/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services [1977] OJ L176/1 and Council Directive 77/453/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of nurses responsible for general care [1977] OJ L176/8; Council Directive 75/362/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1975] OJ L167/1 and Council Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors [1975] OJ L167/14; Council Directive 85/432/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy [1985] OJ L253/34 and Council Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy [1985] OJ L253/37; Council Directive 78/686/EEC concerning the mutual recognition of diplomas, certificates and other formal evidence of qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1978] OJ L233/1 and Council Directive 78/687/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners [1978] OJ L233/10; Council Directive 78/1026/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1978] OJ L362/1 and Council Directive 78/1027/EEC concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of veterinary surgeons [1978] OJ L362/7; Council Directive 85/384/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1985] OJ L223/15.

<sup>41</sup> Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [1989] OJ L219/16 (Diplomas' Directive); and Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [1992] OJ L209/25 (First Supplementary Directive).

<sup>42</sup> Recognition Directive, Title III, Chapter I.

recognition of professional qualifications on the basis of professional experience, education and so-called 'common training principles'.<sup>43</sup>

## 1. General Recognition Scheme

In respect of the first method, art 10 provides that it is to apply to all those regulated professions which are not covered by the other schemes and to certain exceptional cases which do not fall under those other schemes.<sup>44</sup> This fall-back scheme ensures such persons access to and exercise of their profession in another member state, provided that, if access to and exercise of same is contingent upon possession of a specific professional qualification, then they possess an 'attestation of competence' or other 'evidence of formal qualifications' from the competent authority in the member state in which they previously practised their profession. If the profession is not regulated in the member state of origin, then access to and pursuit of that profession in the host member state will be ensured if the person concerned has practised their profession for at least one year full-time or an equivalent period part-time in the past ten years and can provide either an attestation of competence or evidence of formal qualifications.<sup>45</sup> In *Toki*, the Court of Justice explained the purpose of the need for professional experience: professional experience is required so as to provide the host member state with safeguards equivalent to state regulation through market regulation in states with limited market intervention.<sup>46</sup>

Under this scheme, the host member state is permitted to restrict or delay access on a number of grounds. First, according to art 13(4), the host member state is entitled to refuse access to and pursuit of a profession if the profession in question requires nationals to hold a diploma certifying that the holder has completed post-secondary education of at least four years duration, whereas the national pursuing that profession in their home state only holds an attestation of competence.<sup>47</sup> Second, the

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<sup>43</sup> Recognition Directive, Title III, Chapters II-III A.

<sup>44</sup> Case C-238/98 *Hocsmán* [2000] ECR I-6623; Case C-31/00 *Dreessen* [2002] ECR I-663; Case C-477/13 *Angerer* ECLI:EU:C:2015:239.

<sup>45</sup> Recognition Directive, art 13.

<sup>46</sup> Case C-424/09 *Toki* [2011] ECR I-2587 [30]-[32].

<sup>47</sup> Similar derogations and equivalence assessments are provided for in Recognition Directive, art 14(3).

host member state may require the professional to complete an adaptation period or an aptitude test, subject to the principle of proportionality and the provision of a reasoned decision, if there are substantial differences between the training of the professional and the training pursued in the host member state;<sup>48</sup> the pursuit of the profession requires precise knowledge of national law or rules;<sup>49</sup> or the training period is one year shorter in that in the host member state.<sup>50</sup>

In *Colegio de Ingenieros de Caminos, Canales y Puertos*, the Court of Justice emphasised the need to adhere to the principle of proportionality in the application of such restrictions and noted the seriousness of such restrictions. As the Court noted, '[a] non-application of those measures might be significant, *and even decisive*, for a national of one Member State wishing to take up a regulated profession in another Member State'.<sup>51</sup> The competent authority of the host member state may also permit partial access to the profession only in the most extreme circumstances. According to art 4f(1) of the Recognition Directive, the professional must be fully qualified in their home member state, the difference between the profession in the home and host member states must be so large that the application of other compensation measures would be tantamount to requiring the applicant to undergo the full course of training ordinarily required of nationals of the host member state to be admitted to the profession, and the activity in question can be objectively distinguished from other activities in the regulated profession in the host member state.

## 2. Automatic Recognition Schemes

The second scheme provides for the automatic recognition of professional experience. According to art 16, if access to and pursuit of a profession listed in Annex IV to the Recognition Directive—generally, manufacturing, assembly, transport, maintenance, communications, personal service, certain itinerant and intermediary services—requires the possession of general, commercial or professional knowledge and abilities,

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<sup>48</sup> Recognition Directive, art 14(1), (4). See also Case C-313/01 *Morgenbesser* [2003] ECR I-13493.

<sup>49</sup> Recognition Directive, art 14(3), first and third paragraphs.

<sup>50</sup> Recognition Directive, art 14(3), fourth paragraph.

<sup>51</sup> [2006] ECR I-801 [24] (emphasis added).

then the host member state shall recognise previous experience as sufficient proof, subject to specific periods of past experience in some cases.<sup>52</sup> The third type of recognition scheme concerns the automatic recognition of qualifications on the basis of coordination of certain minimum training conditions listed in Annex V to the Recognition Directive for medical doctors, specialised doctors, nurses, dental practitioners, specialist dental practitioners, midwives, veterinary surgeons, pharmacists and architects in a manner substantially similar to the sectoral directives.<sup>53</sup> The Commission is empowered to update the knowledge and skills embodied in the coordinated minimum training requirements, subject to the right of member states to organise their education systems.<sup>54</sup>

The final automatic recognition scheme concerns the recognition of qualifications obtained on the basis of 'common training principles'.<sup>55</sup> According to art 49a(1) of the Recognition Directive, a 'common training framework' is 'a common set of minimum knowledge, skills and competences necessary for the pursuit of a specific profession'. The Administrative Cooperation Directive, which introduced this provision by way of amendment to the Recognition Directive, provides some insight on the purpose of common training frameworks. Recital 25 of the Administrative Cooperation Directive states that their introduction should 'promote a more automatic character of recognition of professional qualifications for those professions which do not currently benefit from it'. Furthermore, common training frameworks could be helpful in providing automatic recognition to certain specialisations not harmonised in the liberal professions. Professional organisations represented at EU level and national professional organisations should be able to submit suggestions for common training principles to the Commission. According to art 49a(2) of the Recognition Directive, common training frameworks must satisfy a number of conditions:

- (i) They must facilitate more professionals to move across member states;

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<sup>52</sup> Recognition Directive, arts 17-19.

<sup>53</sup> Recognition Directive, Title III, Chapter III.

<sup>54</sup> Recognition Directive, art 21(6).

<sup>55</sup> Recognition Directive, Title III, Chapter IIIA.



- (ii) The profession must be regulated in at least one-third of the member states;
- (iii) The common set of knowledge and skills collated combines the knowledge and skills required in at least one-third of the member states;
- (iv) The common training framework must be based on the European Qualification Framework;
- (v) It must have been prepared during a transparent consultation process; and
- (vi) It must permit nationals of any member state to be eligible to pursue their profession in another member state without being required to join or register with a professional organisation.

To date, a common training framework has been adopted for hospital pharmacists<sup>56</sup> and a common training framework is under construction for veterinary specialists.<sup>57</sup>

## **B. The Effects of Mutual Recognition**

While the principal effect of these mutual recognition schemes is to require access to a given profession on the basis of the recognition of qualifications,<sup>58</sup> clearly reflecting the access dimension of the previously-discussed right to work and therefore freedom as non-domination, the case law of the CJEU provides a number of insights into the incidental or indirect effects of these mutual recognition schemes on the organisation, structure and regulation of professions which merit consideration. A first concerns the extent to which the recognition of qualifications requires or permits admission to the host member state's labour market conditions. In *Beuttenmüller*, the Court of Justice confirmed and clarified that the right of access to and pursuit of a profession guaranteed by the then Diplomas' Directive did not extend to remuneration and other

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<sup>56</sup> Common Training Framework for Hospital Pharmacy <<http://www.hospitalpharmacy.eu/>> (accessed 3 December 2019).

<sup>57</sup> European Board of Veterinary Specialisation, 'Common Training Framework (CTF) for EBVS-recognised specialists: update October 2017' <<https://ebvs.eu/news/common-training-framework-ctf-for-ebvs-recognized-specialists-update-october-2017>> (accessed 3 December 2019).

<sup>58</sup> Recognition Directive, art 4(1).

employment conditions in the host Member State.<sup>59</sup> Any such claims must be dealt with under the relevant EU equality legislation.

A second issue concerns the organisation and structure of certain professions across the member states. A case well illustrating the potential effect of the Recognition Directive in this respect is *Burbaud*, in which the Court of Justice considered the organisation of the profession of hospital manager in France.<sup>60</sup> The applicant, a Portuguese national, obtained a law degree and a hospital administrator qualification from Portuguese institutions. She worked as a hospital administrator for several years in Portugal, before moving to France, obtaining a doctorate in French law in France and acquiring French nationality. The applicant then applied for admission to the hospital managers' corps of the French public service but was denied admission. The operative reason for denying the applicant admission was that she had not taken an entrance exam required in France to undergo training to become a hospital manager.

The Court first found that the profession of hospital manager in the French public service was a 'regulated profession' within the meaning of the Diplomas' Directive. Next, the Court held that the qualification obtained after completion of the training course required constituted a 'professional qualification' within the meaning of the Diplomas' Directive. Initially, the Court upheld the entrance examination, insofar as it served a 'dual purpose': first, successful performance in the examination facilitated entry to the French state's training college for hospital managers; and, second, successful performance also led to recruitment as trainees in the public service. If the applicant's Portuguese qualification was found to be equivalent to that awarded at the end of the training course in France, then she would still be required to take the entrance exam but would be exempted from the course itself and the final examination.

The Court then recognised that requiring nationals of other member states to pass an entrance exam to a training course for which they already hold the final qualification constituted an obstacle to the free movement of workers. As such, it

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<sup>59</sup> Case C-102/02 *Beuttenmüller* [2004] ECR I-5405 [45].

<sup>60</sup> Case C-285/01 *Burbaud* [2003] ECR I-8219.

required justification. According to the Court, the effect of the entrance exam in such circumstances was to downgrade nationals of other member states and was not necessary to the legitimate objective of seeking the best candidates for the job. The applicant could not therefore be required to undertake the entrance exam.

*Burbaud* thus illustrates the significant effects that the competition engendered by the principle of mutual recognition can have on professions in the EU and the consequent effect on the governance of those same professions. For, first, the operation of the principle of mutual recognition provides excellent evidence of one way in which our competitive pluralistic culture works. Insofar as working in the EU constitutes a form of participation in the ongoing construction and entrenchment of the Single Market, migrant workers who seek to practise their profession in another member state directly contribute to this process where their right to work requires the liberalisation of professional regulation. To recall some of my analysis in chapter 2, workers, as autonomous actors, are competing to advance their own conception of the good in and through their work. But, as there noted, there are limits to permissible competition in the form of prohibited harm or domination. Where people's pursuit of the good seems to be hindered through unnecessary, dominating regulation, such as that in *Burbaud* itself, it is right that they be able to challenge it; and, by contrast, where their flourishing is hindered by a *lack* of regulation, it is right that they be able to challenge such a failure to positively regulate. An example of this may be where professions are forced to merge or split, thus creating newly regulated professions.

At present, at least some economic data suggests that further *deregulation* of regulated professions across the EU, such as making it easier for people to access and participate in the labour market, would facilitate greater participation in the labour market, lower prices for consumers and improve allocative efficiency across the Union.<sup>61</sup> And these changes should lead to the satisfaction of people's well-being in the EU because (i) people will have a wider and/or better range of options to choose from and (ii) it will be easier to pursue at least some of those options given, amongst other things, lower prices and easier access conditions. Second, *Burbaud* illustrates how our

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<sup>61</sup> Commission, 'Reform recommendations for regulation in professional services' (Communication) COM(2016) 820 final, 7-8. See also Parliament and Council Directive 2018/958/EU on a proportionality test before adoption of new regulation of professions [2018] OJ L173/25.

competitive pluralistic culture *itself* generates norms governing behaviour, a point first made in chapter 2.III.A. By facilitating people's access to the labour market through the right to work, equal treatment and the right to have one's qualifications recognised for the purpose of accessing one's profession, such rights provide routes for people to challenge contemporary norms, either by having them reduced through deregulation or replaced by reregulation. They form a vital part of what Pettit described as 'insulation programmes', designed to ensure that people are not subjected to domination in society. Such legal rights thereby facilitate freedom non-domination and consequently, people's well-being.

*Nasiopoulos* also illustrates these points.<sup>62</sup> In that case, the Court confirmed that where the exercise of one regulated profession in the host member state could be separated distinctly from that of another, the dissuasive effect caused by the impossibility of partial recognition of the professional qualification in question was too serious to be offset by the fear of potential harm to the rights of recipients of services. For example, suppose

Profession I = Activities (X + Y + Z)

and

Profession II = Activities (A + X + Y)

According to *Nasiopoulos*, a person practising Profession I must be granted partial recognition to practice Profession II, even though they are clearly somewhat different. In that case, the plaintiff obtained a qualification as a medical masseur-hydrotherapist after two and a half years of training in Germany. He then moved to Greece and sought access to the profession of physiotherapist, which there required a higher degree of at least three years duration. His application was rejected. The Court adopted a broad sectoral approach noting that as both professions were in the paramedical sector, they could not avoid the mutual recognition system. Once again,

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<sup>62</sup> Case C-575/11 *Nasiopoulos* [2014] 1 CMLR 7 [34].

the effects of the principle of mutual recognition embodied in the Recognition Directive can be seen very clearly. As the overwhelming emphasis is on facilitating access to and participation in the labour market through the recognition of qualifications, that same mandate may require the reregulation of professions due to increased competition in the labour market. Indeed, in *Colegio de Ingenieros de Caminos, Canales y Puertos*, the Court acknowledged that 'partial recognition of professional qualifications could, theoretically, have the effect of fragmenting the professions regulated in a Member State into various activities'.<sup>63</sup> In such cases, the Court noted,

"the legitimate objective of protection of consumers and other recipients of services may be achieved through less restrictive means, particularly the obligation to use the professional title of origin or the academic title both in the language in which it was awarded and in its original form, and in the official language of the host Member State."<sup>64</sup>

This suggests that, where possible, partial recognition must be facilitated in all but the most extreme circumstances, implying that the possibility of increased fragmentation of professions and the consequent institutionalisation of individualised legal regulation is heightened. This should not be viewed as problematic; rather, it reflects the demands of our contemporary culture and the centrality of work to people's lives. Given that productivity is the hallmark of work, which is itself such a fluid concept, it should come as no wonder that old professions are constantly being challenged and fragmented by emerging forms of business and new ways of using skill sets. Once again, therefore, the recognition of professional qualifications can be understood as contributing to the further entrenchment of the Single Market by liberalising seemingly restrictive regulations and practices which dampen competition.

Notwithstanding the significant consequences this may have on the profession in question, the possibility of professions merging as a result of the mutual recognition

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<sup>63</sup> [2006] ECR I-801 [32].

<sup>64</sup> [2006] ECR I-801 [38].

process has also been recognised. In *Ordine degli Ingegneri di Verona e Provincia and Others*, the French state introduced regulations governing a specialisation in oral surgery which would provide elements of specialist dental and medical surgery.<sup>65</sup> This specialisation already existed in certain other member states and was listed in Annex V of the Recognition Directive. The question for the Court was whether the Recognition Directive precluded such a development. According to the Court, the Recognition Directive did not preclude such a development. Such a training course could be open to persons who have completed basic medical training or basic dental training. However, *Pešla* forces us to resist drawing stronger conclusions about the far-reaching implications of mutual recognition for the regulation, organisation and structure of professions.<sup>66</sup> In that case, the Court observed

“Article [45 TFEU] does not, in order to be given practical effect, require that access to a professional activity in a Member State be subject to lower requirements than those normally required of nationals of that State (...) However, although Article [45 TFEU] does not, of itself, require a lowering of the level of knowledge required of the law of the host Member State (...), that article cannot be interpreted as depriving the Member States of the possibility of relaxing the relevant qualification requirements.”<sup>67</sup>

Thus, there are some limits to the need to reorganise or reconfigure professions due to the recognition of qualifications. While professions may need to reorganise their access, training and practice structures, or even merge partially or wholly, they cannot be obliged to lower their educational, training or technical standards independently of the need to facilitate partial recognition or reorganise. In other words, a race to the bottom in terms of quality standards is not required, although it is possible.

In relation to educational standards, the principle of mutual recognition facilitates the proliferation of standards which originated in third-countries, albeit in

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<sup>65</sup> Case C-492/12 *Council national de l'ordre des médecins* ECLI:EU:C:2013:576.

<sup>66</sup> Case C-345/08 *Pešla* [2009] ECR I-11677.

<sup>67</sup> [2009] ECR I-11677 [50], [56]. See also Case C-125/16 *Malta Dental Technologists Association and Reynaud* ECLI:EU:C:2017:707 [47]-[49].

limited circumstances. In *Commission v Spain*, the Court confirmed that it is sufficient if education and training constituting a professional qualification is received mainly, but not wholly, in the EU.<sup>68</sup> Moreover, as noted in section III.A above, qualifications wholly obtained in third-countries may be recognised in certain limited circumstances under the Recognition Directive. This means that professions in the Single Market may be affected not only by standards of the member states but also global standards from outside the EU. However, this is less likely to have such a substantial impact, because the number of third-country nationals exercising their limited free movement rights in the EU is much smaller than the number of member state nationals exercising free movement rights. Nonetheless, the possibility remains that third-country nationals can play a distinctive role in the process of EU integration generally by using the skills which they have obtained outside the EU when working in the EU. In so doing, they provide new sources of value which enables the EU to remain competitive, thereby contributing to the well-being of its peoples through the provision of a wide range of options which satisfies the contemporary demands of our culture.<sup>69</sup>

A final implication of the principle of mutual recognition in this context is the fine line between the abuse of rights in EU law, on the one hand, and taking advantage of the benefits of a more attractive regulatory system in another member state, on the other hand. In *Torresi*, this question arose directly under the Second Lawyers' Directive.<sup>70</sup> The applicants, having obtained a law degree in Italy, then obtained a law degree in Spain and were registered as lawyers in Spain. Shortly thereafter, they sought registration in Italy. The Italian courts referred a question to the Court of Justice, expressing concern that the applicants, if they were registered in Italy, would then immediately return to Spain, thus resulting in an apparent abuse of their rights of free movement and freedom of establishment. While the Court of Justice confirmed that abuse of EU law rights cannot be tolerated, the circumstances of the case did not give rise to such an abuse. Specifically, the fact that a national obtains a law degree in one member state, moves to another member state to obtain the professional qualification

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<sup>68</sup> Case C-286/06 *Commission v Spain* [2008] ECR I-8025.

<sup>69</sup> See my 'Recognition of Professional Qualifications Post-Brexit' (*Regulating for Globalisation*, 6 February 2019) <<http://regulatingforglobalization.com/2019/02/06/recognition-of-professional-qualifications-post-brexit/>> (accessed 7 June 2019).

<sup>70</sup> Case C-58/13 *Torresi* EU:C:2014:2088.

of lawyer, and then returns to their own member state to practise under that title does not constitute an abuse of EU law rights. Moving to another member state to benefit from a more favourable legislative or administrative regime cannot be considered abusive. This is a clear example of the competition fostered by the principle of mutual recognition.

This case of course needs to be distinguished from cases of actual abuse or poor regulation. In *Consiglio Nazionale degli Ingegneri*, the holder of an Italian mechanical engineering degree sought recognition of his degree as a professional qualification in Spain.<sup>71</sup> The competent authority in Spain recognised his degree for the purposes of the Recognition Directive, and the applicant enrolled in the register of industrial technical engineers in Spain. However, the applicant had not obtained any professional qualification as an engineer in Italy prior to seeking recognition in Spain. The question of recognition should not, therefore, have arisen in the first place before the Spanish authorities. Without ever practising in Spain, the applicant then immediately sought recognition of his Spanish qualification in Italy so that he could enrol on the Italian Register of Engineers. His Spanish qualification was recognised in Italy and this was challenged by the applicant professional body before the CJEU. The Court of Justice accepted that the recognition of the mechanical engineering degree by the competent Spanish authority had not been based on any examination of the professional qualifications or professional experience held by the degree holder. Moreover, the degree holder had not been subject to any examination or assessment by the Spanish authority. Consequently, the Spanish enrolment certificate based on the Spanish authority's recognition of equivalence was not a 'diploma' requiring recognition by the Italian competent authority. Ultimately, the case stands out as illustrating a failure to appropriately adhere to the regulatory procedures in question.

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<sup>71</sup> Case C-311/06 *Consiglio Nazionale degli Ingegneri* [2009] ECR I-415. Cf Case C-118/09 *Koller* [2010] ECR I-13627.



## C. Restrictions on Mutual Recognition<sup>72</sup>

Permissible restrictions on the operation of the principle of mutual recognition in the context of the Recognition Directive or the general rules under art 53 TFEU are those which adhere to the general rules on restricting rights of free movement.<sup>73</sup> Thus, restrictions must be based on considerations of public policy, public security or public health. Derogations based on such considerations must be read in the light of the general principles of EU law, such as fundamental human rights and proportionality.<sup>74</sup> Alternatively, it is possible to justify restrictions on the basis of the public interest, provided that restrictions so justified in the public interest are non-discriminatory and proportionate.<sup>75</sup> Such restrictions may have the effect of maintaining or constituting high standards in certain professions.

In addition to certain restrictions noted in the case law discussed in section III.D.2 above, several other restrictions have been found by the CJEU to be excessive. Requiring further qualifications than those stated in the annexes to the Recognition Directive is contrary to EU law.<sup>76</sup> Similarly, the need to prove special qualifications in certain fields has been held to infringe EU law.<sup>77</sup> Additional examinations for foreign qualified architects were also held to be contrary to the Recognition Directive,<sup>78</sup> as was an authorisation test for estate agents working in Belgium involving an aptitude test in law.<sup>79</sup>

In *Commission v Greece* numerous restrictions imposed by the Greek competent authorities were found to be excessive.<sup>80</sup> Specifically, the Greek competent authorities

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<sup>72</sup> See generally *The Substantive Law of the EU* (n 4) ch 12 and Panos Koutrakos, Niamh Nic Suibhne and Phil Syrpis (eds), *Exceptions to EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016).

<sup>73</sup> Articles 45(3), 52(1) and 62 TFEU.

<sup>74</sup> Case C-100/01 *Ministre de l'Intérieur v Olazabal* [2002] ECR I-10981; Case C-108/96 *MacQuen* [2001] ECR I-837; Case C-17/92 *Federación de Distribuidores Cinematográficos v Estado Español et Unión de Productores de Cine y Televisión* [1993] ECR I-2239.

<sup>75</sup> Case C-76/90 *Säger* [1991] ECR I-4221; Case C-19/92 *Kraus* [1993] ECR I-1663; Case C-319/92 *Haim* [1994] ECR I-425; Case C-55/94 *Gebhard* [1995] ECR I-4165; Case C-108/96 *MacQuen* [2001] ECR I-837; Case C-279/00 *Commission v Italy* [2002] ECR I-1425; Case C-294/00 *Gräbner* [2002] ECR I-6515; Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* [2006] ECR I-801.

<sup>76</sup> Case C-365/13 *Ordre des architectes* ECLI:EU:C:2014:280.

<sup>77</sup> Case C-111/12 *Ordine degli Ingegneri di Verona e Provincia and Others* [2013] 2 CMLR 39.

<sup>78</sup> Case C-43/06 *Commission v Portugal* [2007] ECR I-73.

<sup>79</sup> Case C-197/06 *Van Leuken* [2008] ECR I-2627.

<sup>80</sup> Case C-274/05 *Commission v Greece* [2008] ECR I-7969.

systematically refused to recognise qualifications obtained from a private body in Greece which was accredited by the competent authority of another member state; the transposing legislation incorrectly qualified the right to choose between an adaptation period and an aptitude test; the Greek competent authority was wrongly empowered to assess the certificates which were supposed to be automatically recognised; persons who held professional qualifications could not have them recognised in the public service for the purpose of promotion; and a professional organisation for engineers refused to recognise foreign qualified engineers in accordance with the terms of the Recognition Directive. This case in particular serves as an important lesson to protectionist member state practices.

## **D. Beneficiaries**

### **1. Third-Country Nationals: The Law**

As should be clear from the discussion in section III above, the beneficiaries of the Recognition Directive are first and foremost EU citizens exercising their free movement rights under EU law. Given that third-country nationals do not generally enjoy such rights, the Recognition Directive does not generally apply to them. Rather, the Recognition Directive applies to third-country nationals in very specific circumstances only. To be clear, some categories of regular migrants do have limited mobility rights within the EU. Specifically, third-country nationals who do have mobility rights to differing degrees within the EU under EU law are long-term residents,<sup>81</sup> highly-qualified workers,<sup>82</sup> researchers, students, trainees, volunteers and au pairs,<sup>83</sup> intra-

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<sup>81</sup> Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 (LTR Directive), ch III.

<sup>82</sup> Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17 (Blue Card Directive), ch V.

<sup>83</sup> Parliament and Council Directive 2016/801/EU 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 (recast) [2016] OJ L132/21 (Researchers', Students', Volunteers' and Au Pairs' Directive), ch VI.

corporate transferees,<sup>84</sup> family members of an EU citizen,<sup>85</sup> citizens of states party to the EEA Agreement<sup>86</sup> and citizens of states party to the EC-Swiss Confederation Agreement.<sup>87</sup> Forced and irregular migrants do not have free movement rights under EU law. They therefore completely fall outside the scope of the Recognition Directive. Those third-country nationals who do have free movement rights in varying degrees may only benefit from the terms of the Recognition Directive where they rely on their free movement rights to move from one member state to another member state. A number of variations of this scenario merit critical attention and disambiguation.

The first is where a third-country national has a professional qualification from outside the EU, resides in a member state and moves to another member state on the basis of the host member state's immigration law. Can that third-country national benefit from the terms of the Recognition Directive in those circumstances? The answer seems to be no. Although their qualification may have been recognised in the member state they resided in and therefore require consideration by their host member state, the third-country national has not exercised free movement rights, and therefore the threshold established in section III.B above has not been met. Any assessment of their qualifications in these circumstances is outside the scope of EU law.

The second is where a third-country national resides in and obtains a professional qualification from one member state and then moves to another member state on the basis of the host member state's immigration law. Can that third-country national benefit from the terms of the Recognition Directive in those circumstances? The answer seems to be no: while they have a professional qualification and therefore meet one element of the test applicable, they have not exercised any free movement rights and therefore falls outside the scope of the Recognition Directive and EU law. In

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<sup>84</sup> Parliament and Council Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1 (ICT Directive), ch V.

<sup>85</sup> The primary scheme is embodied in Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12 (Family Reunification Directive). See the discussion in Steve Peers, *EU Justice and Home Affairs Law Volume 1: Immigration and Asylum Law* (4th edn, OUP 2016) ch 6.

<sup>86</sup> Agreement on the European Economic Area between the European Communities, their Member states and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1994] OJ L1/3.

<sup>87</sup> Agreement between the European Community and its Member states, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

other words, while they meet the criterion established in section III.A, they do not meet the requirements of section III.B.

The third scenario is where a third-country national holds a professional qualification obtained outside the EU, resides in a member state and then moves to another member state on the basis of EU free movement law. If that professional qualification was previously recognised as at least equivalent to professional qualifications obtained in the member state of residence, then it may need to be taken into account in accordance with question 1 above. If it was not, then the criterion in section III.A is not met and the Recognition Directive does not apply.

Finally is the paradigm scenario falling within the terms of the Recognition Directive: where a third-country national obtains a professional qualification from the member state in which they reside and then moves to another member state on the basis of EU free movement law, then they will be able to take advantage of the terms of the Recognition Directive. In other words, third-country nationals holding professional qualifications obtained in a member state exercising free movement rights for the purposes of practising their profession fall within the scope of the Recognition Directive.

## **2. Third-Country Nationals: Critical Reflections**

There are two points to make in respect of the circumstances in which third-country nationals can benefit from the Recognition Directive. The first concerns the general exclusion of qualifications obtained from third-countries from the Recognition Directive. This means that many if not most third-country nationals will not be able to rely on the Recognition Directive when moving within the Single Market and permits that member states maintain independent criteria for third-country nationals when moving within the EU.

On the one hand, the rationale for this exclusion is clear: unlike the member states, third-countries are not bound by the principle of mutual recognition which underlies the Recognition Directive and are therefore not required to coordinate their qualification recognition systems with those of the EU's member states. Indeed, permitting the mutual recognition of professional qualifications obtained outside the

EU with the Single Market may effectively allow third-countries to control, albeit very much indirectly, the quality of professional qualifications in the EU. This possibility is particularly poignant in respect of Brexit. Allow me to explain. The UK's higher education system attracts many students from the EU and will likely continue to do so for the foreseeable future. If professional qualifications obtained therein continue to be mutually recognised and thereby facilitate access to and participate in professions in the EU, then the UK will still have an influence on the regulation of professions in the EU. Furthermore, even if professional qualifications obtained in the UK are not formally mutually recognised in the EU, it is still plausible that at least some professions in the EU may track the professional qualification standards set in the UK.

On the other hand, the general exclusion of third-country qualifications from the terms of the Recognition Directive appears to leave member states with a degree of discretion in relation to the procedures governing the recognition of qualifications obtained in third-countries. On its own, such discretion may be a significant source of domination for third-country nationals and persons holding professional qualifications obtained in a third-country insofar as they may not be entitled to procedural equality with member state nationals or persons holding professional qualifications obtained in the EU. However, this discretion ought to be significantly tempered in the light of the argument made in chapter 5. Recall that, in chapter 5.II.C, it was argued that third-country nationals coming to the EU and seeking to have their qualifications recognised pre-departure or on arrival should be entitled to strict procedural equality with member state nationals. The same should hold true of persons holding qualifications from outside the EU when moving within the Single Market but outside the scope of the Recognition Directive. Persons holding third-country professional qualifications should therefore be entitled to have then considered on an equal basis with persons holding EU professional qualifications. As with third-country nationals coming to the EU for the first time, this reasoning should apply to all persons holding third-country qualifications when moving within the Single Market.

The second point to make in respect of the circumstances in which third-country nationals may benefit from the Recognition Directive concerns the limited free movement rights which third-country nationals have in the EU. The EU has acknowledged, through arts 45(2) CFREU and 79(2) TFEU, that third-country nationals

should have the right to free movement in at least some circumstances. And like Bjarney Friðriksdóttir's analysis discussed in chapter 4.II.B.1, Anja Wiesbrock has demonstrated that the member states played a dominant role in defining the contours of the guarantee of free movement for third-country nationals in the EU's migration *acquis*.<sup>88</sup>

As with the argument made in chapter 4 concerning the equal treatment of third-country nationals with member state nationals in general, the arguments canvassed here derive their legitimacy from an appeal to the egalitarian elements of a commitment to the republican ideal of freedom as non-domination. Accordingly, it is arguable that the power to grant third-country nationals free movement rights could and should be exercised to extend the circumstances in which third-country nationals have free movement rights beyond those which are currently permitted. However, whether the EU's migration and asylum *acquis* should be challenged and/or liberalised in this way depends on the *reasons* for such an approach. To be clear though, not all of the reasons applicable will be considered. This section presents something of a one-sided view. It would be pompous to think that it could be here conclusively argued that third-country nationals should have greater free movement rights than they currently do. But, in arguing in favour of their equal treatment in general, this thesis at least raises what philosophers would describe as the *pro tanto* or defeasible reasons in favour of such equal treatment. This section, then, should be understood as making a relatively minor contribution to the broader debate on the free movement rights of third-country nationals in the EU generally without conclusively analysing or ending that debate.

Accordingly, what are the reasons in favour of change? Reforming the EU's migration and asylum *acquis* to permit the free movement of third-country nationals within the EU would have several benefits.<sup>89</sup> First, it would provide further evidence

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<sup>88</sup> Anja Wiesbrock, 'Free movement of third-country nationals in the European Union: the illusion of inclusion' (2010) 35 *EL Rev* 455.

<sup>89</sup> Thomas Hoogenboom, 'Integration into Society and Free Movement of Non-EC Nationals' (1992) 3 *EJIL* 36; Willy Alexander, 'Free Movement of Non-EC Nationals: A Review of the Case Law of the Court of Justice' (1992) 3 *EJIL* 53; Andrew Evans, 'Third-Country Nationals and the European Union' (1994) 5 *EJIL* 205; Anna Kocharov, 'What intra-Community mobility for third-country workers?' (2008) 33 *EL Rev* 913; Sara Iglesias Sánchez, 'Free Movement of Third-Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice' (2009) 15 *ELJ* 791; Sara Iglesias Sánchez, 'Free movement as a precondition for integration of

that the EU is becoming a true political community which secures the well-being of people subject to its authority. I say this because, in permitting third-country nationals to move freely within the EU as it already does to some extent for member state nationals, it would better mimic what nation states do, namely, permit the free movement of persons within and subject to their jurisdiction. Second and relatedly, permitting third-country nationals to move freely within the EU would better secure their well-being because it would provide them with a wider range of options than would otherwise be available to them. Indeed, it has long been acknowledged that, from an economic point of view, restricting the free movement of persons is senseless.<sup>90</sup> Extending the circumstances in which third-country nationals could move freely within the Union would therefore bring economic benefits. Indeed, third-country nationals are more likely to move across borders than member state nationals and are often understood as contributors to the project of EU integration even more so than member state nationals.<sup>91</sup> If anything, then, the arguments in favour of the benefits of free movement apply with particular strength to third-country nationals.

Third, granting third-country nationals free movement rights within the EU may prompt further reform, entrenchment and the extension of such rights for member state nationals. As was suggested in chapter 5, making nationality a prohibited ground of discrimination would lead to and necessitate largescale reforms across national and EU migration and asylum law. In other words, by better facilitating the integration of

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third-country nationals in the EU' in Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate 2009); 'Free movement of third-country nationals in the European Union: the illusion of inclusion' (n 91); Anja Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?' (2012) 14 EJML 63; Paula García Andrade, 'Privileged Third-Country Nationals and Their Right of Free Movement and Residence to and in the EU: Questions of Status and Competence' in Elspeth Guild, Cristina Gortázar Rotaèche and Dora Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship* (Brill 2014); Sara Iglesias Sánchez, 'Free Movement Law within the European Union: Workers, Citizens and Third-Country Nationals' in Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (eds), *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (Palgrave Macmillan 2015); and Lucia Della Torre and Tesseltje de Lange, 'The 'importance of staying put': third-country nationals' limited intra-EU mobility rights' (2018) 44 *Journal of Ethnic and Migration Studies* 1409.

<sup>90</sup> WR Böhning and J Werquin, *Some Economic, Social and Human Rights Considerations concerning the Future Status of Third-Country Nationals in the Single European Market* (ILO 1990) 9.

<sup>91</sup> A Turmann, 'A New European Agenda for Mobility' in *CEPS-ECHR Taskforce* (2004) cited in 'Free movement of third-country nationals in the European Union: the illusion of inclusion' (n 89); and European Migration Network Synthesis Report, *Intra-EU Mobility of Third-Country Nationals* (European Commission 2013) 5.

third-country nationals into the emerging EU political community, it would suggest a deepening of the process of EU integration as a whole. Fourth, permitting the free movement of third-country nationals may better enable them to make use of their skills. If their skills are not adequately or appropriately recognised in one member state, then perhaps they will be in another member state. In other words, free movement may be at least a partial solution to the problems of discrimination and inadequate skills recognition which third-country nationals habitually face. Finally, permitting the free movement of third-country nationals would also make the Single Market a more attractive place to live in the global 'market for migrants', making the EU better able to compete with the USA in particular.<sup>92</sup>

What, specifically, do the above reasons in favour of reform entail? As Wiesbrock notes, there are numerous ways in which the aforementioned migration measures could be improved, made more effective and, ultimately, better tailored to their supposed goals, such as making the Union more attractive to 'workers around the world', sustaining its competitiveness and growth;<sup>93</sup> promoting 'the generation and acquisition of knowledge and skills';<sup>94</sup> and 'better matching labour supply with demand'.<sup>95</sup> First, according to Wiesbrock, member states should not be allowed to apply labour market tests or national quotas to third-country nationals. This implies that discrimination on the basis of nationality should be reduced, thereby instead facilitating heightened discrimination on the grounds of skills. Specifically, rather than labour market tests and national quotas, I would envisage critical skills lists as being an appropriate mechanism to discriminate on the grounds of skills rather than nationality.

Second, Wiesbrock suggests restricting the necessity to pass 'integration programmes', such as language testing, which member states may adopt,<sup>96</sup> when moving from the first member state to a second member state. However, given that such integration measures are designed to facilitate people's integration into the host society, it is difficult to see why these measures should *not* be applied. In support of her

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<sup>92</sup> FH Buckley, 'The market for migrants' in Jagdeep Bhandari and Alan Sykes (eds), *Economic Dimensions of International Law: Comparative and Empirical Perspectives* (CUP 1998).

<sup>93</sup> Blue Card Directive, recital 7.

<sup>94</sup> Researchers', Students', Volunteers' and Au Pairs' Directive, recital 7.

<sup>95</sup> ICT Directive, recital 3.

<sup>96</sup> Family Reunification Directive, art 7(2); LTR Directive, arts 5(2) and 15(3); Blue Card Directive, recital 23.



argument, Wiesbrock notes the fact that member state nationals are not obliged to undertake such integration programmes. However, just because they are not currently required to participate in such programmes does not mean that they should not be obliged to participate therein. Such programmes contribute to people's integration by enabling their participation in the culture of which they are contributing to and becoming a part. And as we saw in chapter 6.V.B, the EU is already facilitating the recognition of EU nationals' language skills when moving within the EU to some extent.

Of course, this is not to say that the application of all integration requirements by the member states to date has been appropriate. In *P and S*,<sup>97</sup> discussed briefly in chapters 4.II.C.4 and 5.II.B.1(ii), a Dutch requirement for long-term residents to partake in mandatory civic integration courses was challenged by two long-term residents on the basis that failure to pass the course resulted in the imposition of a fine. The Court of Justice held that while the obligation to take such a course was consistent with the spirit of the LTR Directive, the payment of a fine (€1,000), in addition to the costs incurred in relation to the course, was liable to jeopardise the achievement of the integration objectives of the Directive.

There are, finally, two other categories of migrant which need to be considered. The first category is that of forced migrants,<sup>98</sup> which itself consists of persons seeking temporary protection,<sup>99</sup> asylum seekers,<sup>100</sup> refugees and persons eligible for subsidiary protection.<sup>101</sup> While none of these groups of forced migrants currently enjoy rights of free movement within the EU as a whole, some of them do enjoy free movement rights *within* their host member state.<sup>102</sup> Are there good reasons justifying the restrictions on

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<sup>97</sup> Case C-579/13 *P and S* [2015] 3 CMLR 44.

<sup>98</sup> Marjoleine Zeick, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 *Mich J Int'l L* 19.

<sup>99</sup> Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive).

<sup>100</sup> Parliament and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Directive).

<sup>101</sup> Parliament and Council Directive 2011/95/EU 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 (recast) [2011] OJ L337/9 (Uniform Status Directive).

<sup>102</sup> Uniform Status Directive, art 33; and Reception Directive, art 7.

the free movement of forced migrants? What are the reasons in favour of removing the current restrictions on the free movement of persons for forced migrants?

In the case of persons seeking temporary protection and asylum seekers, a restriction on their freedom of movement lasting for the duration of their legal status qua persons seeking temporary protection or asylum seekers seems reasonable given the need for the host member state to determine their status. However, the longer this process takes, the weaker the justification for the restriction on the freedom of movement, given the impact of such a restriction on their well-being. To put it another way, restricting people's free movement affects the range of options available to a person; and the greater the restriction, the more compelling must be the justification therefor. When the decision-making/administrative process takes a long period of time for reasons of administrative inefficiency, such delay is not a satisfactory argument justifying the restriction of free movement indefinitely.

Furthermore, this argument is even less compelling in the case of refugees and persons eligible for subsidiary protection. For, first, both of these categories of forced migrant are entitled to freedom of movement within their host member state on equal terms with third-country nationals legally resident in the state. So, as with labour and voluntary migrants, it stands to reason that freedom of movement should be extended throughout the EU. And second, that is not to say that no restrictions are permissible; rather, restrictions are permissible but must be based on valid, valuable reasons. And given that the reasons in favour of expanding the circumstances in which third-country nationals can in general benefit from free movement rights are quite compelling, it stands to reason that forced migrants should also generally benefit from free movement rights.

The second and final category is that of irregular migrants, which consists of those who enter the EU unlawfully, certain victims of trafficking who enter the EU unlawfully<sup>103</sup> and those whose status as legal migrants becomes irregular while in the EU. In respect of the first and third categories of irregular migrant, although the EU

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<sup>103</sup> Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19 (Victims of Trafficking Resident Permit Directive).

does not have the competence to regulate irregular employment, the EU has indirectly regulated irregular employment by prohibiting employers operating in the EU from employing irregular migrants.<sup>104</sup> Thus, the question of irregular migrants working does not arise under EU law. In respect of victims of trafficking, while they must be granted access to the labour market when they hold a valid residence permit, no free movement rights are granted to them. In the light of the reasons canvassed above in respect of third-country nationals in general, however, it can plausibly be claimed that victims of trafficking legally resident in the EU should be entitled to free movement rights.

## Conclusion

The analysis in this chapter has established a number of conclusions which contribute to the answer of the second sub-question which this thesis explores, namely, what is the relationship between theory and praxis and what reforms, if any, are required?

First, the mutual recognition of qualifications in the Single Market is a reflection of our contemporary competitive culture which facilitates people's pursuit of the good in and through the construction and entrenchment of the Single Market. In other words, by enabling people to challenge the over- and under-regulation of certain professions in the EU that hinder their freedom of choice, the principle of mutual recognition underlying the Recognition Directive contributes to people's well-being. The combined application of art 53 TFEU and the Recognition Directive in general and to third-country nationals specifically can be restated as follows.

First, a person must hold a professional qualification either obtained in the EU or obtained outside the EU but previously recognised by a member state. This excludes many third-country nationals who hold professional qualifications obtained outside the EU and not previously recognised therein. However, the argument made in chapter 5.II.C suggests that persons holding qualifications from third-countries should be entitled to strict procedural equality with persons holding qualifications obtained in the EU.

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<sup>104</sup> Parliament and Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24.

Second, a person must then move to another member state by exercising their free movement rights. Again, this excludes many third-country nationals who do not have free movement rights within the Single Market. Some of the academic literature to date suggests that there are some good reasons in favour of affording greater free movement rights to third-country nationals. The republican ideal of freedom as non-domination does not argue conclusively in favour of such change but arguing for equal treatment in general, as chapter 4 did, does suggest a need to reconsider the reasons applicable. This chapter therefore reiterated some of the reasons applicable and calls for further discussion of and reflection on these and other reasons.

Finally, the profession in question must be a regulated one. If it is not regulated, the Recognition Directive does not apply and, instead, an independent duty to recognise qualifications arises by virtue of the direct effect of art 53 TFEU.

## Conclusion

## Introduction

Third-country nationals working in the EU regularly face discrimination and inadequate skills recognition, experiences which affect their well-being. Accordingly, this thesis has investigated whether and to what extent the Single Market can be designed to secure certain aspects of the well-being of third-country nationals accessing work in the EU, namely that they be free from wrongful discrimination and given opportunities to have their skills recognised for the purposes of access to and participation in the EU's labour market. The answer this thesis has provided to this question is that the Single Market has not been entirely adequately designed to secure those aspects of third-country nationals' well-being in accessing work.

This chapter reflects on a number of issues. First is the neorepublican ideal of freedom as non-domination. Has it provided a useful theoretical guide on this journey (section I)? Questioning the role of republicanism then leads to a similar consideration of the EU. How and to what extent does the EU live up to the ideals of republicanism (section II)? Third, the chapter reflects on the recognition of professional

qualifications generally, the major subject of Part II of this thesis (section III). Fourth, the theme of governance is considered, consolidating my reflections (section IV). Finally, the chapter address some of the raised but unanswered questions which have been noted throughout this thesis. What empirical data is necessary to confirm some of the conclusions here reached; and what practical steps can be taken to implement them? In other words, what explanatory gaps have been exposed by the argument this thesis seeks to make (section V)? A short conclusion follows.

## I. Judging Neorepublicanism

At the very beginning of this thesis, it was suggested that a significant change in culture would be necessary to address the obstacles third-country nationals habitually face in access to and participation in the EU's labour market. Accordingly, a normative political theory was adopted and outlined to critique EU law and policy as it currently stands so as to lay out a pathway for change in the future. A normative political theory does not necessarily look to the facts on the ground and seek to construct a theory which best accounts for our practice as it is (although it may); rather, it can establish a manifesto of sorts according to which our practice can be reformed.<sup>1</sup> The approach encapsulated in this thesis can be best summarised as lying somewhere between interpretation and normative stipulation: on the one hand, interpreting EU law and policy in the light of neorepublican normative political theory, assessing the areas of fit; and on the other hand, stipulating conditions which EU law and policy ought to meet in the light of the goals and aspirations of the EU going forward. In so doing, this thesis has aimed to provide at least a partial analysis of the balance of reasons in favour of a change in culture in the light of an overarching theoretical commitment to a neorepublican understanding of the EU while at the same time maintaining a narrow focus on the implications of neorepublicanism for third-country nationals at work in the EU. The question which thus arises is, how successfully has that normative political theory provided a lens through which to understand and critique relevant EU law and policy?

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<sup>1</sup> See generally Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (OUP 2016).

The answer to this question has two parts. The first concerns neorepublican political theory itself while the second concerns the application of neorepublican political theory to the EU and EU law. The former will be dealt with in this section while the latter will be dealt with in the next section.

The contemporary neorepublicanism of Philip Pettit provides a number of benefits. A first is the ideal of freedom as non-domination as a political ideal. It was noted in chapter 2.II that this ideal resonates particularly well with the concerns of labour lawyers because of and insofar as it tends to focus on the reduction of power between people within political communities and between political communities. The neorepublican ideal of freedom as non-domination focusses so clearly and centrally on the reduction of arbitrary power between persons and political communities that it seems particularly appropriate to provide for the autonomy of labour law from the general law of contract. As there suggested, it does not necessarily provide a justification for the entirety of labour law but may nonetheless provide at least a partial justification thereof. Similarly, the relevance of non-domination as a concept became clear in respect of migrants generally in chapter 4.I.B and the neo-colonial objection raised to the EU's relations with third-countries in chapter 6 which paradigmatically involves domination.

A second benefit was the clarity with which neorepublicanism identifies the importance of sufficientarian justice and equality. Again, to expand upon and reiterate the previous point, insofar as neorepublican political theory contains a theory of just distribution, employment and labour law scholars may be able to draw on same to justify at least some labour laws. The possibility of so doing was considered, in part, in chapter 2.II. Similarly, insofar as republicanism involves a commitment to equality in some respect in pursuit of people's freedom as non-domination, it may be possible to justify anti-discrimination and equality norms with a particular focus on reducing nationality discrimination. The possibility of so doing was explored, in part, in chapter 4.I. A third benefit has been the ability of the republican ideal of freedom as non-domination to highlight the theme of governance running throughout this thesis insofar as it is a requirement of neorepublican political theory that laws and other norms regulating people's well-being be established. A final benefit is the fact that Pettit's neorepublicanism provides an account of the internal and external dimensions

to people's well-being. This is not something that all political theorists do.<sup>2</sup> The internal and external dimensions to the republican doctrine of freedom as non-domination were particularly necessary in the context of this thesis given that migration is something of a cross-cutting issue, one at the intersection of the internal and external dimensions to people's well-being.

However, my reliance on neorepublicanism has not been without its drawbacks. The external dimension of the republican ideal of freedom as non-domination as Pettit describes it seems, with respect, somewhat underdeveloped. Pettit does not, for example, prescribe a list of sovereign liberties all states must have, but rather suggests that these should be developed at an international level. And while referring to human rights and suggesting that states may intervene to secure the human rights of other peoples, he does not suggest how and to what extent states may intervene, nor does he provide a list of relevant human rights justifying intervention. Indeed, unlike the basic liberties, Pettit does not say to what extent peoples must be entrenched in respect of the sovereign liberties. Pettit does of course advocate the 'straight talk' test but does not suggest that, say, peoples should be entrenched to a sufficient level in respect of the sovereign liberties. It would have been preferable if the 'straight talk' test was clarified in this respect. It is, of course, plausible to think that the fairly minimalistic standards set by the external dimension of Pettit's republicanism merely reflect a lack of sufficient debate and action at an international level to date. To develop further and more onerous requirements might therefore be too early.

## II. Judging the EU

In applying Pettit's neorepublican normative political theory to the EU and EU law, I made three important assumptions. First, I only applied the republican ideal of freedom as non-domination to the EU in part. I assumed that it was possible to sever certain aspects of neorepublican political theory from others. It is therefore probable that I have only given a very fractured picture of a fully neorepublican EU. I did not consider,

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<sup>2</sup> Cf Joseph Raz, *The Morality of Freedom* (OUP 1986). But see John Rawls' *The Law of Peoples with 'The Idea of Public Reason Revisited'* (HUP 1999).



say, to what extent the EU's institutions cohere with the political legitimacy and democratic requirements of neorepublicanism because it was neither necessary nor expedient for the purposes of this thesis to do so. A full exploration of neorepublicanism's implications for the EU would need to do so.

Second, I assumed that political communities and their constituents admit of quite significant differences in degree. A political authority may be more or less sovereign; a political community's population may be more or less homogenous; and so on. Accordingly, it is my view that the EU as it stands is at least a partial political community. Moreover, it does seem that part of the EU's current self-understanding is that it is closer to a federation than a confederation; and if its subjects and constituent member states also, over time, reach a similar understanding, it stands to reason that the EU will make a greater claim to authority than those of its constituent states. In other words, overtime, the EU may approximate to a complete political community. Insofar as the EU is increasingly considered as such a form of political community, its claims to legitimacy, in distributive and political terms, will become more important in the coming years. This thesis, relying on the assumption that the EU's claim to authority will grow over time, therefore primarily critiqued an aspect of the EU's distributive legitimacy, namely, its securing at least a degree of justice and equality for third-country nationals working in the EU.

The third and related assumption I made was that the success of institutions like the EU will depend to a large degree on their ability to mimic those successful aspects of nation states, such as their ability to discharge obligations of justice. Such obligations, if they exist at all within the EU, currently rest on unclear foundations. This was a weakness in my application of the neorepublican ideal of freedom as non-domination, rather than a weakness of the theory itself. That is, there was a gap between the requirements of neorepublican political theory, on the one hand, and the actual facts on the ground, on the other hand.

In the light of the demands of neorepublicanism and some legal doctrinal arguments, the changes in culture suggested by this thesis are essentially twofold. The first is a change in legal culture. By 'legal culture', I essentially mean a change in the practice of the law. And the primary site of legal practice is that of legislators, legal officials and courts. Thus, for example, in chapter 4 I argued that nationality should be

made a prohibited ground of discrimination as a matter of EU equality and anti-discrimination law on the basis of some republican theoretical and legal doctrinal arguments. I also there stated that it is possible that the CJEU will take part in this cultural change. There are some good reasons of legal doctrine to depart from the status quo and courts can play a role in amending legal doctrine in the light of these reasons. I have not, however, identified all of the reasons which factor in the balance of reasons; the argument has been largely one sided and tilted in favour of the preferences and interests of third-country nationals. A full analysis of all of the reasons in favour of and against such a significant change in the EU's legal culture remains to be completed.

Making nationality discrimination a prohibited ground of discrimination is not the only area where judicial reform is possible and perhaps even necessary. It is also possible that, insofar as the rights contained in EU migration and asylum, external relations and free movement law are justiciable before the CJEU, the Court could exercise its jurisdiction to develop an expansive interpretation of those rights to incorporate some of the requirements of the republican ideal of freedom as non-domination. Interpretation, it was suggested in passing in chapter 5, is but one way in which EU law as it currently stands could be understood to grant third-country nationals rights to greater resources than they currently have. However, while international and European law provide a fairly solid basis for developing a reformist integrated interpretation of EU anti-discrimination and equality law, as argued in chapter 4, in the light of the review of the fairly sparse and even vague corresponding provisions of international and European law in chapter 5, the same cannot be said for a possible reformist integrated interpretation of EU migration and asylum, external relations and free movement law.<sup>3</sup>

The second and concurrent change, largely implicitly suggested by the analysis provided in Part II of this thesis, is a broader change in political culture. This point was made most clearly in chapters 5 and 7 where it was suggested that to afford third-country nationals greater rights and resources was largely a matter of policy.

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<sup>3</sup> On the integrated approach to interpretation, see Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRL Rev 529.

Neorepublican political theory and legal doctrine tended to run out of argumentative steam at this point, leaving room instead for policy makers to make arguments of consistency with the demands of neorepublicanism based on economic and social analyses of the consequences of granting third-country nationals greater rights and resources, as well as the consequences of third-country nationals actually making use of such rights and resources. One example of such an argument was provided in chapter 7.I.D.2 where it was suggested that, from at least one economic perspective, further deregulation of regulated professions would make it easier for people to participate in the EU's labour market. Such arguments fall within what I described in chapter 2.II as the 'interpretive space' provided by republican political theory to make arguments which are consistent with its requirements. Similarly, as suggested in chapters 5 and 6, whether the EU actually dominates certain third-countries and third-country nationals in exercising its economic, social and cultural power to externalise its laws and policies is a largely empirical matter which remains to be investigated. But neorepublican political theory does provide a helpful conceptual device, in the form of the doctrine of freedom as non-domination, to analyse and deconstruct the power relations evident in, for example, the negotiation and operation of international agreements in practice.

There are, however, some minor exceptions to this view. Failing to provide for the recognition of the non-formally and informally obtained skills of third-country nationals seems like an obvious gap in EU law and policy. The lack of a strong legal basis to develop integration measures, discussed in chapter 5.V, may also be viewed as problematic from the perspective of the internal dimension of Pettit's neorepublicanism. Finally, much of the EU's cooperation with third-countries in respect of education and training, discussed in chapter 6, actually exceeds the minimalistic standards of the external dimension to the republican doctrine of freedom as non-domination, although it remains to be seen whether the EU and its member states adequately discharge their humanitarian obligations to third-countries.

Nonetheless, whether or not such change in political culture is practically or politically possible or plausible is, of course, very controversial and uncertain. As noted in the introductory chapter, the EU has faced and continues to encounter significant challenges, some of which are so great that they have questioned the very existence

and nature of the EU itself. On at least one view of history, the greatest changes brought about in political culture are triggered by significant economic, social and cultural crises. The EU will no doubt continue to face further crises in the future; whether or not they lead to a widening and deepening of the project of EU integration can only involve quite a significant degree of speculation. This thesis has accordingly relied on several potentially speculative assumptions about the future direction of the EU. Only time will tell whether these assumptions are borne out in practice. While some of the reasons applicable in assessing how such a change in political culture might be brought about have been outlined in this thesis, a complete all-things-considered analysis of the balance of reasons remains to be completed.

### **III. The Recognition of Qualifications**

Besides providing a novel application of neorepublican political theory to the EU in Part I, Part II of this thesis investigated, in relative detail, a legal right which has yet to be discussed by many EU free movement and employment and labour lawyers, namely, the right to have one's qualifications recognised. This right only came to light because of this thesis' theoretical emphasis on the role of people's skills in their pursuit of the good. That is, skills form part of people's capacity for freedom of choice or well-being and consequently their formation, exercise and development may be taken into account as part of a more general exploration of how to guarantee people's well-being in society.

It is perhaps most surprising that this right has not attract much if any juridical attention in respect of persons seeking to access the labour market generally. That is to say, this right has not been deployed by people attempting to have their qualifications recognised by employers within their own member state for the purposes of participating in the labour market. Employers regularly and often rightly discriminate between people on the ground of their skills. It is possible that, in doing so, they violate the right to have one's qualifications recognised. This right, like many other rights, at its core is a guarantee of procedural equality of treatment consisting of the obligation to fairly and objectively assess, in a non-discriminatory manner, people's

qualifications standards in the light of criteria known in advance. If employers fail to adhere to such a guarantee of procedural equality, then they may violate the right to have one's qualifications recognised.

This thesis is primarily concerned not with employers as authorities governing access to the labour market but with public and/or private professional regulatory bodies. Moreover, it focussed on the application of that right in the context of movement across borders by third-country nationals moving to and within the EU. As to the first such context, which I described as the external dimension, that right has been guaranteed in a fairly haphazard fashion. While it is generally guaranteed to some extent in international and European law, albeit occasionally quite vaguely, as a matter of EU migration and asylum law not all third-country nationals coming to the EU are entitled to have their qualifications recognised on an equal basis with member state nationals. Moreover, as a matter of EU external relations law some third-country nationals, particularly those from third-countries with which the EU has close relations, are entitled to have their qualifications recognised on an equal basis with member state nationals while many others are not. In other words, some third-country nationals are privileged in EU law. This is not inherently problematic as it is legitimate to discriminate between people and peoples on the basis of their skills, but some third-country nationals should not be benefited at the expense of others. All third-country nationals should be entitled to have their qualifications recognised in a procedurally fair manner.

In terms of non-binding measures, the EU has again adopted a plethora of programmes such as Mobility Partnerships, measures facilitating the recognition of non-formal and informal learning and targeted integration measures designed to facilitate, *inter alia*, the recognition of qualifications of third-country nationals coming to the EU. Given the increasing significance of the right to have one's qualifications recognised in facilitating effective access to the labour market, however, it is surprising that these measures, all of which are very welcome, are non-binding in nature. Indeed, given that complex patchwork of legal and non-legal measures adopted by the EU and its member states to date, it should come as no surprise that the European Migration Forum considered, at its meeting in April 2019, the possibility of adopting a directive harmonising the conditions for the recognition of professional qualifications of third-country nationals coming to the EU. This possibility would be consistent with the

demands of neorepublicanism if it could be demonstrated to reduce the arbitrary power to which third-country nationals are subject to in being treated differently from member state nationals and to make it easier for third-country nationals to have their qualifications recognised in practice. While this thesis does not conclusively endorse such a measure given its uncertain scope at present, if it met the aforementioned criteria, then it would indeed be a welcome development. Unfortunately, the European Migration Forum's June 2020 meeting was cancelled due to the COVID-19 pandemic. It is hoped that the rescheduled meeting, which is yet to be confirmed, will continue to reflect on the possibility of a directive facilitating the recognition of professional qualifications of third-country nationals.

In terms of making it easier for third-country nationals to have their qualifications recognised when moving to the EU, it was suggested that the EU and its member states should coordinate their education and training systems, at least to some extent, with those of third-countries, particularly those from which there is a high degree of inward migration to the EU. A review of the EU's external relations to date suggests that this process appears to be underway. Again, while not strictly necessary as a matter of neorepublican political theory, this is a welcome development insofar as it may reduce the inadequate skills' recognition third-country nationals habitually experience when coming to the EU. However, doing so does come with the serious risk that third-countries and third-country nationals experience domination insofar as it involves the EU's exercise and exportation of its economic, social and cultural power. The extent to which the EU complies with its general humanitarian obligations to such third-countries and third-country nationals will therefore be most pressing. An outline of the facts toward which such an investigation should be conducted was provided in chapter 6.

Finally, consideration was given to the extent to which third-country nationals may have their professional qualifications recognised when moving within the Single Market. Perhaps surprisingly, the EU has developed a highly sophisticated mutual recognition system to facilitate the recognition of professional qualifications of persons moving within the EU. This contrasts sharply with, say, the USA where the recognition of professional qualifications is completely decentralised and regulated at state level. This system enables its beneficiaries to challenge over-regulation and under-regulation

of regulated professions, thereby facilitating greater access to and participation in the good of work. The structural links between the right to work and the right to have one's qualifications recognised are clear here: like the right to work generally, the right to have one's qualifications recognised derives from a concern to both prohibit hindrances to and positively promote people's basic liberty to work which, in the light of the elements of value theory presupposed by this thesis and outlined in chapter 1, is crucial to people's well-being.

However, this system almost exclusively applies to persons who have obtained a professional qualification within a member state and have the right, as a matter of EU free movement law, to move freely within the Single Market. The vast majority of third-country nationals cannot, therefore, benefit from this system. While it is possible that there are some economic and political justifications for this, given that third-country nationals are more likely to move within the Single Market for work than member state nationals, this is nonetheless a source of regret. As with the external dimension of the right to have one's qualifications recognised, while it is not strictly necessary as a matter of neorepublican political theory that third-country nationals be afforded equal treatment with member state nationals as a matter of EU free movement law, arguing for equal treatment in general, as chapter 4 did, requires a reconsideration of the balance of reasons in favour of and against such equal treatment. An assessment of some of the reasons applicable would suggest that the argument in favour of equal treatment in respect of free movement is quite convincing. It is hoped that the EU's institutions will engage in a complete reconsideration of the relevant balance of reasons concerning the rights of third-country nationals coming to work in the EU will occur soon.

#### **IV. Governance**

In chapter 1.VI, governance was identified as a central theme running throughout this thesis. It was there noted that this thesis is primarily concerned with traditional or 'hard law' modes of governance. However, it should by now be clear that the EU adopts a wide variety of modes and means of governance to achieve a diverse range of goals. At

this stage, there are essentially three issues which arise for discussion. A first is whether and to what extent the measures adopted by the EU actually achieve their purported goals. This is a question of the efficacy of the modes of governance adopted, which largely depends on empirical research for verification. There is or ought to be a strong pro tanto case that hard law is better able to institutionalise and systematise norms and standards because that is a necessary conceptual property of traditional legal regulation. In other words, because law is an institutionalised normative order, it is more likely to be able to achieve comprehensive goals with widespread implications. Unless it can be empirically established that soft legal regulation is better able to instantiate these properties than hard legal regulation, then my general preference for same remains sound. This is particularly relevant for those measures discussed in chapter 6.V, where it was suggested that integration measures specifically targeted at third-country nationals should be based on legal regulation. Some of the measures there discussed were essentially pilot schemes. This is, of course, permissible. Some experimentation at the outset of developing a policy is valuable. But over time, these measures should be promoted through legal regulation. This would not only institutionalise and systematise these measures; it would also enable third-country nationals to rely on legally enforceable rights which secure crucial aspects of their well-being.

The second issue is the nature and value of the goals of legal regulation. How extensive and far reaching are the aims of the EU's governance in the areas discussed in this thesis? Are they adequate; are they sufficiently ambitious? As noted in chapter 1.VI, the law will occasionally become 'reflexive', adapting and even ameliorating its goals to govern other social systems, a view which is consistent with Pettit's understanding of governance. But it is by now clear that some of the goals of republican political theory are exceptionally ambitious and may require significant alteration of existing norms and standards to better cohere with its demands. While the law may indeed be reflexive, in many cases its reflexivity must be limited in the light of the ambitious goals it must achieve. In other words, the goals which many soft laws aspire to achieve are inadequate in the light of republican political theory. It is presumed that some goals can only be achieved through hard law, possibly in a top-down fashion, such as through courts, an approach I suggested in chapter 5.IV.A.1 in respect of expanding



the guarantee of equal treatment currently afforded third-country nationals in the EU. In respect of areas of the law in which courts cannot or should not play a role, legislation is likely to be the most appropriate form of governance. Whether legislation will actually be adopted to implement some of the changes suggested above largely depends on political will and the possibility that EU legislators might be persuaded by the values of republicanism and the reasons here espoused and discussed.

A final but important point of reflection is on the role of international modes of governance. EU law is of course a form of transnational governance, but its special characteristics largely distinguish it from other forms of international regulation. International and European law has nonetheless offered an extensive doctrinal armoury from which to draw upon in critiquing EU law and policy. And while not always strictly binding nor even readily enforceable, the EU and its member states can use it to better legitimise their laws and practices in the light thereof. In other words, in adhering to agreed standards in international and European law, the EU and its member states can better secure the external dimension of the well-being of their peoples insofar as, by doing so, they cohere to agreed standards designed to secure the well-being of the peoples of free states.

## **V. Explanatory Gaps**

While I have endeavoured to identify concrete reforms, which seem necessary in the light of an overarching commitment to a neorepublican understanding of the European Union, in some cases it has not been possible to do so in the absence of specific and detailed empirically verified arguments and claims. Moreover, in some parts, the argument made in this thesis contained some explanatory gaps which need to be filled by further research in order to be complete. Accordingly, it is helpful to here consider some explanatory gaps which this thesis has identified as necessary to fill in order to justify more substantial conclusions.

The first area requiring further data and research concerns the extent to which the EU is falling within the justice relation and discharges humanitarian obligations. As earlier noted, in chapter 2.III.C I largely assumed that the EU is in the process of

undertaking obligations of justice on the basis of the criteria developed by David Miller, namely, that the EU applies coercive laws to all its members, its members identify with one another as compatriots and although it is not fully self-contained from an economic point of view, its economy and accompanying set of social services can be regarded as a large-scale cooperative practice since most production, exchange and distribution occurs within the borders of the state.<sup>4</sup> As the discussion in chapter 2.III.C suggested, whether all of these criteria are currently met is certainly up for debate. Similarly, I assumed that the EU is or ought to be bound by the same humanitarian obligations which states are bound by. I did not interrogate these assumptions too deeply. Accordingly, in future, a systematic account of the EU's humanitarian obligations and obligations of justice and the extent to which the EU actually discharges same would be helpful, particularly in the light of the risk that the EU may dominate third-countries or third-country nationals in its external relations. This is essentially something for political theorists to establish.<sup>5</sup> Only if such research is undertaken can the EU be fittingly and fully critiqued in the light of a model or paradigm of (federal) statehood, something which this thesis merely began to do.

The second area in which further data is required is in respect of the prevalence of nationality discrimination across the EU. In chapter 4.III.A.3, I identified some sources of empirical data suggesting that discrimination on grounds closely associated with nationality, such as ethnicity, remain prevalent in the EU. It would, however, be preferable if there was also specific evidence concerning the prevalence of discrimination on the ground of nationality. Such empirical evidence would have to distinguish between host state nationals, EU migrant nationals and third-country nationals. Only with that level of evidence could it be convincingly established whether or not nationality discrimination is decreasing. Further evidence demonstrating the link, if any, between equality and anti-discrimination norms and the reduction of discrimination would also be helpful to strengthen the case in favour of making nationality a prohibited ground of discrimination. These are largely sociological questions.

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<sup>4</sup> David Miller, *Justice for Earthlings: Essays in Political Philosophy* (CUP 2013) 163-164.

<sup>5</sup> See, eg, Andrea Sangiovanni, *The Bounds of Solidarity: International Distributive Justice, Reciprocity and the European Union* (HUP forthcoming).

A third and related area in which further research is required is the political plausibility of the arguments made in this thesis. That is, the question is whether the claims I have made here are politically palatable. This could perhaps be established through surveys or identifying how and to what extent similar policies have been developed elsewhere, or in specific member states of the European Union, and assessing their success. And given that my claims are based on the EU as a whole, such research would generally have to be conducted on an EU-wide scale. Similarly, research would need to be conducted on the role of courts, particularly the CJEU, in the process of EU integration both in general and with a particular focus on third-country nationals. Should courts be involved in the process of EU integration? If so, how and to what extent? Research should also be conducted considering how to cultivate political palatability where none currently exists. How can people be best convinced of the benefits of republican political theory for the EU? How can we transition towards a republican European Union? How could legislators be captured by the values of neorepublicanism? As was noted in chapter 5.II.C.1, this point is particularly relevant to actually trying to implement the changes envisaged necessitated by a theoretical commitment to republicanism; otherwise, the effort has been in vein. These and other questions are for political scientists to investigate.

Another crucial source of empirical evidence required was noted in chapter 5.II.C concerning third-country nationals' entitlement to sufficientarian measures. It was there noted that if it could be proven, as a matter of policy, that third-country nationals were less likely to suffer discrimination and inadequate skills' recognition if they were immediately afforded access to sufficientarian measures on the same or similar grounds as member state nationals, then there would be a compelling policy case in favour of so affording third-country nationals such access. Accordingly, to test that hypothesis, what would be required at the very least would be pilot schemes affording third-country nationals immediate access to prioritarian measures. A control group, which did not have access to such measures, would also need to be established to verify the hypothesis. This is essentially a question of social policy.

A final source of empirical data required is the extent to which the EU does actually dominate third-countries in its external relations. This point was made most clearly in chapter 8 but it is also relevant to the EU's external relations with third-

countries more generally. For example, if it could be established that the EU successfully exports its values and norms to other countries, then there would be, at the very least, a compelling pro tano case establishing the EU's domination of third-countries. To establish this systematically would require a close analysis of the EU's association, trade and partnership agreements, their negotiation and implementation in practice. The EU's participation in certain international organisations, such as the WTO, would also be relevant. Such a study is well beyond the scope of this thesis and is largely a matter of international political economy.

## Conclusion

This thesis has concluded that the EU does not entirely adequately secure certain aspects of the well-being at work of third-country nationals coming to or currently in the EU from the perspective of one form of contemporary neorepublican normative political theory. It has identified some potential reforms, outlined in Part II of this thesis, which could be undertaken to better cohere with the underlying theoretical framework in this area as outlined in Part I. Some of these reforms are purely matters of legal doctrine, such as the argument for equal treatment on the ground of nationality in chapter 4; others involve more complex and multifaceted analyses of legal and political theory; and others still involve engagement with broader debates in the social sciences more generally. Moreover, whether or not those reforms will eventually, if ever, be made is, unfortunately, very uncertain. But this thesis has attempted to nudge the debate in the right direction by identifying some of the reasons which can and should motivate a deepening of the project of EU integration by and through the work of third-country nationals. Third-country nationals clearly play a vital role in that project and could best do so if their well-being was adequately secured. However, as I here conclude, this project forms but one part of a much larger research agenda for the social sciences in advancing and investigating the well-being of people at work in a neorepublican European Union.

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