



EU Migration Policy and Dissensus over Liberal Democracy

Christian Joppke

I INTRODUCTION

“Liberal democracy” is a tension-riddled synthesis of two different principles of political order. “Liberalism” is a device to restrain political power for the sake of individual freedom, answering the question “how” to rule, while “democracy” commands that political power is exercised—at least legitimised—by those over whom it falls, answering the question “who” rules. Accordingly, the composite “liberal democracy” is no natural given but the name for a happy moment in twentieth-century history, post-1945, and it has been in persistent crisis since the onset of neoliberal globalisation, post-1989, and the parallel rise of nationalist populism. But more than a contingent historical compositum that may have seen its days, “liberal democracy” is also a necessary combination for either of its elements to thrive: take away the democratic element, and you are left with the Nietzschean freedom of the heroic few; and take away the liberal element, and you arrive at the nationalist populism that is currently swamping both sides of the Atlantic. While it may have various expressions (see Coman & Brack, 2025), “dissensus over liberal democracy” is at heart an uncompromising commitment to only one of its composite elements, and a forgetfulness that their combination is required for either element to thrive.

The European Union (EU) is uneasily tied up with the post-WWII liberal-democratic synthesis. The Union’s rise coincided with its full blossoming, sometimes referred to as the era of Social Democracy or the *Trentes Glorieuses*

C. Joppke (✉)

Department of Political Science, Luiss University, Rome, Italy

e-mail: cjoppke@luiss.it

(1945–1975). But it was also a force of breaking this synthesis apart, reducing democratic “nation states” to elite-ruled “member states” that follow similar programs of slimming the welfare state and making the economy more competitive (Bickerton, 2012). “Liberal” the EU certainly is, encapsulated in the “four freedoms” (of people, goods, services, and capital) that its core institution, the Common Market, is all about. But “democratic” the Union is not even by a thin definition of democracy, as “a system in which citizens collectively decide by whom and, to some extent, how they will be governed” (Przeworski, 2024). Consider, for instance, that a loudly advertised expression of EU-level “democracy”, the so-called *Spitzenkandidat* procedure for selecting the Commission president (whose function resembles that of a head of government), was simply shelved, in 2019, when the French president was not happy with the outcome. Oddities like this one conventionally run under the rubric “democratic deficit”, along with the hope that it can be fixed (e.g., Follesdal & Hix, 2006). But one way of thinking about the EU, which dates back to Hayek (1939), is that liberalism minus democracy is the whole point of it, as the world’s most pristine case of a “neoliberal” polity (see Scharpf, 1999). Some argue that the formal strengthening of the European Parliament has made the EU more democratic over the years. However, in “actual practice”, as Menéndez and Olsen (2020, p. 135) have shown in detail, “(t)he scope of democracy has been narrowed down through procedural tweaking, delegation to expert institutions, minority-based voting, and the proliferation of emergency decision-making”.

This chapter, in the next (second) step, situates EU migration policy within the liberal-democratic synthesis and its dissolution, arguing that, much like at the state level, this policy may be depicted as subject to a “liberal paradox”. Thirdly, it traces the gradual development of EU migration policy, taking competences away from member states. Fourthly, it maps competing themes and identities that undergird EU migration policy. It closes with a look at a restrictive turn after the 2015 Syrian Refugee Crisis. Overall, EU migration policy is less a case of dissensus “over” than “within” liberal democracy, shaped by a tension inherent in this synthesis.

2 THE LIBERAL PARADOX IN MIGRATION POLICY

How does EU migration policy relate to the liberal-democratic synthesis, as well as its falling apart? An answer must start at this synthesis’s original site, the nation state. Here, migration policy is subject to contradictory principles and forces, which Jim Hollifield has influentially summarised as “liberal paradox”. It comes in two versions. In one (Hollifield, 2004, p. 892), states are “caught between economic forces that propel them toward greater openness (to maximise material wealth and economic security) and political forces that seek a higher degree of closure (to protect the *demos*, maintain the integrity of the community, and preserve the social contract)”. The reference to *demos* suggests that the “liberal paradox”, which for Hollifield is one among

several “contradictions inherent in liberalism” (p. 896), is not really a “*liberal* paradox”. There is nothing inherent in liberalism that calls for closure. On the contrary, liberalism is a universalistic creed that stipulates the equal dignity of all people. One should thus speak of a “liberal democratic” (or “liberal state”) paradox—even though the opposite policy implications of both elements are to be expected and, strictly speaking, do not constitute a “paradox”. Hollifield seems to plausibly assume that “liberal” and “democratic” ideally require one another, and that a liberalism without equality (the democratic element) would not be liberal but aristocratic, as envisaged by Nietzsche. Tocqueville (1969, p. 503) has put it well: “(M)en will be perfectly free because they are entirely equal, and they will be perfectly equal because they are entirely free. Democratic people are tending toward that ideal”. Indeed, the “liberal paradox”, as formulated by Hollifield (2004), is expressive of a constitutive tension between liberalism and democracy (as well as the latter’s close historical affiliate, nationalism, which defines the boundaries of the demos).

The “liberal paradox”, qua singularly *liberal*, is only one if “rights-based liberalism” (Hollifield, 2004, p. 892) is brought into the picture. “Rights” are central to a second (in fact, the original) version of the “liberal paradox”, presented in Hollifield’s classic *Immigrants, Markets, and States* (1992). Here, it is the conflict between a liberal “market” logic, asking for the cheapening of labour (be it that of citizens or of immigrants), and an equally liberal but “rights” logic, making labour more expensive (again, of whatever extraction, citizens or immigrants). However, on the part of immigrants, “rights-based liberalism” is not a force of “closure”, as Hollifield summarily describes the function of rights, but of the continued “opening” of society, because under its reign immigrants cannot be discarded at will. This makes the following statement implausible: “(T)he economic logic of liberalism is one of openness, but the political and legal logic is one of closure” (Hollifield, 2004, p. 887). The problem is that the “legal logic”, central to the protection of rights, is located here entirely on the side of closure, which is not necessarily so—with respect to citizens, yes, with respect to immigrants, no.

The problem with the “liberal paradox” is that there are not two but *three* principles and forces at play in the conditioning of migration policy: two liberal ones, in terms of markets and rights, or economic and legal prerogatives, the two not necessarily in sync (as rights are costly and move in opposite directions for immigrants and citizens); and an additional democratic, in effect statist or nationalist logic, which always tilts towards closure.

How does EU migration policy relate to the “liberal(-democratic) paradox”? The demotic or statist element appears only indirectly at the European level, in terms of the European Council and Council of Ministers that are constituted by the (democratically accountable) heads and ministers of state, respectively, and that, much as at member state level, have mostly played a restrictive and control-minded role in migration policy (for exceptions, see Zaun, 2017). The two liberal principles, markets and rights, which are both forces of openness rather than closure with respect to migrants, are pushed

by the EU's supranational institutions: above all, the Court of Justice of the European Union (CJEU) that watches over the EU treaties and secondary laws and their implementation, but also the European Court of Human Rights (ECtHR) that, while formally outside EU law, watches over the European Convention of Human Rights (ECHR) that has become a major source of migrant rights in Europe.

The constellation of restriction-minded, democratically accountable executive power, represented by the Council, facing rights-protecting courts, closely resembles the situation at the state level (see Joppke, 1998). The other two supranational EU institutions, the European Commission (whose main function is to propose new legislation) and the European Parliament (that has co-legislating power with the Council of Ministers since the 2007 Lisbon Treaty), play a more ambiguous and changeable role in this respect: cosmopolitan and liberal pro-migrant forces of opening in an earlier phase, when migration was not yet a politically salient issue; but both institutions moving towards more restrictive positions once populist radical right parties have pushed migration, in particular of the asylum-seeking and irregular kinds, towards the top of the political agenda, at state and EU levels alike, with vehemence since the 2015 Refugee Crisis.

With respect to EU migration policy, the falling-apart of the liberal-democratic synthesis is mostly experienced by sceptical national regulators (like Sommer, 2025), who dread the populist heat in their necks and “look forward with trepidation” to “each new decision” of European high courts that “feel exclusively obliged to individual protection and irresponsibly ignore their impact on protection-providing states”—but whose calls for resurrecting the “primacy of politics”, as we shall see, have not remained unheard.

3 THE EVOLUTION OF EU MIGRATION POLICY

Migration policy appeared only late in the development of the EU, when the latter transformed from a transnational market regulator towards exercising “core state powers” (Genschel & Jachtenfuchs, 2013, p. 1). The authors include in the latter “military security”, “fiscal policy”, and “public administration”, but the migration function needs to be added.

A watershed moment for the *need* (not yet reality) of an EU migration policy was the move from the “common” to the “single market”, in the 1985 Single European Act (SEA), the first major revision of the 1957 Treaty of Rome that had set up the European Economic Community. The logic of this move was to slash not only internal tariffs but also “non-tariff” barriers. In a typical instance of the court-driven making of “Europe” (see Weiler, 1991), the SEA merely ratified, in primary treaty law, what had long been established by case law, in terms of the CJEU's *Cassis de Dijon* decision (1979). This decision introduced the principle of “mutual recognition”, according to which a good was to be considered “safe” to be sold on the common market if it was

“safe” in its origin country. The same principle would later be applied globally by the World Trade Organization, thus launching “hyperglobalisation” (Rodrik, 2011). This is the combination of national sovereignty and globalisation, but at the cost of democracy, because all three together can never be had—Rodrik’s famous “trilemma” (ibid.). Concretely, it meant that national standards of health, safety, and labour protection, derived from the national-level democratic process, were sacrificed on the altar of unhindered economic factor mobility.

But on the positive side, the single market logic included the free movement of people and the abolition of internal borders. Not by accident, 1985, the year of the SEA, was also the year of the Schengen Convention, at first an inter-state agreement outside European Community law that abolished internal borders for the movement of people. As Thym (2023a, p. 24) puts it, Schengen’s removal of internal borders set in force a “compensatory logic” of securing the Union’s external borders, and “the harmonisation of migration law was the functional equivalent of the external tariff for the importation of goods” (ibid., p. 34).

Accordingly, unlike nation-state borders that are the result of war and conquest, Europe’s external borders are the indirect result of trade, and of the accompanying free movement regime. Because “Europe” is not “the world”, free movement could never be for *all* human beings. The polemic of “Fortress Europe”, which denounces Europe’s emergent immigration function as unduly restrictive, results from an optical illusion, as if the process of internal border dissolution could be prolonged ad infinitum.

Europe’s immigration function long remained under the competence of member states, and it was only gradually, and unevenly across types of migration, subjected to supranational control. The irony is that labour migration has largely remained under member state control, while family and asylum migration are marked by a high level of supranational control. Considering that the EU is in the first an economic project, one would expect the exact opposite outcome, of regulating labour migration first. If the opposite has been the case, one must hold a logic of “venue-shopping” (Guiraudon, 2000) responsible for this, in which national leaders delegate to supranational institutions the curtailment of essentially unwanted migration that meets strong legal-constitutional obstacles at the domestic level. This expectation went badly wrong because European courts and other European institutions would help install strong migrant rights that often exceed state-level protections (see Arcarazo & Geddes, 2013).

The communitarisation of EU migration policy occurred stepwise, identifiable by the city names of three major treaty revisions: Maastricht, Amsterdam, and Lisbon. The 1992 Maastricht Treaty that established the “European Union” marked the ambition to expand “Europe” from a merely economic into a political union with state-like features, including a hymn, flag, and citizenship. Nevertheless, the immigration function was still lodged in the merely intergovernmental “Third Pillar” that dealt with justice and home affairs. In

it, member state interests reigned supreme and policy output was limited to non-binding “joint positions” and international conventions that needed to be nationally ratified. The most important of them, the pre-Maastricht 1990 Dublin Convention, relegated the asylum procedure to the member state into which a claimant first set her feet, and—despite multiple revisions and its ultimate supranationalisation—it has remained the (dysfunctional) pillar of the EU asylum system. From the Maastricht period stems the charge that the emergent EU migration regime is a “Fortress”. The kernel of truth in it is that this way Europe’s “venue-shopping” interior ministers circumvented migrant-friendly courts and constitutional constraints at home.

Things changed, to a degree, with the 1999 Amsterdam Treaty, the “true beginning” of EU migration policy (Tsourdi & De Bruycker, 2022, p. 2). It moved migration policy from the intergovernmental Third into the supranational First Pillar, and mandated the creation of an Area of Freedom, Security, and Justice. However, this was still an “incomplete” communitarisation (Thym, 2023a, p. 27), because the role of the European Parliament was merely consultative, unanimity in the decision-making Council was required, and the CJEU could not yet get involved through the all-important “preliminary decision” mechanism (in which national courts refer a question of EU law to the CJEU). Nevertheless, the greater involvement of supranational institutions sparked enthusiasm that the days of member state-controlled and restrictionist “venue shopping” were over, and that “liberal constraints” by EU institutions would set a new, more migrant-friendly direction for EU migration policy (Bonjour et al., 2018).

Indeed, the parallel 1999 Tampere Declaration of the European Council contains the stunningly cosmopolitan statement that the “challenge of the Amsterdam Treaty” was to make the “shared area of prosperity and peace”, which had been “already put in place for (EU) citizens”, henceforth “accessible to all”: “It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory”. This implied that the “legal status of third country nationals...be approximated to that of Member States’ nationals”. As Thym (2023a, p. 30) observes, the Tampere Declaration expressed the “youthful enthusiasm” of post-communist globalisation, which would not last.

Two main legal outcomes of the Amsterdam/Tampere period are the Family Reunification and Long-Term Residents Directives (2003). They are not quite as liberally inclusive as their first versions had promised. “Third-country nationals”, this EU newspeak popping up parallel to the newly created “EU citizens”, were subjected to “integration measures” and “conditions” that EU citizens were not (see Joppke, 2006, p. 228 ff.). On the positive side, however, EU law principles like “proportionality” now applied to EU migration policy, quotas for family intakes were rejected (confirming the rights-based logic of this migration), and after five years permanent residence status had to be granted, which set Europe on a different track, say, than the migrant-receiving Gulf states that do not grant such privileges (see

Tsourdi & De Bruycker, 2022, pp. 9–10). In the end, both “venue shopping” pessimists and “liberal constraints” optimists got it wrong. As Thym succinctly summarises the actual dynamic, “supranational decision-making is characterized by permanent consensus-building and compromise-seeking”; and legislation is “finalized in the secretive ‘trilogue’ format...: representatives of the Parliament, the Council, and the Commission meet behind closed doors to hammer out the final deal” (Thym, 2023a, p. 68).

The 2007 Lisbon Treaty completed the supranationalisation of EU migration policy, and it made the Charter of Fundamental Rights legally binding. In formal respect, only now the European Parliament acquired co-decision-making power with the Council (where from now on the majority vote was sufficient), and the CJEU could use the “preliminary reference” procedure that turned it into a major force of shaping EU migration policy. And migration policy was no longer just a “flanking” and complementary measure for the loss of internal border control, which it had been since the 1985 SEA, but it became a “self-sufficient policy field” (Thym, 2023a, p. 29). According to the new Article 67(2) of the Treaty on the Functioning of the European Union (TFEU), the Union “shall frame a common policy on asylum, immigration and external border control, based on solidarity between member states, which is fair towards third-country nationals”.

Now there was a double movement. On one side, “the trend toward migrants’ rights gained momentum when the powers of the supranational institutions expanded” (Thym, 2023a, p. 45). On the other side, the politicisation of migration by populist radical right parties set a strong counterpoint from which Court, Parliament, and the Commission could not stay immune. As Hooghe and Marx (2008, p. 14) observed for EU politics in general, the earlier “permissive” gave way to a more precarious “constraining consensus”, the result being “a greater divergence of politically relevant perceptions and a correspondingly constricted scope of agreement”.

4 COMPETING THEMES AND IDENTITIES IN EU MIGRATION POLICY

Following Chalmers et al. (2014), one may distinguish between four “competing themes” underlying EU migration law and policy: “economic mercantilism”, “security”, “humanitarianism”, and “European solidarity”. With respect to “economic mercantilism”, the irony is that the regulation of labour migration has remained a (near-)“exclusively domestic concern” (ibid., p. 526). This is despite measures like the Blue Card Directive for the highly skilled, which turned out to be a “policy failure” because of its “lack of added value” to the continued existence of nationally distinct policies (Tsourdi & De Bruycker, 2022, p. 11). Article 79(5) TFEU states that the envisaged “common immigration policy” “shall not affect the right of member states to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work”. However, one needs to see

this reluctance in the context of the free movement regime for EU citizens. After an optimistic moment of EU citizenship being considered “destined to be the fundamental status of nationals of the Member States”, as the CJEU’s famous 2001 *Grzelczyk* decision put it, EU citizenship has been cut down to its original size of a market citizenship that is contingent on employment and economic self-sufficiency. Accordingly, the need for labour “migrants” is satisfied through the intra-European citizen route.

A second, though historically first, theme undergirding EU migration policy is “security”, which gave rise to the “Fortress Europe” polemic. It had already been present in EU migration policy’s maximally cosmopolitan moment, the 1999 Tampere Declaration, that *also* committed the Union to “stop illegal immigration and to combat those who organise it”, and in this respect “laid the ground for (the) criminalization of irregular migration and externalization of migration control” (Wagner et al., 2024, p. 3) that by now has become the dominant strand in EU migration policy. This trend is commonly referred to as “securitisation”, in more critical quarters even as “crimmigration”, the criminalisation of migration. The operational flanking of the emergent EU migration policy indeed contains measures that are stricter than parallel measures at the member state level. For instance, the EURODAC database requires the fingerprinting of all asylum applicants (to avoid multiple applications), while at the national level fingerprinting kicks in only after “significant criminal acts” (Chalmers et al., 2014, p. 532).

Thirdly, “humanitarianism”, that is, a “powerful discourse of human rights” (Chalmers et al., 2014, p. 536), counteracts the security theme. This theme grew in importance with the involvement of supranational institutions in EU migration policy-making. Article 67(1) TFEU stipulates that the “area of freedom, security, and justice” must be aligned “with respect for fundamental rights”, which achieved constitutional status with the Lisbon Treaty’s incorporation of the Charter of Fundamental Rights. Overall, the European Convention’s rights guaranteed to third-country nationals, from family reunification to asylum, by far exceed what international human rights and refugee law requires. In particular, Article 3 ECHR, which prohibits torture and “inhuman and degrading treatment”, has come to exceed the level of protection under the Geneva Refugee Convention, including a broader definition of “persecution” (by non-state actors also), and extending the non-refoulement norm under a generous regime of “subsidiary protection” (where the refugee definition does not apply) to situations of “extreme material poverty” (Thym, 2023a, p. 352).

A final theme undergirding European migration policy, in particular with respect to refugees and asylum seekers, is “solidarity” (Chalmers et al. 2014, pp. 541–543). It is legally enshrined in Article 80 TFEU, which stipulates that the broadly conceived immigration function (including “border checks, asylum, and immigration”) is to be “governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”. For the factual non-existence of solidarity stands the collapse

of the Dublin Regulation during the 2015 Refugee Crisis. Hungarian Prime Minister Viktor Orbán, who prided himself for establishing “illiberal democracy” in his country, infamously refused the redistribution of Syrian and other refugees, calling them not a “European” but a “German problem”. In the perhaps strongest expression of a not just practical but principled “dissensus over liberal democracy” in EU migration policy, Orbán puts his disagreement to the point: “They (EU institutions) would like to manage migration, and not to stop the migrants” (quoted in Thym, 2023a, p. 32). This disagreement and resulting lack of solidarity is at the core of the malfunctioning of Europe’s asylum regime, which burst into the open in 2015, and has never been repaired.

The mentioned themes competing over the shape of EU migration policy correlate with different identities attributed to the EU. Lavenex (2019) has usefully distinguished between three of them: the EU as “super state”, as “common market”, or as “normative power”, while attributing these identities to distinct actors and policies within the larger migration function. These identities boil down to the two liberal identities (economic and legal) competing with a democratic (in fact, nationalist or statist) identity, which undergirded the “liberal paradox” in migration policy.

The statist identity, represented above all by the Council, is the “oldest and dominant frame” (Lavenex, 2019, p. 572) in asylum and immigration matters, rooted in the historical origins of EU migration policy as flanking and compensating the dissolution of internal borders since the 1985 Schengen Convention. The compensatory logic still shines in the Area of Freedom, Security, and Justice (AFSJ) created in the Amsterdam Treaty: internal “free” movement requiring “security” as a backdrop, with “justice” as only the distant third consideration. The AFSJ was furthermore reflective of the ambition to move from an “economic” to a “political Europe”, which is “at the service of its citizens” (p. 575). The protracted terrorism threat after 9/11 even pushed “security” ahead of “freedom”. At the 60th anniversary celebrations of the Treaty of Rome, in 2017, the assembled heads of state tellingly considered as the “first goal” of the EU, ahead of economic prosperity and growth that are ever more difficult to achieve in neoliberal times, “A safe and secure Europe: a Union where all citizens feel safe and can move freely” (p. 575). In the same year, Emmanuel Macron made “*une Europe qui protège*” a key slogan of his successful campaign for the French presidency. The incantation of “a Europe that protects”, which started with Commission President Juncker in September 2016, reached an apex in the proposal of a new Commission portfolio, under his successor von der Leyen, labelled “Protecting our European Way of Life” (that had to be reduced to the milder “Promoting”) (see Foret & Trino, 2022).

Secondly, and surprisingly, a “market power” identity, if applied to third-country nationals, appeared “relatively late” (Lavenex, 2019, p. 579), in the context of the exuberantly neoliberal Lisbon Strategy (2000) of “becom(ing) the most dynamic and competitive knowledge-based economy in the world,

capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment”, and this in ten years. This period saw a plethora of market-related migration directives, for students (2004), researchers (2005), high-skilled (2009), and intra-corporate transferees (2014). However, “a common European policy for economic migration is still lacking”, Lavenex (2019, p. 580) observes, and tellingly the post-Lisbon “Europe 2020” strategy makes no reference at all to migration (p. 579).

Finally, a “normative power” identity also arrived “relatively late” (Lavenex, 2019, p. 575), acquiring constitutional status in the Lisbon Treaty’s Charter of Fundamental Rights, and pushed by the EU’s supranational institutions. Its high point remains the Tampere Conclusions of 1999, and their cosmopolitan project of minimising the distinction between European citizens and third-country nationals. Even after the withering of the turn-of-the-millennium enthusiasm, the Tampere notions of “fair treatment” of migrants and “measures against racism and xenophobia” were retained.

Importantly, in the EU’s technocratic consensus culture, extreme legal and policy positions and outcomes have remained the exception. Accordingly, in his overview of a European migration law torn between the conflicting imperatives of “rescuing” and “taming” the nation-state, Thym (2023b, p. 1677) arrives at a “nuanced picture” marked by a “combination of protective and restrictive elements” that has “defined...European migration law from the beginning”.

An influential theme in the evolution of the EU is that of “failing forward”, which rests on the assumption that “crisis prompts integration” (Jones et al., quoted in Lavenex, 2018, p. 1198). However, of Europe’s two major new millennium crises, the 2008 Sovereign Debt Crisis and the 2015 Refugee Crisis, this tempered optimism applies only to the financial, not to the migration crisis. In their comparison of both, Boerzel and Risse (2018) explain these opposite outcomes and the “failure of integration” in the refugee crisis with the rise of “right-wing populism” that has “successfully mobilized exclusive nationalist identities and anti-immigrant sentiments against a Union in which detached elites took decisions defying national sovereignty and democracy” (ibid., p. 101).

Indeed, the 2015 Refugee Crisis marks a major rupture in the pragmatic “protectionism” versus “protection” balance of European migration policy (Lavenex, 2018); it has moved even the Union’s supranational institutions closer to the “protectionist” pole. We thus need to have a closer look at the EU’s heavily contested asylum policies. Formally, these policies have kept their migrant-protective core. But they have made it ever more difficult for migrants to take advantage of it by pushing them back at the border and seeking to externalise the asylum process to non-European states.

5 RESTRICTIVE TURN AFTER 2015

The Refugee Crisis of 2015, when over 1 million Syrians and other refugees marched unhindered through the Balkan Route to Germany and further north, marks a deep cesura in the evolution of EU migration policy. Legislative attention now focused on bringing order into the EU's defunct asylum system, in effect moving the management of refugee and irregular migration ever closer together, reflective of the fact that most south-to-north migration today is "mixed", with economic and persecution rationales difficult to disentangle. The restrictive turn is obvious in the EU's 2024 Pact on Migration and Asylum. "Promoting legal pathways" is only one of its sixteen priorities, tellingly tugged into the promotion of "international partnerships" whose primary concern is to contain irregular migration and "fighting migrant smuggling" (European Commission, 2024).

The current constellation is concisely described by Thym (2023a, p. 348): "The increase in protection standards and procedural standards domestically coincided with the proliferation of non-arrival policies and the externalization of migration control". With respect to increased protection standards, a particularity of the EU asylum regime is the enlargement of its protective scope from refugees as defined by the Geneva Convention ("well-founded fear of being persecuted") to "subsidiary protection" for anyone who "face(s) a real risk of suffering serious harm" when returned to their country of origin (Chalmers et al. 2014, p. 555). In the process, "the crucial concern has moved to the dignity of the individual rather than the nature of the oppression" (ibid., p. 563 ff.). Hailbronner (2024) only mildly exaggerates when castigating an "oversized (*überdimensioniert*) EU asylum-seeker protection", which has (over-)extended the "prohibition of torture" under Article 3 ECHR from something that protects physical life to a remedy for "bad living conditions, economic 'lack of prospects for success', and 'risk of pauperisation'".

Even notionally restrictive measures, such as the 2008 EU Return Directive, are imbued with strong migrant-protective elements. Initially denounced as "directive of shame" because it eschewed mass amnesties (the Spanish preference at the time) in favour of "returning" irregular migrants to their home country (French President Sarkozy's successful counter-position), in reality, it offers a "rather protective framework for returnees" (Tsourdi & De Bruycker, 2022, pp. 13–14). For instance, voluntary return is prioritised over forced return, pre-removal detention is strictly limited, and additional procedural guarantees are provided. No wonder that well under one-third of irregular migrants with a deportation order *are* in fact deported. Accordingly, when in 2025, under the double pressure of deadly knife attacks by deranged asylum seekers and increasing electoral support for the populist right in Germany, even centrist political forces headed by new CDU chancellor, Friedrich Merz, seized radical measures like internal border controls and summary rejections at the border, asylum-seekers included, they had to reckon with the fact that European law erects high hurdles for this. In particular, in its 2023 *Addendum*

Others decision, the CJEU declared it illegal to reject migrants at EU internal borders, even if they have not made an asylum claim. This is because the Return Directive prohibits a “forced” return if the possibility for a “voluntary” return has not been exhausted in the first, and even if the migrant in question is a “serious threat to public policy or domestic security”—“He or she must..., in principle, be subject to the common standards and procedures laid down by the directive”, the CJEU decreed. The German Police Union, for one, has interpreted this court decision as “factual prohibition to reject persons at the border” (Jaeger, 2024). The irony is that the Return Directive, a measure whose main purpose is to “mandate” (not just allow) the return of irregular migrants, has become a major obstacle to just this.

Considering that “European values” have grown in rhetorical and legal importance with the supranationalisation of the migration function over the past two decades, it is unsurprising that the attention of EU law and policy has shifted towards making it impossible for prospective migrants to come under the protective shield of EU jurisdiction in the first place. This only replicates at the EU level a dynamic that was earlier observed at the state level: once a migrant has managed to put her feet into a liberal state, its rule of law protections cannot be denied to her, so that it becomes difficult to get rid of her. Non-refoulement protections for terrorists and criminals are the most galling demonstration of the “liberal paradox”—hence, nine member state leaders, headed by Denmark and Italy, recently called upon the ECtHR to “restore the right balance” and leave “more room nationally to decide on when to expel criminal foreign nationals” (Open Letter, 2025).

The most obvious way around the liberal paradox is to make it inapplicable, by strategies of externalisation. They reach from visa requirements and carrier sanctions, which are long-established practices of “remote control” (Zolberg, 1997), to the more recent “pushbacks” at the borders, including at high sea, physical border fortifications, and farming out the asylum process to third countries. These measures amount to the factual annihilation of the right of asylum while leaving it formally in place. In the early 1990s, the German government had shown the way by not abolishing but merely rendering inaccessible its constitutional asylum right (that exceeds the protections under the Geneva Convention), with the help of the “safe third country” rule, novel at the time, that makes it very difficult to invoke this right in the first place.

In the EU consensus culture, and under the growing pressure of besieged external borders and populist parties feeding on that, even courts, the strongest pro-migrant protagonist under the liberal paradox, have partially okayed the executive-driven externalisation trend. In 2012, in the *Hirsi Jamaa and Others v. Italy* decision, celebrated by human rights advocates as “historic”, the Grand Chamber of the ECtHR had still denounced as illegal “collective expulsion” (because occurring without individual assessment) and refoulement the return to Libya by an Italian coastguard vessel of some Somalians and Eritreans floating at high sea. The argument was that while outside of Italian territory, the coastguard vessel was still under Italian jurisdiction, so

that Convention protections applied. The novelty was to extend the concept of “collective expulsion”, which previously required prior residence, to cases of non-admission at the border.

However, in its 2020 *N.D. and N.T. v. Spain* decision, the ECtHR at least partially changed course, decreeing that a similar summary rejection of fence jumpers in the Spanish-ruled Melilla enclave in Morocco did *not* constitute collective expulsion—if only on the dubious assumption that the plaintiffs’ “own conduct” had brought them into their dismal situation, because alternative land border check points existed where they *could* have filed an individual claim for entry and protection (that Moroccan police, however, factually prevented them from reaching). This judgement constitutes an “obscure combination of restrictions and dynamism” (Thym, 2020): on the one hand, the previously little noted “collective expulsion” prohibition under the Convention continues to be “a freestanding procedural guarantee for people without a realistic opportunity to be recognised as a refugee” (ibid.); on the other hand, the court now has followed the executive’s (that is, member states’) wishes to neutralise it in practice.

“Organised hypocrisy”, that is, the “concurrent reinforcement of protective claims and protectionist policies”, is an adequate description of past and present EU migration policy, which may be attributed to the EU’s “unsettled constitutional balance” of “high normative ambitions and practical political limits” (Lavenex, 2018, p. 1196).

The European Commission, previously a liberal force within the liberal paradox, partakes in the restrictive turn. Faced with the challenge of “instrumentalised migration” at the Union’s Eastern borders to Russia and Belarus, in which the latter have instigated mass irregular migration and asylum-seeking as tool of hybrid warfare, the EC has signalled that the “emergency” Article 72 TFEU might allow member states, like Poland, to engage in “pushbacks” for the “maintenance of law and order and the safeguarding of internal security”. This would “dish the individual right of asylum” (Thym, 2025a), as long as the non-refoulement norm is not violated—but here the *N.D. and N.T. v. Spain* case might show ways around that too (ibid.). Thym (2025b) detects in the recent Commission communication on pushbacks “a symbolic victory for governments calling for a fundamentally new approach to asylum”.

The emergent restrictive migration consensus in Brussels is strongly visible in the new Migration Pact, to go into effect in 2026. It is framed as “grounded in our European values” (European Commission, 2024), which are cosmopolitan. But key elements of it are a new Return Regulation that would shift the focus from voluntary to forced return, and a “border procedure” that would allow the internment and rejection at the border of migrants who pose a security risk or who come from a safe third country, based on the “legal fiction that those arriving have not yet entered the EU” (The Economist, 2024). One critic sees in the pact—which was agreed after three years of arduous negotiation by the European Parliament, the EC, and most member states, and thus is a product of the EU’s consensus culture—a “paradigm shift” towards “harsh,

indiscriminate measures in the name of ‘security’” (Grzeskowiak, 2024). This seems exaggerated. Consider that for *real* hardliners, like Hungary’s Viktor Orbán, the envisaged restrictions of the asylum process do not go nearly far enough, and strong legal protections, in particular for vulnerable groups like unaccompanied minors, continue to exist.

6 CONCLUSION

EU migration policy replicates at the supranational level the contours of the state-level liberal paradox, in which liberal-legal forces of opening, centred on the supranational actors within the EU, clash with democratic-nationalist forces of closure, represented by the Council that stands for member state interests. With some exceptions (noted above), this is less a dissensus *over* than a dissensus *within* liberal democracy, articulating a tension inherent between its “liberal” and “democratic” components that is not new but as old as the “politics of immigration” (Hampshire, 2013, ch. 1). EU migration policy evolved over three periods: an intergovernmental beginning from the 1980s to the turn of the century, in which the dissolution of internal borders had to be compensated by the making of external borders, the notorious “Fortress Europe”; a euphoric middle phase in which cosmopolitan values pushed by supranational actors seemed to flatten the citizen-immigrant distinction; and a restrictive turn following the 2015 Refugee Crisis, in which a new pragmatic consensus of centrist forces besieged by the populist right, seeks to protect the normative core of a human rights-friendly European migration system by making the latter less accessible to unwanted migrants. One may call this “organised hypocrisy”. But what is the alternative?

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