Legal Mobilization and the Judicial Construction of EU Migration Law

Virginia Passalacqua

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Virginia Passalacqua
6 November 2019

Abstract

Legal mobilization is a peculiar type of mobilization: it does not bring people to the streets and does not use banners and slogans. Instead, it quietly uses the law and courts to press for social change. While most of the studies on legal mobilization focus on the United States or on the European Court of Human Rights, this thesis brings attention on the underexplored but yet important question of legal mobilization before the Court of Justice of the European Union. In particular, this research asks whether the preliminary reference mechanism (267 TFEU) can be used as a tool for enhancing migrants' participation and protection. To do so, the thesis departs from the classic court-centric approach and conducts a law and society analysis of three case studies (Italy, the UK and the Netherlands). By interviewing the individuals involved in the preliminary reference proceedings on migrants' rights, and by analysing press documents and political statements, I collected fine-grained qualitative data that allowed me to uncover the legal mobilization stories behind the litigations. Finally, analysing together the three case studies, the last chapter identifies the conditions under which a legal mobilization emerges and reaches the Court of Justice. These conditions lay bare the fact that supranational legal mobilization is not a 'cheap' strategy: it is generally a rather long process, that requires material and non-material resources, and the outcome of which is difficult to predict. The findings of this thesis offer an innovative understanding of the preliminary reference mechanism and of its potential to create social change. Although in some instances the Court of Justice has not been responsive to the civil society's calls, in other cases litigation has led to the redefinition and expansion of migrants' rights, and arguably it represents an important tool to scrutinize the executive's activity and give voice to minorities' interests.

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Acknowledgments

Doing a doctoral program at the European University Institute was an honour and a privilege. From the first day, I felt extremely lucky to have the possibility of spending my working days surrounded by incredibly knowledgeable and smart colleagues and professors in such beautiful places like the Badia Fiesolana and Villa Schifanoia on the hills of Fiesole. Each seminar, lecture and conversation that I had enriched not only my knowledge of the law, but also my views on society, and nurtured my fascination with research in the social sciences.

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Chapter I. Research Question and Methodology

1. Introduction: Europeanization of the migration field and legal mobilization

Being at the same time powerful and isolated, the Court of Justice of the European Union has attracted much criticism but few praises, and the question of whether it has trespassed the boundaries of its mandate is often discussed in academic studies and political debates. For some, the Court is 'the most effective supranational judicial body in the history of the world'[1] and the 'hero' of European integration.[2] For others, the Court is 'eroding Member States' sovereignty' and its reach 'has extended to a point where the status quo is untenable'.[3] As a result, the Court of Justice's judgments are both critically important and highly controversial, and legal scholars comment on them almost in real time.

Thanks to this political and scholarly attention we know almost everything about what the Court of Justice says. In contrast, we know little about who asks the Court certain questions and why. Most of the case comments leave little or no space for the national context where the request for preliminary rulings stem from, so that we often have no

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[1] Alec Stone Sweet, *The Judicial Construction of Europe*, Hardback and Paper (Oxford University Press, 2004), 1.

[2] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization* 47, no. 1 (ed 1993): 41.

[3] Marina Wheeler, 'Cavalier with Our Constitution: A Charter Too Far', *Human Rights Blog* (blog), 9 February 2016, https://ukhumanrightsblog.com/2016/02/09/cavalier-with-our-constitution-a-charter-too-far/; Annabelle Dickson and Ariès Quentin, '9 Reasons Why (Some) Brits Hate Europe's Highest Court', *Politico*, 26 July 2017, https://www.politico.eu/article/brexit-ecj-european-court-of-justice-9-reasons-why-some-brits-hate-europes-highest-court/.

idea of who the parties are that initiated the litigation at the national level and what is the local impact of the preliminary rulings, both in legal and political terms.

This research investigates who mobilizes EU migration law before the Court of Justice of the European Union, how, and why. By doing this, it reverses the classical viewpoint adopted in legal scholarship: the focus is not on how the Court shapes migrants' rights but rather on how migrants and their supporters can use litigation to participate in the construction of EU migration law. The Court is therefore de-centred in favour of concrete national processes: migrant supporters, national political dynamics, and litigation resources come to the forefront, enriching our understanding of whether the preliminary reference mechanism can be a tool for participation.

1.1 Europeanization of the migration field and its impact on migrants' participation

My research builds on two considerations. First, the EU competence to decide on the legal status of third-country nationals (TCNs) has recently expanded, and today, the EU is arguably the most important decision-maker in the field of migration and asylum in Europe. This, of course, did not happen at once; until the 1990s, migration law was under the exclusive competence of the Member States who could rule independently on admittance, residence, and integration of TCNs in their territory (even if there were some important exceptions[4]). The situation changed in 1997 when the Treaty of Amsterdam conferred on the (then) European Community shared competence to legislate in the field of visa, migration, and asylum.[5] Relatively quickly, migration reached the top of the European policy agenda.

[4] For instance, the provisions on the free movement of workers (now article 45 TFEU) already covered TCNs who are family members of Member States' nationals. Another eminent example is that of Turkish nationals, whose movement and rights were regulated via the so-called Ankara Agreement and the following protocols (Agreement Establishing an Association between the European Economic Community and Turkey, signed at Ankara, 12 September 1963, OJ L 361/29, 13.12.77).

[5] 'The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts', signed in 1997 and entered into force on 1 May 1999. The period before the Amsterdam Treaty was characterized by intergovernmental cooperation on migration and asylum policies: 'resolutions, recommendations and conclusions the legal effect of which was deeply unclear'. Elspeth Guild, 'Competence, Discretion and Third Country Nationals: The European Union's Legal Struggle with Migration', *Journal of Ethnic and Migration Studies* 24, no. 4 (1 October 1998): 624. In 1997, the Dublin Convention also entered into force, which is the first milestone of what became the EU asylum system. See 'Dublin Convention, Convention determining the State

The second consideration regards the role of the CJEU in the migration field. Guiraudon noted how, in the 1980s, the Member States' governments decided to 'Europeanize' the migration field not only because of the abolition of internal border checks but also because of 'venue shopping' considerations.[6] By transferring migration decision-making to the European level, governments were escaping national constraints: in fact, national constitutions, high courts' decisions, pro-migrant NGOs, and national parliament opposition represented important obstacles to governments' discretion and restrictive migration policies.[7] At the European level, instead, governments could organize the asylum and migration law-making with an ample margin of manoeuvre: the Council voted according to the unanimity rule, the Commission and European Parliament had a limited role, and the CJEU only had partial jurisdiction.[8] Obviously, after having escaped national constraints, governments did not want to be subjected to the European ones and were trying to 'maintain national discretion at all costs'.[9]

Guiraudon's account resonates well with the observations of Conant who pointed out the Member States' lack of compliance with CJEU judgments in the migration field. Even when the Court issued expansive pro-migrant judgments, Member States disregarded them and successfully contained justice.[10] This was possible thanks to migrants' 'organizational weaknesses and lack of strong allies', which limited their

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responsible for examining applications for asylum lodged in one of the Member States of the European Communities', OJ C 254, 19.8.1997, p. 1–12.

[6] Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping," *JCMS: Journal of Common Market Studies* 38, no. 2 (June 1, 2000): 252; her view departs from the mainstream account, according to which the abolition of internal borders would have generated the need to guarantee a coordinated control of the Community external borders instead. Azoulai and Karin de Vries, *Migration and EU Law and Policy* (Oxford University Press, 2014), 3.

[7] Guiraudon, "European Integration and Migration Policy"; on the important role of constitution and the judiciary in constraining migration control, see Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford University Press, 1999); James Hollifield, Philip L. Martin, and Pia Orrenius, *Controlling Immigration: A Global Perspective, Third Edition* (Palo Alto, USA: Stanford University Press, 2014).

[8] The Maastricht Treaty of 1992 had explicitly excluded the Area of Freedom, Security and Justice (including migration) from the jurisdiction of the then European Court of Justice. This exclusion was partially confirmed in the Treaty of Amsterdam which gave the ECJ the power to rule on preliminary references coming only from last-instance courts, neglecting to lower courts the possibility to submit a preliminary question on immigration and asylum issues. Mark A. Pollack, *The Engines of European Integration Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press, 2003), 182.

[9] Guild, 'Competence, Discretion and Third Country Nationals', 623.

[10] Lisa J. Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca; London: Cornell University Press, 2002), chap. 7.

capacity to mobilize significant legal or political pressure.[11] This considered, 'National governments felt relatively free to ignore the ramifications of case law that conferred rights on migrants.'[12] Moreover, different from other fields like the environment or women's rights,[13] migration transnational activism is very little developed: there are few migration organizations in Brussels, and most civil society actors are concentrated at the national level.[14] Therefore, migrants struggle to make their voice heard at the European level.

These considerations suggest that migrants have lost out from the Europeanization of the migration field, and they have been left relatively powerless to confront unbridled executives. However, this is not the end of the story. After a first intergovernmental period, EU supranational institutions found their space in migration law-making; in particular the European Parliament became co-legislator and the Court of Justice acquired full jurisdiction in the field.[15] Another important development, at the centre of this thesis, is that migrants and their allies started realizing the potential of EU law and the Court, establishing organizations in Brussels and starting exploring new European litigation strategies.

My thesis argues that the preliminary reference mechanism offers migrant supporter groups new opportunities to expand migrants' rights; as the law and society investigation carried out in this thesis shows, in the last years, EU litigation has been used as a tool for contesting restrictive national migration laws and policies. At the same time, this research points out that migrant supporters use these new EU opportunities only if particular conditions are met. To identify who mobilizes the CJEU, how, and why, I first conducted a contextual analysis of three case studies: Italy, the Netherlands, and the UK. After having gained insights on the inner dynamics of litigation in these three countries, I engaged in their comparison, which allowed me to identify four sets of conditions that, in my view, might determine the emergence of a

[11] Conant, 207.

[12] Conant, 215.

[13] Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007), chaps 5–6.

[14] Guiraudon, 'European Integration and Migration Policy', 264.

[15] 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

legal mobilization before the CJEU. In so doing, this research addresses three critical gaps in our knowledge that have been identified in the literature: first, it analyses legal mobilization in the field of migrants' rights,[16] second, it sheds light on the potential of the EU legal order as a terrain for legal mobilization,[17] third, it investigates how national-level factors influence supranational litigation.[18]

1.2 Bottom-up and legal mobilization approach

To understand the political use of the preliminary reference mechanism and its potential as a participatory tool, a classical doctrinal legal approach (top-down and court-centric) would not be appropriate. For this reason, I decided to conduct a contextual and bottom-up analysis, redirecting the focus on the litigants and the national context, using what is known as 'legal mobilization approach'. The next section will explain the meaning of legal mobilization as an analytical approach and as an empirical phenomenon. For now, I will just say that its central claim is that courts are mainly 'reactive' institutions that 'do not acquire cases on their own motion, but only upon the initiative of one of the disputants'.[19] According to this view, to understand the logic and dynamic of litigation, we need to look at who invokes the law and why, studying the social and political context of the use of law.

The perspective taken in this dissertation is rather uncommon for the legal field: what usually lies at the margins, i.e. the facts of the case and the national context, takes centre-stage. However, this study is in line with a growing body of EU scholarship, which shows some dissatisfaction with the mainstream way of depicting litigation before the CJEU. Authors increasingly challenge the classical approach that pictures the CJEU as an activist and isolated body, as it was 'always already there, out of history,

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[16] Susan Sterett, 'Legal Mobilization and Juridification: Migration as a Central Case', *Law & Policy* 38, no. 4 (1 October 2016): 273.

[17] Lisa Conant et al., 'Mobilizing European Law', *Journal of European Public Policy*, 30 May 2017, 5.

[18] Dia Anagnostou, *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*, Oñati International Series in Law and Society (Oxford: Hart Publishing, 2014), 26.

[19] Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law', *The Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 10.

independent from the socio-political contexts in which it successively operated'.[20] These scholars started pointing out the existence of other actors and factors playing a pivotal role in the judicial law-making of the CJEU.

For instance, already in the mid-1990s, Alter argued that the CJEU could not develop its integrationist agenda without the support of domestic lower courts, which, driven by inter-institutional competition, empowered the Court of Justice via preliminary references.[21] More recently, Vauchez and De Witte analysed the critical role played by lawyers, legal professionals, and academics who participated, behind the scenes, in the construction of EU integration.[22] Another example is the collection of 'EU Law Stories', gathered by Nicola and Davies, who presented some of the landmark cases of the CJEU in a new light that emphasizes their historical context.[23] Finally, and particularly relevant for this thesis, is the call by Conant *et al* for further empirical research on the phenomenon of legal mobilization in the European litigation context.[24] These works show that there is a growing interest in analysing the CJEU from new angles, and this research contributes to these scholarly efforts.

2. The legal mobilization approach: Who sets the CJEU's agenda in the migration field?

The legal mobilization approach was first developed by scholars in the US interested in studying litigation as a tool for political participation. This section provides a definition of the concept of legal mobilization by distinguishing between legal mobilization as an empirical phenomenon and as an analytical approach. Then, it also

[20] Antonin Cohen and Antoine Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited', *The Annual Review of Law and Social Science* 7 (13 September 2011): 418.

[21] Karen J. Alter, 'The European Court's Political Power', *West European Politics* 19, no. 3 (1 July 1996): 458–87.

[22] Antoine Vauchez and Bruno de Witte, *Lawyering Europe: European Law as a Transnational Social Field* (Hart, 2013).

[23] Fernanda Nicola and Bill Davies, *EU Law Stories* (Cambridge University Press, 2017).

[24] Conant et al., 'Mobilizing European Law'.

explains how the legal mobilization approach influences my work and shapes my way of analysing litigation before the CJEU.

2.1 Defining legal mobilization

One of the most cited definitions of legal mobilization was set forth by Zemans in 1983: the law is mobilized 'when a desire or want is translated into a demand as an assertion of one's rights'.[25] If read out of context, this definition may sound rather vague; but, Zemans' article laid down the basis for a new understanding of litigation as an intrinsically political activity that offers to the individual a means to participate in the polity. In fact, litigation, even when conducted between private parties in pursuit of personal interests, consists in the action of invoking states' powers and participating in law-enforcement.[26] With her article, Zemans challenged the mainstream understanding of the role of law and courts in society, and started a new reflection on litigation as a tool for democratic participation.

Race discrimination offers an example of how litigation for the private interest can be a form of political participation: this is indeed the field where litigation was most famously used as a tool for social change.[27] When an individual brings a lawsuit against a private company because it refuses to hire black people, the lawsuit is privately motivated (the individual wants to be hired) but has a clear political impact (having a labour market free from race discrimination). Thus, by invoking anti-discrimination provisions in court, that person is participating in law enforcement and in the advancement of equality.

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[25] Frances Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System', *The American Political Science Review* 77, no. 3 (1983): 700.

[26] 'The legal system […] provides a uniquely democratic (as opposed to republican) mechanism for individual citizens to invoke public authority on their own and for their benefit. The bulk of this activity takes place among private citizens who, in the process of involving legal norms, employ the power of the state and so become state actors themselves.' Zemans, 692.

[27] I am referring here to the US Supreme Court's case of *Brown v. Board of Education*, 347 U.S. 483 (1954), famous for ending the policy of "separated but equals" that justified race segregation in US public schools. Even if the real impact of the decision is contested (see Gerald N. Rosenberg, *The Hollow Hope : Can Courts Bring about Social Change?* (University of Chicago, 1991); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass.; London: Harvard University Press, 2010)), the case remains the most famous example of litigation for political change and minorities' rights.

Zemans' legal mobilization concept, however, can be used to describe any type of litigation, and therein lies the beauty and the limit of her definition.[28] In fact, if any litigation is a legal mobilization, her definition loses analytical value and we may ask what the point is of having the concept at all. Arguably, in my view, Zemans' main contribution is indeed not in the definition of legal mobilization as an empirical phenomenon (although she is mainly quoted for that) but in the elaboration of the legal mobilization *approach*. As she explains, this consists in looking at courts as mainly reactive institutions, while individual litigants 'set the agenda of the judicial branch of government.'[29] This shift in focus (from the courts onto the litigants) offers a new perspective on litigation ('user perspective'[30]), and it is the lowest common denominator of legal mobilization studies' methodology; for this reason, these studies are also defined as bottom-up.

Regarding the definition of legal mobilization as an empirical phenomenon, I decided to adopt a narrower definition, drawn from the political science literature on social movements and the 'group-based legal mobilization'.[31] In this dissertation, the term legal mobilization, if referred to as an empirical phenomenon, will indicate any process whereby law and courts are used by collective actors to achieve a political goal. Its distinguishing features are two: first, the reason why courts are used, i.e. to achieve a political reform, and second, the collective character of the litigation. By collective, I do not mean that the litigation has to feature a class action or a collective lawsuit; for the litigation having a collective character, it suffices that it is promoted, sponsored, or supported by a plurality of actors different from the private party in the case. Collective actors can be either organized groups or individuals, as long as they are a plurality and they are motivated by collective interest (not their own private interest).

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[28] This might be seen as a case of "conceptual stretching", see Giovanni Sartori, 'Concept Misformation in Comparative Politics', *The American Political Science Review* 64, no. 4 (December 1970): 1034.

[29] Zemans, 'Legal Mobilization', 691.

[30] Michael McCann, 'Litigation and Legal Mobilization', in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford University Press, 2008), 524.

[31] Lisa Vanhala, 'Legal Mobilization', in *Political Science, Oxford Bibliographies Online.*, accessed 29 January 2019, http://www.oxfordbibliographies.com/abstract/document/obo-9780199756223/obo-9780199756223-0031.xml. McCann, 'Litigation and Legal Mobilization', 533.

The presence of collective actors, as understood here, can be difficult to detect because it might not result from any documents of the case. [32] In fact, this is probably one of the reasons why most scholars have disregarded or downplayed the role of collective actors in the preliminary reference procedure. Thanks to my methodology of in-depth case studies and interviews, I could detect the presence of collective actors in cases where it was not immediately evident.

Today, the legal mobilization literature is a body of scholarship that studies litigation as a form of political participation where the courtrooms become battlefields for social struggles and where minorities excluded from policy-making can gain the chance for making their voices heard. Remarkably, many scholars have also pointed out the limits of mobilization through law and courts. For instance, there is widespread agreement that litigation is characterised by a structural imbalance between different kinds of parties: the 'haves' ('in terms of wealth, status and power') and the 'have-nots'; the 'repeat players' (who use the courts more often) and the 'one shotters'.[33] The firsts have 'a position of advantage in the configuration of contending parties', and this advantage may perpetuate or augment in a formally neutral legal system.[34]

The power imbalance between parties also impacts on litigation for social change. It has been noted that the 'ability to mobilize resources' (widely understood as funding, allies, professional support etc.) decisively affects interest groups' choice of resorting to litigation strategies or not, and their chances of success.[35] In addition to resources, the use of litigation depends on whether, and to what extent, individuals enjoy access to courts in a given judicial system.[36] Moreover, ideological considerations might lead a movement to prefer non-institutional ways to pursue its political goals and, therefore,

[32] See for instance the preliminary references analysed in the Italian case study (chapter 2): from the official documents of the case, we would say that these proceedings do not feature the participation of any group or NGO. However, thanks to the interviews and in-depth contextual research, I could trace the presence and important role of groups and associations.

[33] Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9, no. 1 (1974): 95–160, https://doi.org/10.2307/3053023.

[34] Galanter, 103.

[35] Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2006), 4.

[36] Tanja A. Börzel, 'Participation Through Law Enforcement. The Case of the European Union', *Comparative Political Studies* 39, no. 1 (2 January 2006): 129.

to avoid legal mobilization.[37] Resources, access to justice, and ideological considerations are all factors that influence the feasibility of legal mobilization, and they are studied using the two notions of legal opportunity structure and mobilization's resources. Even if we lack an agreed upon definition of these concepts in the literature,[38] there is wide consensus on the fact that the legal opportunity structure of a certain country and the resources available to movements are key to explain when and if a legal mobilization emerges; considering their relevance, these circumstances will be explored in the case studies of this research.

2.2 Using the legal mobilization approach to study the CJEU law making in the migration field

US scholars have the strongest tradition in legal mobilization studies, probably due to the experience of the civil rights movements in the 1950s and 1960s.[39] Instead, in Europe, legal mobilization studies are growing only recently, and mobilization before the CJEU needs further research,[40] especially because the Court of Justice is certainly not immune to cases of litigation for social change.[41] So far, there have been few studies using the legal mobilization conceptual tools to analyse the CJEU[42] but, to my

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[37] Chris Hilson, 'New Social Movements: The Role of Legal Opportunity', *Journal of European Public Policy* 9, no. 2 (1 January 2002): 238–55; Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy', *Comparative Political Studies* 51, no. 3 (1 March 2018): 21.

[38] For instance, Andersen's definition of LOS includes any factor or resource which impacts on the opportunities for legal mobilization. Instead, Hilson, building on the social movement literature, understands LOS as the grade of access to courts and considers financial resources as a separate factor influencing mobilization. Andersen, *Out of the Closets and into the Courts*; Hilson, 'New Social Movements'.

[39] McCann, 'Litigation and Legal Mobilization'; Dia Anagnostou, *Rights and Courts in Pursuit of Social Change*.

[40] Dia Anagnostou, *Rights and Courts in Pursuit of Social Change*, 21; Conant et al., 'Mobilizing European Law'.

[41] It is common knowledge that some leading cases of the CJEU have been the result of strategic litigation efforts. For instance, see the *Defrenne* saga described by Richard Rawlings, 'The Eurolaw Game: Some Deductions from a Saga', *Journal of Law and Society* 20 (1993): 309–40.

[42] On legal mobilization before the CJEU in the field of social provision and environmental protection policies, see Cichowski, *The European Court and Civil Society*; Karen Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', *Comparative Political Studies* 33, no. 4 (1 May 2000): 452–82; Börzel, 'Participation Through Law Enforcement. The Case of the European Union'. On legal mobilization in

knowledge, none has focused specifically on the CJEU and migration.[43] With my research, I want to contribute to what I deem is an important debate, especially in light of the increasing role that the EU is playing in the migration field.

Legal mobilization is of special importance for third-country national migrants. In fact, migrants from non-EU countries are often underrepresented in our societies, either because of institutional barriers to their democratic participation (e.g. depending on their status, they have limited right to vote) or because they may be more exposed to social exclusion. For these same reasons, legal mobilization for migrants often depends on the support of interest groups who provide key resources for litigation.[44] These aspects impact on migrants' capacity to mobilize the law and are also central to understand how EU litigation works in general. Ultimately, these are important aspects to understand whether the Court of Justice plays a counter-majoritarian role in European society, defending minorities' rights and interests.

3. **Access to the CJEU and the preliminary reference procedure**

One of the reasons why the CJEU has seldom been the object of legal mobilization studies is because it is rather difficult for individuals and especially for groups to access the Court. The CJEU has been defined as 'hostile to collective action' as its 'restrictive [access] rules are sufficient in themselves to explain the absence of group activity'.[45]

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the migration field but with a focus on the US and France, see Leila Kawar, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France*, (New York: Cambridge University Press, 2016).

[43] Two doctoral theses have been recently published that partially deal with this issue: Jos Hoevenaars, 'A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice' (Radboud University, 2018); and Moritz Baumgärtel, 'From Deficit to Dylemma. An Evaluation of the Contribution of Europe's Supranational Courts to the Promotion of the Rights of Vulnerable Migrants' (Université libre de Bruxelles, 2016), now published as a book: Moritz Baumgärtel, *Demanding Rights. Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge: Cambridge University Press, 2019). However, these works do not focus specifically on legal mobilization for migrants' rights but they touch upon it to investigate other related issues (i.e. the relationship between the individual and the Court of Justice and the impact of the European Courts' jurisprudence on migrants' rights).

[44] On collective actors role in litigation before the CJEU, see Elise Muir et al., 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum' (Working Paper, 2017).

[45] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Taylor and Francis, 2013), 525 and 528.

To be sure, legal and natural persons can bring direct action to the CJEU against a potentially unlawful act adopted by EU institutions.[46] However, under this procedure, rules for legal standing are fairly strict: individuals can bring direct action against an act of a European institution only if it is 'of direct and individual concern to them' or 'against a regulatory act [i.e. non legislative act] which is of direct concern to them and does not entail implementing measures'.[47] If these rules make direct access to the Court sufficiently difficult for individuals, the CJEU has made it even more difficult by interpreting them in a restrictive manner.[48] In practice, the majority of direct actions brought to the CJEU do not deal with migration or public interest issues.[49]

The most important procedural venue used to reach the Court of Justice, which gives origin to the greatest part of the Court's case-law, is the preliminary reference procedure (art. 267 TFUE). This procedure can be triggered during national proceedings in case the judge is in doubt regarding the interpretation of EU law. Notably, this procedure is not in the hands of the litigants: it is the national court or tribunal that 'may' request a preliminary ruling to the CJEU 'if it considers that a decision on the question is necessary to enable it to give judgment'.[50] Only when the national court or tribunal is of last instance, it 'shall' bring the matter before the Court of Justice.[51] The question referred to the CJEU may either be on the interpretation of the EU Treaties or on the 'validity and interpretation of acts of the institutions, bodies, offices or agencies of the

[46] Art. 263 TFEU.

[47] Art. 263(4) TFEU. This provision was amended by the Lisbon Treaty which somehow relaxed standing requirements for private applicants in relation to regulatory acts that are directly applicable.

[48] See *Plaumann* where the Court said that applicants "may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." Court of Justice of the European Union, *Plaumann v. Commission*, C-25/62 (July 15, 1963). In following judgments, the Court confirmed and further restricted its interpretation: Court of Justice of the European Union, *Unión de Pequeños Agricultores*, C-50/00 P (July 25, 2002); Court of Justice of the European Union, *Inuit Tapiriit Kanatami and others,* C-583/11 P (October 3, 2013). For a comment: Albertina Albors-Llorens, 'Judicial Protection before the Court of Justice of the European Union', in *European Union Law*, ed. Catherine Barnard and Steve Peers (Oxford University Press, 2014).

[49] See Court of Justice of the European Union, "Annual Report 2016, The Year in Review" (Luxembourg, 2017), 27.

[50] Art. 267 TFEU.

[51] Art. 267(3) TFEU.

Union'.[52] In case the national court finds that the EU norm in question is not sufficiently clear and unambiguous, the court stays the proceedings before it and refers the question to the Court of Justice which will issue a ruling on the interpretative question referred, without dealing with the substance of the case. However, no reference is necessary when the correct interpretation 'may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' (so-called *acte clair*) or when the CJEU has 'already dealt with the point of law in question'(*acte éclairé*).[53] Remarkably, the evaluation of whether there is an *acte clair* or an *acte éclairé* leaves the national court with room for discretion.

It follows from the foregoing that the preliminary reference mechanism 'is not a remedy but a prerogative of the national court',[54] and the parties in the case cannot independently reach the Court without a judge supporting their view. The CJEU itself defined the preliminary reference procedure as 'based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary'.[55] It seems that individual litigants have little to do with the submission of a reference: they have no right to initiate a preliminary reference procedure and they are merely invited to submit their observations. Arguably, legal mobilization, which is based on the initiative of the litigants, cannot take place in this case.

This is, however, only a description of how the procedure works in theory; in practice, things go differently. This dissertation, relying on empirical research, provides examples of the *sui generis* legal mobilization taking place before the CJEU and of how

[52] Art. 267(2) TFEU. The CJEU clarified that national courts or tribunals do not have the power to declare an act of the EU institutions invalid, therefore when the validity of such acts is in question the duty to refer a preliminary question is "particularly imperative", since "[d]ivergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty." See Court of Justice of the European Union, *Foto-Frost*, Case 314/85 (22 October 1987), at par. 15.

[53] Court of Justice of the European Union, *CILFIT*, C-283/81 (October 6, 1982), at par. 10.

[54] Christiaan Timmermans, 'Will the Accession of the EU to the European Convention on Human Rights Fundamentally Change the Relationship between the Luxemburg and the Strasbourg Court?', *EUI Working Papers, CJC* 1 (2014): 15.

[55] Court of Justice of the European Union, *Cartesio Oktató és Szolgáltató bt*, Case C-210/06, ECLI:EU:C:2008:723, 91 (2008)

litigants can impact on the emergence of a preliminary reference. But, first, we shall point out the existing scholarship on the role of individuals in the preliminary reference mechanism, illustrated in the next section.

4. The individual and the preliminary reference mechanism: the debate

Intrinsic to the concept of legal mobilization is the idea that law and courts can be tools for individuals' political participation. Therefore, when talking about legal mobilization before the CJEU, it is important to explore what scholars have said about how the preliminary reference mechanism impacts on individuals' participation. This has been object of study by both EU constitutional lawyers and political science scholars of European integration, who used different approaches and sometimes arrived at different conclusions. Below, I provide an overview of this literature, and later I will discuss its relevance for migration studies.

4.1 The preliminary reference mechanism and its impact on the EU constitutional order

According to the Court of Justice, the EU has a 'new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles'.[56] The classical view explains the exceptionality of the EU legal order with the principles of direct effect and supremacy, which govern the relationship between the EU and Member States' citizens. Interestingly, these constitutional features of the EU legal order were not foreseen in the Rome Treaty, but they are the result of judicial interpretations delivered by the Court of Justice in its preliminary rulings in the 1960s.

The first of these constitutional decisions was *Van Gend en Loos,* which enshrined the direct effect principle. The CJEU stated that the subjects of the EU [then EC] Treaties are not only the Member States, but also their citizens who can invoke their new European rights before national courts.[57] This has been called subjectivation of EU law:

[56] Court of Justice of the European Union, Opinion 2/13 of the Court (18 December 2014).

[57] *Court of Justice of the European Union, Van Gend en Loos, Case 26/62 (5 February 1963).* The Court at 12: '[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise

'the move from state-based interpretation of the Treaties into an individual-based interpretation'.[58] To be precise, it is not uncommon that an international treaty confers rights directly on individuals (think of the ECHR, for instance). The novelty of *Van Gend en Loos* resides in the fact that the CJEU created a particular enforcement rule that applied independently from what the single Member States' constitutional system provided: when EU (Treaty) norms are sufficiently clear, precise and unconditional, individuals can invoke them before national courts and ask for their direct enforcement, even if the Member State has not transposed them.[59]

A second important constitutional decision of the CJEU was issued a year later, and it further strengthened the enforcement of EU law. This was in the case of *Costa v. ENEL*, where the Court established the doctrine of supremacy: hereby, any EU act prevails over any conflicting national law, no matter which has been issued first or the national provision's rank.[60] This doctrine was particularly important for national courts: they have the duty to establish whether national law is in conflict with an EU act, and if it is so, they must 'disapply', or set aside, the national provision. In case national courts are uncertain about whether the two norms conflict, they can always ask for assistance from the CJEU via the preliminary reference mechanism.

This last point leads us to another important change that direct effect and supremacy triggered in the relationship between the CJEU and national courts. On paper, Article 267 TFEU enables national courts to refer questions to the CJEU regarding the interpretation or the validity of EU norms; however, from the 1960s on, national courts started making references regarding the compatibility of national law with EU

not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.

[58] Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (London: Bloomsbury Publishing, 1998).

[59] Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in *The Evolution of EU Law*, ed. Paul P. Craig and Gráinne De Búrca, Second edition. (Oxford University Press, 2011), 330. As noted by De Witte, such direct effect carried important novelties especially for Member States with a dualist approach towards international law, like Italy and Germany; while for monist countries, like The Netherlands or Luxembourg, direct enforcement of international law was already provided for in their constitution. The novelty for monist states resides in the fact that, this time, the CJEU decides, through its preliminary rulings, which EU norms are directly applicable and which are not.

[60] Court of Justice of the European Union, Flaminio Costa v E.N.E.L., C-6/64 (15 July 1964).

obligations.[61] This change of target entailed a transformation in the function of the preliminary reference mechanism: while it was originally created to guarantee a uniform application of EU law across all the Member States, it soon became a mechanism to monitor Member States' compliance with the EU Treaties. As Alter revealed, this change in the target of preliminary references was not envisaged and not even desired by the Member States governments, but quite the opposite.[62] In fact, when they ratified the Treaty of Rome, they thought of the Court of Justice as a tool to monitor the EU executive (the Commission) and not as a mechanism that would have brought their own national laws under the CJEU's judicial scrutiny. What the Member States could not control and foresee, of course, was the CJEU's judicial principles of direct effect and supremacy, and their endorsement by domestic courts. Especially lower courts started to make use of EU law to challenge national laws and higher courts' precedents, giving rise to the 'decentralized enforcement of EU law'.[63]

With a sublime *coup*, the Court of Justice equipped national courts and Member States citizens with powerful tools to enact a decentralized enforcement of EU law from within the Member States. Commentators, from both the legal and the political science fields, attributed far-reaching consequences to these constitutional judgments. A first group of scholars argued that national courts became a central engine of EU integration: they have acquired new powers whereby they can set aside any national provision, even of constitutional rank,[64] if they deem it in conflict with EU law. Other scholars pointed out that, in reality, litigants and their lawyers should be seen as the 'guardians' of EU law integrity:[65] they bring cases and questions to the attention of national courts and the CJEU to foster integration and Member States' compliance. Finally, a third group of scholars emphasized the political and public interest dimension of litigation before the CJEU and underlined its broader implications for European power structures. The

[61] Karen J. Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice', *International Organization* 52, no. 1 (1998): 126.

[62] Alter, 129.

[63] Alter, 126; Pollack, *The Engines of European Integration Delegation, Agency, and Agenda Setting in the EU*, 163.

[64] This was established clearly by the CJEU in its case law since the 1970s, even if it took a while for national and especially constitutional courts to accept it. See *Internationale Handelsgesellschaft, C-11/70* (1970) ECLI:EU:C:1970:114 (Court of Justice of the European Union); and de Witte (n 53) 342.

[65] Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal* 100, no. 8 (1991): 2414.

next subsections will examine these three concurrent (but not incompatible) views, considering both legal and political scientists' contributions; these different disciplinary perspectives enrich and inform this research, which is characterized by the analysis of the preliminary reference mechanism from a law and society approach.

4.2 Judicial empowerment and judicialization

EU integration scholars devoted great attention to the role of national judges in the EU legal order. Former CJEU judge, Mancini, famously held that national courts, by referring 'sensitive questions of interpretation', are 'indirectly responsible for the boldest judgments the Court has made'.[66] Such indirect responsibility of national courts has been labelled by the most careful commentators as a 'judicial dialogue', and by the boldest as 'judicial empowerment'. The judicial empowerment thesis generated, and still generates, a rich strand of legal and political scholarship, and it is based on the idea that part of the European integration success is due to the support of national judiciary.

Weiler was among the first who pointed out the reciprocal benefits that the EU legal order and (especially lower) national courts derived from the doctrine of direct effect and supremacy. In fact, on the one hand, national courts guarantee EU law enforcement: 'When EC law is spoken through the mouths of the national judiciary, it will also have the teeth that can be found in such a mouth and will usually enjoy whatever enforcement value that national law will have on that occasion'.[67] On the other hand, (lower) national courts gained new powers of judicial review over national law and the executive, and this was especially important in countries where such power was non-existent.[68]

In a similar fashion, Mattli and Burley argued that the CJEU and national courts are mutually empowering: 'While offering lower national courts a "heady" taste of power, the ECJ simultaneously strengthens its own legal legitimacy by making it appear that

[66] G. Federico Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review* 26, no. 4 (1989): 597.

[67] Joseph H. H. Weiler, 'A Quiet Revolution The European Court of Justice and Its Interlocutors', *Comparative Political Studies* 26, no. 4 (1 January 1994): 519.

[68] Weiler, 523.

its own authority flows from the national courts'.[69] This is at the core of their neofunctionalist framework, according to which the drivers of European legal integration are 'supranational and subnational actors pursuing their own self-interests within a politically insulated sphere', that is the law.[70]

National courts' self-interest in triggering the art. 267 procedure was further studied and explained by Alter. She famously held that (lower) courts are not only motivated by their new judicial review power vis à vis the executive, but they also have incentives deriving from a 'competition-between-courts dynamic of legal integration': thanks to the preliminary reference mechanism, lower courts can supplant higher courts and have their judicial interpretation confirmed by the Court of Justice. Even if they are at the bottom of the judicial hierarchy, lower courts can challenge a long-standing judicial precedent and be part of the creation of a new European precedent: 'This enabled lower courts to deviate from established jurisprudence or to obtain preferred new legal outcomes.'[71]

The study of judicial empowerment, although it started twenty years ago, has not exhausted its potential and neither lost its appeal. Today there are many EU political and legal scholars investigating the reasons why national judges make or do not make references to the CJEU, with new methodologies and data.[72] Although I cannot recall them all here, I will rely on their work in the course of my dissertation.

4.3 Individual empowerment

[69] Burley and Mattli, 'Europe Before the Court', 64.

[70] Burley and Mattli, 43.

[71] Alter, 'The European Court's Political Power', 465–66.

[72] I will cite here only few examples of a much richer strand: Morten P. Broberg and Niels Fenger, *Preliminary References to the European Court of Justice*, Second edition (Oxford, United Kingdom: Oxford University Press, 2014); Jasper Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', *European Journal of Legal Studies* 10 (2018): 101–54; Juan Mayoral, Tobias Nowak, and Urszula Jaremba, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge', *Journal of European Public Policy* 21, no. 8 (May 2014): 1120–41.

Different from the judicial empowerment theses, the studies analysed in this subsection, deliberately labelled 'individual empowerment', are expressions of a more recent trend in EU scholarship. They stem from the idea that we should depart from mainstream court-centric approaches to the study of European integration by turning our attention to other actors that have been long overlooked but that are nevertheless important to understand the integration dynamic.

Kelemen focused on the process of subjectivation of EU law as a result of the direct effect doctrine.[73] He argues that the EU, by providing 'transparent legal rules and procedures, broad access to justice, empowering private actors to assert their legal rights',[74] is 'encouraging the spread of a European variant adversarial legalism', which he called 'Eurolegalism'.[75] In his view, there are two linked mechanisms that explain this phenomenon. The first is the creation of the single market with its process of de-regulation;[76] the second is linked to the 'fragmented institutional structure of the EU' and to its limited implementation and enforcement capacities. To compensate for this fragmentation, the EU has established a powerful judicial enforcement system. In Kelemen's view, EU law-makers have an incentive to create justiciable rights and to empower private parties because these work as decentralized enforcers of EU law.

Kelemen's Eurolegalism shares some elements with Zemans' definition of legal mobilization; in fact, both think of individuals as triggers of the public enforcement function. However, in the migration domain, Kelemen's account is not fully convincing. In migration legislation, EU lawmakers, and especially the Council, intentionally avoided using a clear language of justiciable rights; moreover, for a long period, they excluded *tout court* the CJEU's jurisdiction in the field. Rather than empowering individuals, they seem to aim at their disempowerment; if we were to

[73] Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

[74] Kelemen, 6.

[75] Kelemen, 240. The concept of "adversarial legalism" was invented by Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2003).

[76] This different approach is characterized by 'More and diverse actors in play, governments and market actors who pressured for a more transparent and formal approach to regulation backed by vigorous enforcement.'

follow Kelemen's account, in such a scenario, we would expect no decentralized enforcement of EU law and no mobilization, which is not what my thesis shows.

Other accounts, rather than properly asserting an individual empowerment, shed light on the many individuals (legal entrepreneurs, public officers, legal communities, etc.) that prompted the European legal revolution. In these accounts, EU law is analysed as a particular 'transnational social field', the construction of which 'can hardly be understood without references to the specific social 'world' of legal professionals that has historically emerged and solidified, from judges to private practitioners, law professors to the states' advisers, etc.'[77] Especially the role of 'Eurolawyers' (lawyers and experts in EU law, with a Europeanist agenda) is gaining more and more recognition thanks to new sociological and historical insights on European integration;[78] these studies challenge the traditional neo-functionalist account and the reification of the CJEU and draw attention to the complex map of connected actors that share an agenda on the European project and actively promote it.[79]

4.4 Civil society's empowerment

A third strain in the literature investigates how the preliminary reference mechanism has influenced civil society litigation strategies and vice versa. At first, these studies concerned litigation for gender equality, coherently with the fact that this is the field where we have seen the first examples of public interest litigation before the CJEU: the *Defrenne* saga.[80] These preliminary rulings were landmark: not only did they recognize direct effect of art. 119 of the EEC Treaty proclaiming equal pay for equal work, but

[77] Vauchez and de Witte, *Lawyering Europe*, 3.

[78] Antoine Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity', *European Law Journal* 16, no. 1 (January 2010): 1–28; Tommaso Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa', *Law & Society Review* 53, no. 2 (20 December 2018).

[79] Cohen and Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited'.

[80] Court of Justice of the European Union, Defrenne I, C-80/70 (25 May 1971); Court of Justice of the European Union, Defrenne II, C-43/75 (8 April 1976); Court of Justice of the European Union, Defrenne III, C-149/77 (15 June 1978).

they also paved the way for the adoption of the first European social policy legislation[81] and the 'first fundamental rights policy of the EU'.[82]

Contrary to what Kelemen would predict, even if the *Defrenne* cases proclaimed the direct effect of the right to equal pay for equal work, this does not mean that women became automatically able to enforce this right. In fact, Kilpatrick warned us against the shortcoming of the individual enforcement model: 'it will generally be impossible for individuals to take an equal value case without the support and expertise of another body/bodies which possesses the knowledge and resources to assist the applicant'.[83] She showed that in the operationalization of EU equality law provisions, trade unions and equality bodies played a crucial role;[84] especially the British Equal Opportunity Commission contributed to increase the level of utilisation of the equal pay provisions: the body provided crucial support, financial, and technical resources which were key to making trade unions and individuals able to operationalize and judicially enforce EU law.[85]

The case of the UK Equal Opportunities Commission has been the object of further study as it 'pioneered the use of a European litigation strategy, taking advantage of the supremacy and direct effect of Community law.'[86] Barnard showed that the British and Northern Irish Equal Opportunities Commissions have funded a third of all the cases referred to the CJEU in the field of equal pay, giving a considerable input to the EU

[81] Cichowski, *The European Court and Civil Society*, 175.

[82] Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press, 2018), 15.

[83] In fact, litigating equal pay for equal value requires that a single worker is aware of the Equal Pay Directive, has access to information regarding the payment system of her male colleagues, is aware of the discriminatory character of the pay gap, is ready to confront her employer, and to pay the litigation cost. Claire Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK', in *Sex Equality Policy in Western Europe*, by Gardiner, European Political Science Series, 1997, 28.

[84] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L 45, 19.2.1975, p. 19–20

[85] Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK', 42.

[86] Catherine Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission', in *New Legal Dynamics of European Union*, ed. Jo Shaw and Gillian More (Oxford: Clarendon Press, 1995), 256.

judicial law-making in the field.[87] Analysing the same cases from a different angle, Alter and Vargas argued that they had a significant impact on national power structure: 'by relying on the [EU] legal system, politically marginalized actors shifted the domestic balance of power in their favour'[88], and from weak domestic actors, they became 'political players capable of influencing national policy.'[89]

Arguably, it is difficult to agree with Alter and Vargas when they define the Equal Opportunities Commission as a 'weak' or 'marginalized' actor; in fact, the Commission enjoyed a significant degree of autonomy from the administration, it benefitted from stable state funding and could count on an in-house team of legal experts.[90] The Commission's empowerment rather confirms Börzel's finding that EU litigation offers new possibilities of participation only to already resourceful groups: 'if individuals lack court access and the resources necessary for using it (person power, expertise, money), they should not be expected to gain broader participation in legal and political processes'.[91]As Dawson, Muir and Claes noted, although EU law offers new opportunities for fundamental rights enforcement, if individual and groups lack resources and 'know-how' these opportunities can get lost.[92]

A different approach to the study of EU litigation is that put forward by Cichowski, who wrote the more comprehensive work on civil society and the CJEU. She compared EU litigation in the fields of gender equality and environmental protection with two main claims: the first is that civil society contributed to the institutionalization of the EU supranational government;[93] the second is that national-level factors shape CJEU

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[87] Barnard, 255.

[88] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 455.

[89] Alter and Vargas, 465.

[90] Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK', 44; Barnard, 'A European Litigation Strategy', 256.

[91] Börzel, 'Participation Through Law Enforcement. The Case of the European Union', 129.

[92] Mark Dawson, Elise Muir, and Monica Claes, 'A Tool-Box for Legal and Political Mobilisation in European Equality Law', in *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi- Level European System*, by Dia Anagnostou, Onati International Series in Law and Society (Oxford and Portland Oregon: Hart Publishing, 2014), 106.

[93] Cichowski, *The European Court and Civil Society*, 1. By 'institutionalization', she means "the process by which these rules and procedures become increasingly formalized and are supported by actors and organizations with increasing competence to change these rules."

decision making.[94] In particular, she identified three factors: 1) 'Mobilized interests', i.e. the organizational strength of relevant interest groups; 2) 'Legal resources', i.e. legal expertise, access to justice, and the presence of national agencies supporting litigation; 3) 'European rules': that is the national/EU law fit. Cichowski analysed these factors in fifteen Member States and tested quantitively whether they explain variation in preliminary reference rates, reaching a positive conclusion.[95]

Although I think that Cichowski's hypotheses are plausible, the main shortcoming of her research is the data she used. As noted elsewhere, 'the indicators constructed for measuring national legal resources remain unrefined',[96] and the same is arguably true for the other independent variables too;[97] second, the impact on the CJEU law-making (her dependent variable) is calculated mainly in terms of number of references, disregarding the concrete outcome of the supranational litigation.[98] The impression is that by choosing a big sample of member states, Cichowski lost track of the micro dynamics of contention; different from the authors mentioned before who focused on power, resources, and conflict, she overlooked the concrete processes and struggles that led to the mobilization.[99]

In recent years there has been a new interest in the study of the CJEU and civil society, and scholars are increasingly drawing on concepts from the social movements field. For instance, Hilson used the social movements' concept of political opportunity to

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[94] Cichowski, 32.

[95] Cichowski, chaps 3 and 4.

[96] Antoine Vauchez, 'Democratic Empowerment Through Euro-Law?', *European Political Science* 7, no. 4 (1 December 2008): 447.

[97] For instance, the groups' organizational strength is measured only through the number of its members; moreover, in chapter 3, she analyses only trade unions (because she has data only on them), but in chapter 5, where she analyses lobbying strategies, she focuses exclusively on women campaign groups. This discrepancy should be explained. Moreover, she measures the fit between national and EU rules by using the Commission's report on Member States' transposition rates, which admittedly gives a very partial and superficial view on how EU law is effectively enforced. Cichowski, *The European Court and Civil Society*, 37.

[98] Cichowski, 82.

[99] Also Vauchez noted that "With its interest essentially focused on assessing the dynamics ('Europeanisation') and the balance of powers among institutions and other reified abstract collectives (the 'supranational' versus the 'national', the 'political' versus the 'legal', the 'Commission' versus the 'member States', etc.), the perspective neglects most of the power relationships and, more particularly, of the various social and professional battles that inform these processes." See Vauchez, 'Democratic Empowerment Through Euro-Law?', 445.

explain that litigation strategies are influenced by the opportunities available, such as access to court, availability of legal aid, etc.[100] Other scholars, also drawing on the concept of opportunity structure, called for more empirical insights on the dynamics of legal mobilization before the CJEU: on how national and European legal opportunity structure interact and influence legal mobilization, on the role of legal staff, and on who is more likely to mobilize EU law.[101] My research aims to contribute to this line of scholarship, investigating the rather unexplored field of legal mobilization for migrants' rights before the CJEU.

5. Questions and methodology

The central aim of my research is understanding whether, by mobilizing the CJEU, migrants and their supporters can contribute to the construction of EU migration law. According to this aim, I started my research with the following questions:

1) Does legal mobilization for migrants' rights before the CJEU exist? If yes, how does it concretely work?
2) Who mobilizes EU migration law before the CJEU? How can litigants (or their supporters) influence judges' decision to refer?
3) How does the national context shape litigation at the supranational level? What is the *local meaning* of litigation before the CJEU (i.e. the meaning of supranational litigation in the Member State's social and political context)?

To answer these questions, I first created a database (see table below)[102] with all the requests for preliminary ruling that have been submitted to the CJEU in the migration field, including also those declared inadmissible or that were later withdrawn by the national court.[103] For reasons of feasibility, I have excluded the cases on asylum and

[100] Hilson, 'New Social Movements', 243.

[101] Conant et al., 'Mobilizing European Law'.

[102] I obtained my data through consultation of the official CJEU's online reports (https://curia.europa.eu/jcms/) and the NEMIS – Newsletter on European Migration Issues for Judges (http://cmr.jur.ru.nl/nemis/)

[103] A request for preliminary ruling will not be ruled upon by the CJEU if inadmissible or if the original dispute is no longer in place (even if, in this last case, the Court can discretionally decide to issue a ruling

refugee law from the scope of my investigation: I preferred to narrow down the scope of my research and investigate fewer cases in a deeper way, rather than trying to cover all cases available. However, since I started my PhD research, the amount of litigation on asylum has grown exponentially (a likely consequence of the rise in the number of people arriving in Europe to seek asylum); this suggests that similar mobilization stories can be told about the asylum and refugee field.

EU migration provision	**Prel. ruling requested**
Family Reunification Directive 2003/86	16
Long Term Residence Directive 2003/109	9
Researchers and Students Directive 2004/114 and 2016/801	2
Single Permit Directive 2011/98	1
Borders Code Regulation 562/2006 and 2016/399	15
Border Traffic Regulation 1931/2006	1
Passport Regulation 2252/2004	7
Transit Through Switzerland Decision 896/2006	1
Visa Code Regulation 810/2009	7
Facilitation Directive 2002/90	2
Return Directive 2008/115	49
Mutual Recognition of Expulsion Decisions Directive 2001/40	1
EEC-Turkey Association Agreement and Decisions 2/76, 1/80 and 3/80	74
TCN Family Member of Union Citizens Directive 2004/38	50
Social Security for TCN - Regulation 859/2003 and 1231/2010	2

ASYLUM AND REFUGEE LAW CASES:

Dublin II and Dublin III - Regulations 343/2003 and 604/2013	30

anyway if it deems it a relevant question of interpretation). See for instance the Order by the Court of Justice of the European Union, *Imran*, Case C-155/11 PPU, 10 June 2011, ECLI:EU:C:2011:387.

Qualification I and II - Directives 2004/83 and 2011/95	39
Asylum Procedures I and II - Directives 2005/85 and 2013/32	15
Reception conditions I and II - Directives 2003/09 and 2013/33	6

Once we exclude the EU legislation on asylum and refugees, the rest of EU migration law is composed of a relatively large group of directives, regulations, decisions, and international agreements, which have been object of preliminary references at very different grades. Interestingly, most of these migration provisions have never been the object of a preliminary reference, while only six of them received almost the totality of national judges' attention. These are the Schengen Border Code,[104] the so-called 'Ankara Agreement' and its implementing decisions,[105] the Return Directive,[106] the Family Reunification Directive,[107] the Citizenship Directive,[108] and the Long-Term Resident Directive.[109]

On the basis of the preliminary reference data, I selected three Member States as case studies: Italy, the Netherlands, and the UK. I will explain the reasons for my case selection in the following subsection. In subsection 5.2, I will explain the type of law in context analysis conducted for each case study.

[104] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006. Available at: http://data.europa.eu/eli/reg/2006/562/oj

[105] Agreement Establishing an Association between the European Economic Community and Turkey, signed in Ankara, 12 September 1963, OJ L 361/29, 13.12.77. For the legal status of Turkish nationals is especially important the Additional Protocol to the Agreement, signed on 23 November 1970, OJ L 293, 29.12.1972, p. 3–56. Available at: http://data.europa.eu/eli/prot/1972/2760/oj

[106] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107. http://data.europa.eu/eli/dir/2008/115/oj

[107] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18. http://data.europa.eu/eli/dir/2003/86/oj

[108] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123. http://data.europa.eu/eli/dir/2004/38/oj

[109] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53. http://data.europa.eu/eli/dir/2003/109/oj

5.1 The case selection

Since my aim is to understand in detail the process of legal mobilization for migrants' rights in the context of the preliminary reference procedure, my case selection is based on the most-likely case criterion. This means that I selected Italy, the UK, and the Netherlands as case studies because they were the most likely states to feature a legal mobilization. My evaluation is mainly based on quantitative data regarding the number of preliminary references that these countries have submitted to the CJEU in the migration field.

The necessary premise is that the requests for preliminary reference in the migration field, besides addressing only some EU norms and ignoring others, are also unequally distributed among Member States. Scholars advanced several hypotheses regarding what makes a country more or less prone to refer,[110] and normally, we would expect that countries that are generally prone to refer would show the same propensity in all the fields, including migration. However, the data do not confirm this. Germany, the Member State with the highest referral rate, submitted only a modest amount of questions in the migration field, with the exception of those regarding Turkish citizens and the Ankara Agreement.[111] On the contrary, the UK, a country generally considered reference-adverse, has submitted a relatively high number of preliminary references on migration. These examples suggest that Member-States variation cannot be accounted for by propensity to refer alone. Thus, how can we explain it?

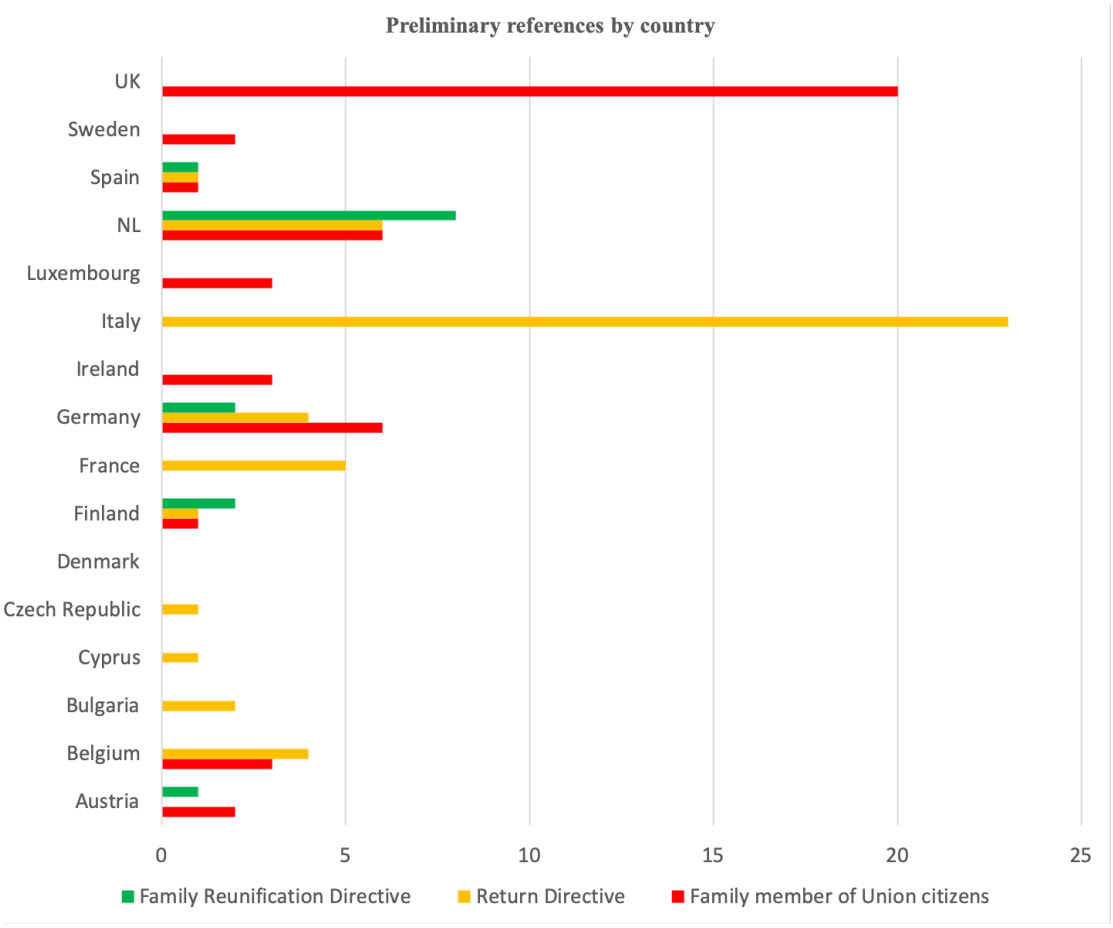
This dissertation will partially deal with this question. I decided to select Italy, the UK, and the Netherlands for my investigation because they present the highest number of preliminary references on a specific migration law.[112] As the graph below shows, each of these Member States produced the highest number of references in, respectively, the

[110] Alec Stone Sweet and Thomas L. Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95', *Journal of European Public Policy* 5, no. 1 (1 March 1998): 66–97; Broberg and Fenger, *Preliminary References to the European Court of Justice*.

[111] Agreement Establishing an Association between the European Economic Community and Turkey, signed in Ankara, 12 September 1963, OJ L 361/29, 13.12.77. For the legal status of Turkish nationals, the Additional Protocol to the Agreement, signed on 23 November 1970, is especially important, OJ L 293, 29.12.1972, p. 3–56. http://data.europa.eu/eli/prot/1972/2760/oj

[112] I excluded the Ankara Agreement, although it presents high levels of litigation in Germany and the Netherlands, because Turkish migrants are vary unequally distributed in the EU. In fact, Germany and the Netherlands are the two countries that present the vast majority of Turkish migrants, which distorts the result of the comparison.

Return Directive, TCN migrants who are family members of Union citizens, and the Family Reunification Directive.[113]



The number of requests for preliminary references is displayed on the horizontal axis of the graph, and the country of reference on the vertical one. Each colour corresponds to the piece of migration legislation at stake. The preliminary references on the Return Directive are marked in orange. The requests dealing with the rights of TCN migrants who are family members of Union citizens are in red. Finally, the references concerning the Family Reunification Directive are in green.

Despite I consider the high number of preliminary references as an indicator of the existence of a legal mobilization, I am aware that the two are not causally related. In other words, I do not think that behind a high number of references there is necessarily a legal mobilization. In fact, the presence of a high number of references was initially

[113] The Return Directive 2008/115; art. 20 and 21 of the TFEU, the Regulation 1612/68, and the Citizenship Directive 2004/38; the Family Reunification Directive 2003/86.

corroborated by the fact that the three issues at stake (return, family members, and integration requirements) seemed linked to political debates occurring in each of the Member States. To verify whether indeed a legal mobilization occurred, I conducted a law-in-context investigation, as the next sub-section will outline.

5.2 The contextual analysis of the three case-studies

Chapters II, III, and IV of this dissertation are devoted to the analysis of the three case studies. They argue that Italy, the UK, and the Netherlands offer three examples of legal mobilization before the CJEU in the field of migration. They also show that legal mobilization can take different forms depending on the context and the actors involved. In fact, country-based analyses contribute to understanding how 'legal mobilization at the supranational and international level is thoroughly mediated and distinctly shaped by legal, judicial, social and political factors at the national level'.[114] This type of analysis offers a unique way to gain a profound understanding of which factors impact on the emergence of EU litigation and to fully appreciate the particular character of the legal mobilization before the CJEU, that starts at the national level with the aim of reaching an international court.

To undertake such contextual analysis, for each selected country, I have conducted empirical research consisting of interviews with the people directly involved in the proceedings: lawyers, activists supporting migrants, and national judges (for a total of 20 interviews).[115] Moreover, to understand the political and social context of litigation, I relied on sources such as policy documents, newspapers, political statements, and NGO reports. An important part of my investigation consisted in understanding two key aspects of the national migration legal framework: first, how (and whether) the EU migration directives were transposed in the national legal framework; second, which national procedure was used to mobilize the EU migration directives. For this more legal part of my analysis, I relied on the study of national migration law and on the

[114] Dia Anagnostou, *Rights and Courts in Pursuit of Social Change*, 21.

[115] On the difference between in-depth interviews, oral history, and focus group, see Diana Kapiszewski, Lauren M. MacLean, and Benjamin Lelan Read, *Field Research in Political Science: Practices and Principles* (Cambridge University Press, 2015), chap. 6.

consultation of doctrinal works. The interviews, together with the analysis of the national migration legal framework, the political context and the national procedures helped me understand whether and how we had a legal mobilization before the CJEU.

The analysis of the three case studies draws attention to a crucial aspect of the legal mobilization before the CJEU: the role of domestic courts. Although the mobilization of national judges is a necessary condition to access the CJEU, this issue has yet to be fully explored by legal mobilization scholars. Perhaps, the lack of consideration for the role of national judges lies precisely in the fact that the legal mobilization approach consists in adopting a 'user' perspective of litigation, which implies relegating courts to a reactive or passive role. On the contrary, studies on European integration have devoted more attention to national courts (see section 5), but they tend to study judges independently from the political context, leaving the question of how to mobilize national judges unanswered.

A partial exception is Alter and Vargas' work on legal mobilization for gender equality in the UK.[116] The authors observed that the support of British lower courts (Labour Tribunals) was the determinant for the success of the EU litigation strategy.[117] But, if Alter and Vargas' study has the merit of raising the issue, it also leaves many questions open. Do the findings of their study apply also beyond the case they analysed? Some scholars already pointed out that Alter's emphasis on the role of lower courts does not hold true for all Member States;[118] this is particularly evident for countries like the Netherlands, analysed in this dissertation, where the highest courts have the monopoly on the submission of preliminary reference requests.[119] In such cases, for obvious reasons, legal mobilization cannot take the same form as that described by Alter and Vargas.

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[116] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies'.

[117] Alter and Vargas, 461. Maybe this is because Alter is one of the scholars of EU integration that focused on the role of domestic courts. See her article on how inter-institutional competition among lower courts fostered their support to the CJEU: Karen J. Alter, "The European Court's Political Power," *West European Politics* 19, no. 3 (July 1, 1996): 458–87.

[118] Stone Sweet and Brunell, 'The European Court and the National Courts', 90.

[119] Almost all the preliminary rulings referred by the Netherlands come from last instance courts.

With these considerations in mind, I decided to explore different factors that might influence the mobilization in the three countries selected:

1) The legal and political context. The national legal framework and the socio-political context enable us to understand the political struggle behind litigation (i.e. unjust migrant's detention, family disruption, and too stringent integration requirements).
2) Legal opportunity structure. This concept refers to the structural factors that make legal mobilization possible or more likely (see what was said in paragraph 3). We lack an agreed upon list of all these factors, but legal mobilization scholars agree that legal standing and not-prohibitive litigation costs (formal and substantial access to justice) are essential conditions.
3) The role of migrant supporters. TCN migrants often have limited resources, both in terms of rights-consciousness and in terms of financial means. This points to the crucial role that migrants' rights activists play, by providing resources inside and outside the courtrooms. In the special context of the preliminary reference procedure, two types of actor result crucial: a) EU law experts;[120] b) Mobilized EU law judges: In order to reach the CJEU, migrants need first to convince a national judge to refer. For each country, I assessed judges' propensity to refer from an institutional (e.g. national procedures and practices) and a subjective point of view.

Once the findings in the three case studies are analysed and compared, the last part of the dissertation will be devoted to understanding when legal mobilization occurs and to what extent it influences the construction of EU migration law. The findings of the case studies will contribute to our understanding of the limits and possibilities of litigation before the Court of Justice as an instrument for political change.

[120] The importance of EU law expertise and of so-called "Euro-lawyers" in the making of EU integration has been explored at length, see: Vauchez and de Witte, *Lawyering Europe*; Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity'.

Chapter II. Italy

Legal mobilization against 'crimmigration'

Can the notorious Return Directive, one of the symbols of 'Fortress Europe', become a tool for defending migrants' rights? This first empirical chapter focuses on the case of Italy, where an exceptional number of preliminary references constitutes the first clue that a legal mobilization might have occurred. Relying on a law and society analysis, this chapter sheds light on how a group of migrant supporters tried to challenge the Italian norms criminalizing undocumented migrants by using the preliminary reference mechanism. Beside detecting and describing what turned out to be a legal mobilization, this chapter unveils a very unusual ally of migrant supporters: an association of judges. By analysing national judges' role in the legal mobilization, the chapter argues that judges' rank (honorary or standard), field (civil, administrative, or criminal), and membership in associations can importantly affect their ability and propensity to refer and the chances that they will take part in the mobilization.

1. The puzzle: An exceptional number of cases

From January 2011 to February 2012, Italian courts referred twenty-two requests for preliminary rulings to the CJEU concerning the interpretation of a single EU norm: the Return Directive 2008/115.[121] Although only three of these were eventually ruled by the CJEU, this is nevertheless an exceptional number: Italy, in only a year, has produced more than half of the preliminary references submitted by all the Member States since the Directive was adopted in 2008 (see Graph 1). Why did Italian judges devote so much attention to the Return Directive?

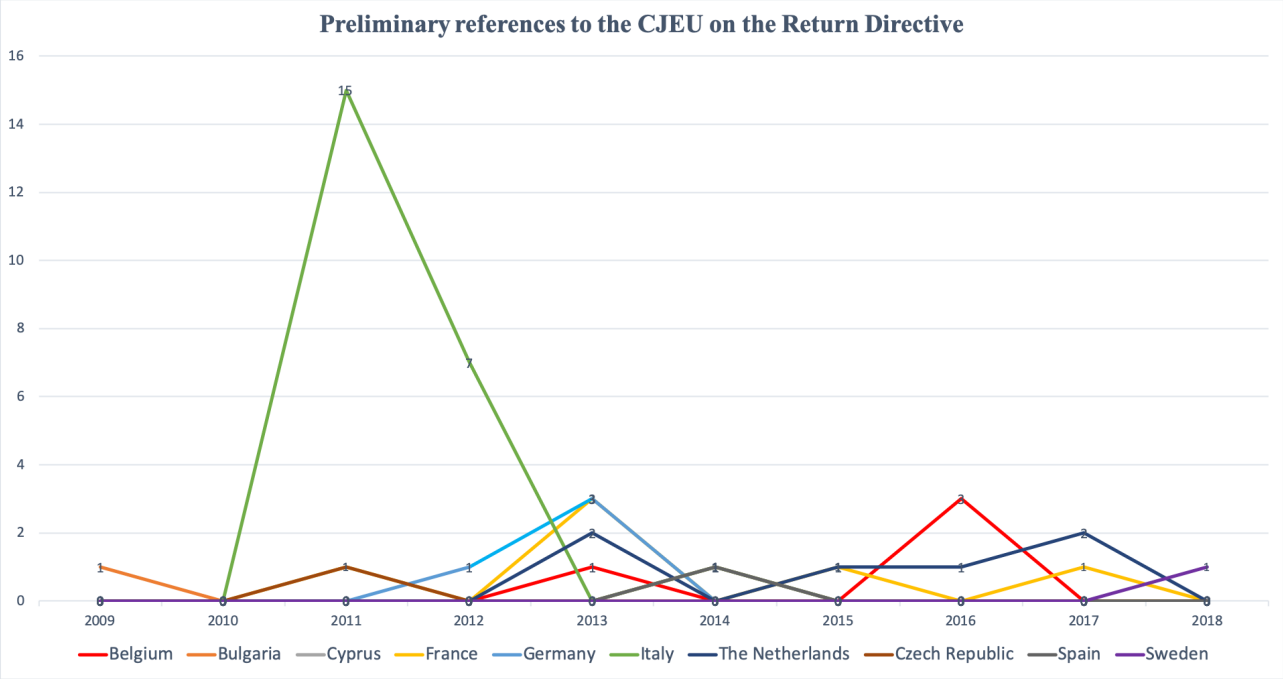
This chapter explores the reason behind this extraordinary number of referrals, arguing that it cannot be understood using a traditional court-centric approach that focuses exclusively on the CJEU's case law. Instead, I will use a bottom-up approach to investigate what happened at the national level, to look at the political situation at that time and at the civil society actors involved. This chapter shows that a large part of the Italian preliminary references (those submitted in 2010 and 2011), which culminated in the CJEU's judgments of *El Dridi*[122] and *Sagor*[123], are an example of supranational legal mobilization: a network of civil society actors, judges, legal scholars, and lawyers using the CJEU to achieve a change within the national migration legal framework.

[121] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.

[122] Court of Justice of the European Union, Hassen El Dridi, alias Karim Soufi, C-61/11 PPU (28 April 2011).

[123] Court of Justice of the European Union*, Md Sagor,* C-430/11 (6 December 2012).

Graph 1: Number of preliminary reference requests submitted to the CJEU on the Return Directive from the year of its adoption (2008) until May 2018.



The Return Directive establishes the standards and procedures Member States shall comply with when returning undocumented migrants. The Court of Justice interpreted the Return Directive upon Italian courts' request on three occasions: in 2011 with *El Dridi*, in 2012 with *Sag*or, and in 2015 with *Celaj*.[124] These decisions compelled the Italian legislation to transpose the Return Directive on the Italian legal framework and to introduce relevant amendments to the Italian Immigration law (*Testo Unico Immigrazione*[125]) in order to remedy its inconsistencies with EU legislation.[126] The amendments adopted after the Court's rulings are an example of how a supranational judicial body can prompt legal reforms at the national level, and one could critically ask whether this was a desirable intervention or an inappropriate interference. However, this chapter takes a totally different perspective. Redirecting the focus from the CJEU onto the national context, the chapter explores the reasons behind the great attention paid by Italian courts to this segment of EU law, and how political forces on the ground

[124] Court of Justice of the European Union, Skerdjan Celaj, C-290/14 (1 October 2015).

[125] Testo Unico Immigrazione, D. Lgs. N. 286/1998 of 25 July 1998, consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals (Ordinary Supplement to GURI No 191 of 18 August 1998).

[126] After the judgments of the Court of Justice in *El Dridi* and in *Sagor*, there were two major reforms to the procedure for returning undocumented migrants in Italy, one in 2011 and one in 2014. See section 6.

influenced the emergence of the preliminary references. In particular, this chapter investigates the role that the preliminary references played in the Italian debate on crimmigration and how civil society actors used supranational adjudication.

Despite the vast literature discussing the CJEU rulings on the application of the Return Directive in Italy,[127] to date there has been no analysis of the social and political causes that can explain this exceptional number of references,[128] probably because only three of them eventually received a ruling by the CJEU. In line with the methodology adopted in this research, this case study does not deal with the role of the CJEU in shaping migrants' rights, but it focuses on the role that migrants' rights supporters played in the making of TCN legal status. Therefore, the focus in this chapter will not be on the CJEU's judgments and legal reasoning but on the role of civil society actors and on the factors and conditions behind their use of the CJEU. I will show how the preliminary reference, from an instrument of interpretation, became a tool for contestation of Italian 'crimmigration' norms.

2. Crimmigration. Or, the background of the legal mobilization

This section describes the Italian social, political, and legal background when the term for transposing the Return Directive expired, namely 24th December 2010.[129] As stated

[127] Just to give some examples, see Chiara Favilli, 'L'attuazione in Italia Della Direttiva Rimpatri: Dall'inerzia All'urgenza Con Scarsa Cooperazione', *Rivista Di Diritto Internazionale* 3 (2011): 695–730; Diego Acosta Arcarazo, 'Migrations and Borders in the European Union: The Implementation of the Returns Directive on Irregular Migrants in Spain and Italy', in *Shaping the Normative Contours of the European Union: A Migration-Border Framework*, CIDOB Monograph (Barcelona: R. Zapata-Barrero, 2010), 81–96; Elisa Fornalé, 'The European Returns Policy and the Re-Shaping of the National: Reflections on the Role of Domestic Courts', *Refugee Survey Quarterly* 31, no. 4 (12 January 2012): 134–57; Andrea Pugiotto, 'Purche' Se Ne Vadano. La Tutela Giurisdizionale (Assente o Carente) Nei Meccanismi Di Allontanamento Dello Straniero', *Diritto e Società*, no. 3/4 (2009): 483–536; Andrea Natale, 'La direttiva rimpatri, il testo unico immigrazione ed il diritto penale dopo la sentenza El Dridi', *Diritto, immigrazione e cittadinanza* 2, no. 2 (2011): 17–36.

[128] A partial exception is the chapter by Raffaelli which emphasized the important role played by national judges in Italy and the article by Viganò and Masera that pointed out the exceptional number of references. Rosa Raffaelli, 'Immigration and Criminal Law: Is There a Judge in Luxembourg?', in *National Courts and EU Law: New Issues, Theories and Methods*, ed. Bruno de Witte et al., Judicial Review and Cooperation (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2016), 217–38; Luca Masera and Francesco Viganò, 'Addio articolo 14' Diritto Penale Contemporaneo (4 May 2011), https://www.penalecontemporaneo.it/d/572-addio-articolo-14.

[129] For a more comprehensive analysis of Italian law and policy of migration in the last years, see Chiara Favilli, *Migration Law in Italy* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2013); Alessia Di Pascale, 'Italy and Unauthorized Migration: Between State Sovereignty and Human Rights

in chapter I and in the previous section, studying the national context is key to understand where the references come from (who asked for them, why, and how) and how they shape EU judicial law-making.

In Italy, the decade between 2001 and 2011 was crucial for migration because three circumstances radically changed the situation forever. First, Italy, previously considered only as an emigration country, rapidly became a destination for migrants. It was said in 1994 that 'among the latecomer immigration countries, Italy has the largest number of recently arrived, noncitizen residents.'[130] According to official statistic figures, the foreign population of Italy in 2001 was about 1.3 million, while by 2011 it had increased to 4 million: about 7% of the entire population.[131] Second, during the same period, there was a transformation in the way people migrated, with an intensification in the flow of migrants trying to reach Italy and Europe across the Mediterranean Sea. For the first time, photos of boats overcrowded with men, women, and children navigating uncertain waters circulated on Italian and international mass media: the small island of Lampedusa was increasingly seen as the symbol of the failure of the Italian and European attempts to control migration flows. Third, during this period of transformation, Italy was ruled by a right-wing coalition that stayed in power for 8 years, almost without interruption.[132] Led by Silvio Berlusconi, this coalition was comprised of, among others, two parties (*Lega Nord* and *Alleanza Nazionale*) characterized by their xenophobic views and neo-fascist roots; they capitalized on migration during their electoral campaigns, framing the problem of undocumented migrants as a security issue.[133]

Obligations', in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford University Press, 2014), 278–310.

[130] Wayne A. Cornelius, Philip Martin, and James Frank Hollifield, *Controlling Immigration: A Global Perspective*, first (Stanford University Press, 1994), 24.

[131] See official report on Italian foreign population, available online at: http://www.istat.it/it/files/2012/12/scheda_stranieri.pdf

[132] From 2006 to 2008, the country was ruled by a short-lived center-left government.

[133] Silvana Patriarca, 'A Crisis of Italian Identity? The Northern League and Italy's Renationalization Since the 1990s', in *Crisis as a Permanent Condition? The Italian Political System between Transition and Reform Resistance*, by Kaiser and Edelmann, Nomos Verlag, 2015; Ted Perlmutter, 'Italy. Political Parties and Italian Policy, 1990–2009', in *Controlling Immigration: A Global Perspective, Third Edition*, by James Hollifield, Philip Martin, and Pia Orrenius, third (Palo Alto, USA: Stanford University Press, 2014).

Regarding the legal framework more specifically, the two Berlusconi governments adopted two important legal reforms of the migration regime which were especially targeted at tackling the situation of undocumented migrants. The first law, adopted in 2002, became known as the 'Bossi-Fini Law', after the name of its authors: the leaders of respectively *Lega Nord* and *Alleanza Nazionale*, the two abovementioned right-wing parties. As one might expect, the law reflected the views of its authors: it amended the Immigration Law by introducing a harsher regime for undocumented migrants. The declared goals of the law were fighting irregular migration (literarily: '*lotta alla clandestinità'*) and facilitating the expulsions of undocumented migrants via the introduction of new coercive procedures.[134] The second reform was completed in 2009 by the same government coalition. It was composed of a series of norms known as a whole by the name 'Security Package';[135] these norms officially inaugurated a new era of securitization of the migration phenomenon and of criminalization of undocumented migrants.[136]

For the purpose of the present analysis, the most important aspect of these two reforms lies in the fact that they converted several administrative fines into criminal sanctions, and they provided for new crimes specifically targeting undocumented migrants. Such 'crimmigration' policies, defined as 'criminal law mechanisms and imagery being heavily resorted to as part of a general political strategy for managing migration flows',[137] are in line with the idea that the TCN who has irregular status is, as such, a threat to public security. The most emblematic examples of these policies is the introduction of article 10bis of the Immigration Law, known as '*reato di clandestinità*': a provision that sanctions as a crime the irregular entry and stay of TCNs in the Italian territory.[138] This article imposes a fine ranging from 5,000 to 10,000 Euros, which can

[134] See art. 13 of the Immigration Law.

[135] The 'Pacchetto Sicurezza', a group of provisions adopted from 2008 to 2009, is composed of a law decree, two laws, and three legislative decrees. The two most relevant measures for the aims of this chapter are D.L. 92/2008 (*Misure urgenti in materia di sicurezza pubblica*), which became the Law 125/2008; and the Law n. 94/2009 (*Disposizioni in materia di sicurezza pubblica*), Ordinary Supplement to GURI No 170 of 24 July 2009.

[136] Alessia Di Pascale, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations," in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford University Press, 2014), 278–310.

[137] Luisa Marin and Alessandro Spena, 'Introduction: The Criminalization of Migration and European (Dis)Integration', *European Journal of Migration and Law* 18, no. 2 (17 June 2016): 147.

[138] Article 10bis was introduced by an amendment to the Immigration law enacted by art. 1(16) of the

be converted in an order of immediate expulsion upon validation by the competent court, i.e. the Giudice di Pace. The jurisdiction of this court, which is the lowest in the Italian judicial hierarchy, has been highly controversial: this court is composed of single-panel honorary judges who are appointed for five years and whose stipend is a function of the number of sentences they issue. These circumstances make Giudici di Pace, in the view of many experts, not competent enough to rule on administrative detention and return, which has important repercussions for individual liberties and human rights;[139] we will further discuss this issue later on in this chapter.

The 'Bossi-Fini' and the 'Security Package' laws provided for a number of crimmigration provisions. For instance, they extended the maximum period of migrants' administrative detention from 30 to 180 days;[140] the 'Security Package' introduced a crime that punishes any TCN who, despite a public authority's request, does not show his/her identification document, with up to one year of imprisonment or a fine of 2000 euros;[141] and finally, and importantly for this chapter, the 'Bossi-Fini' law created a new crime against undocumented migrants that do not comply with the police order to leave Italy. This last crime is provided by art.14(5) of the Immigration Law and is particularly harsh: any undocumented migrant found in the Italian territory despite having received a removal order should be immediately arrested and punished with detention of one to five years.[142]

'Security Package Law', Law n. 94 of 2009.

[139] The Law 271/2004 conferred upon the Giudice di Pace the competence to rule on appeals against return decisions and to confirm the decision to detain an irregular migrant. Angelo Caputo and Livio Pepino, 'Giudice Di Pace e Habeas Corpus Dopo Le Modifiche al Testo Unico Sull'immigrazione', *Diritto, Immigrazione e Cittadinanza*, no. 3 (2004): 13; Di Martino, *The Criminalization of Irregular Immigration*, 86; Andrea Pugiotto, 'La «galera Amministrativa» Degli Stranieri e Le Sue Incostituzionali Metamorfosi', *Quaderni Costituzionali* 34, no. 3 (September 2014): 588.

[140] First, the Bossi-Fini Law doubled the maximum term of administrative detention (from 30 to 60 days) then, the 'Pacchetto Sicurezza' further increased it to a maximum of 180 days, see art. 1(22) of the Law 94/2009. Gianluca Bascherini, 'A Proposito Delle Più Recenti Riforme in Materia Di Trattenimento Dello Straniero Nei Centri Di Identificazione Ed Espulsione', *Rivista Associazione Italiana Dei Costituzionalisti* 1 (31 January 2012): 5.

[141] Art. 22(h) of the Security Package Law 94/2009: "Lo straniero che, a richiesta degli ufficiali e agenti di pubblica sicurezza, non ottempera, senza giustificato motivo, all'ordine di esibizione del passaporto o di altro documento di identificazione e del permesso di soggiorno o di altro documento attestante la regolare presenza nel territorio dello Stato è punito con l'arresto fino ad un anno e con l'ammenda fino ad euro 2.000."

[142] See article 14(5) letter c of the Immigration Law: 'A foreign national who is the recipient of the expulsion order referred to in paragraph 5b and a new removal order as referred to in paragraph 5a and who remains illegally on the territory of the State shall be liable to a term of imprisonment of between one and five years. In any event, the provisions of the third and last sentences of paragraph 5b shall

The crimmigration reforms were received with public outcry by the opposition in parliament and by civil society organizations in support of migrants, both at the national and international level.[143] In the academic realm, several public statements and articles were published denouncing the risk that the crimmigration laws posed for migrants' rights and the rule of law in Italy;[144] the critique that norms such as the clandestinity crime punish migrants for their status as such, and not because they committed an offence, was common.[145] Importantly, also judges and prosecutors expressed themselves negatively on the migration reforms: the National Association of Magistrates (ANM) raised several doubts about the adoption of the clandestinity crime, defined literally as a useless and detrimental norm.[146] These objections, predictably, led to the emergence of several requests for constitutional review before the Italian Constitutional Court, which was called to scrutinize the compatibility of several crimmigration provisions with the Italian Constitution (see also later, section 6.2).[147] Some of these proceedings ended with the Italian Constitutional Court declaring unconstitutional parts of the Bossi-Fini and the Security Package laws, but the Court eventually declared art.14(5) and the clandestinity crime, the two most prominent

apply'. And article 14(5) letter d of the same law: 'Where the offences referred to in the first sentence of paragraph 5b and paragraph 5c are committed, the *rito direttissimo* [expedited procedure] shall be followed and the arrest of the perpetrator shall be mandatory'.

[143] See for an overview: Redazione Melting Pot, 'Speciale "Pacchetto Sicurezza" - Le Nuove Norme Tra Applicabilità Ed Efficacia', accessed 1 February 2016, http://www.meltingpot.org/Speciale-pacchetto-sicurezza-Le-nuove-norme-tra.html. Annual Activity Report of 2009 of the Commissioner for Human Rights of the Council of Europe, CommDH(2010)53, at 7; Letters to the Italian Minister of the Interior, Letter of 25 Aug. 2009, CommDH(2009)40 and of 2 July 2009, CommDH(2010)23) .

[144] Di Martino, *The Criminalization of Irregular Immigration*; Massimo Merlino, 'The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU', CEPS CHALLENGE programme, 10 March 2009; Thomas Hammarberg, 'It Is Wrong to Criminalize Migration', *European Journal of Migration and Law* 11 (2009): 386; Ferrajoli, 'La Criminalizzazione Degli Immigrati (Note a Margine Della Legge n. 94/2009)'; Ferrajoli.

[145] Massimo Donini, 'Il cittadino extracomunitario da oggetto materiale a tipo d'autore nel controllo penale dell'immigrazione', *Questione giustizia* Fascicolo 1, no. 1 (2009): 118.

[146] "*Inutile e dannosa*" was the definition used by the President of the ANM, see his declaration here: http://www.associazionemagistrati.it/doc/1416/immigrazione-anm-bene-stop-a-reato-clandestinit-ma-non-dimenticare-problemi-come-situazione-minori-e-sfruttamento.htm; see also the text of an audit to which members of the ANM participated, http://www.associazionemagistrati.it/doc/517/audizione-pacchetto-sicurezza.htm

[147] In Italy, only the Constitutional Court can review the constitutional legitimacy of a law, upon request of a national judge; the legitimacy of the norm should arise during an ongoing procedure and should be relevant to determine the outcome of the case (the procedure is very similar to the EU preliminary reference mechanism, and indeed, it was its blueprint).

crimmigration norms, compatible with the Italian constitution.[148]

To understand the subsequent developments, it is important to look also at the structural impact that crimmigration had on the Italian criminal justice system. Indeed, the criminalization not only affected migrants' rights but also negatively compromised the overall functioning of Italian criminal justice system. By criminalizing conduct that was dealt with by administrative authorities before, the Bossi-Fini and the Security Package laws transferred a huge amount of cases from the administrative offices and courts to public prosecutors and criminal judges. Public prosecutors' offices were literally flooded with cases reporting undocumented migrants detected by the police. This was especially due to the overmentioned art. 14(5) which provides that every undocumented TCN who does not comply with the order to leave the Italian territory shall be immediately arrested and sentenced to prison; official data from the Ministry of Justice reveals that, in 2006 alone, more than 18000 migrants were tried for this crime, of which 14000 were convicted.[149] All these cases clogged the criminal justice system, and prisons were crowded with migrants who could spend up to five years in jail. This unforeseen consequence of the criminalization should not be underestimated because it had an important effect on judges' attitude towards the preliminary references, as we shall see.

3. The supranational dimension: European norms on return

Adopted in the framework of the norms designed to achieve a European system of integrated border management, the Return Directive provides for a uniform set of standards and procedures regulating the return of irregular migrants.[150] The text of the

[148] Corte Costitizionale, Sentenza n. 5, 13.01.2004, red. Flick; Corte Costituzionale, Sentenza n. 250, 8.7.2010, red. Frigo; and Corte Costituzionale, Sentenza n. 249, 8.7.2010, red. Silvestri. Luca Masera, 'Costituzionale il reato di clandestinità, incostituzionale l'aggravante: le ragioni della Corte costituzionale', *Diritto, Immigrazione e Cittadinanza* Fascicolo 3, no. 3 (2010): 37–58; Guido Savio, 'Prime riflessioni sulle modifiche penali introdotte dalla legge n. 271 del 2004', *Diritto, Immigrazione e cittadinanza*, no. 3 (2004).

[149] Di Martino, *The Criminalization of Irregular Immigration*, 68.

[150] Commissione Europea, 'Towards Integrated Management of the External Borders of the Member States of the European Union' (Brussels: European Commission, 7 May 2002), COM(2002) 233 final. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107

Directive reflects the underlying struggle to strike a balance between the position of the Council, aimed at 'the establishment of an effective removal and repatriation policy', and the position of the Parliament which stressed the necessity to guarantee that people are returned 'in a humane manner and with full respect for their fundamental rights and dignity'.[151] As a result, many provisions of the Directive embody this compromise. For instance, article 15 establishes that undocumented migrants can be detained to implement a deportation order, but such a deprivation of liberty must be in line with the proportionality principle and only for a maximum duration of 18 months.[152]

The Return Directive was adopted on 16th December 2008, and the European Member States were supposed to implement it by 24th December 2010. However, since the very beginning, the Italian government publicly stated that it would not transpose the EU Directive and, instead, it would keep its own return system, deemed already in line with EU standards. Some public statements made by the government revealed the real motivation behind such decision: the then Interior Minister (Roberto Maroni, member of the *Lega Nord* party), at an audit before the Parliament prior to the adoption of the 'Security Package' Law, asserted that the procedure of the Return Directive was inefficient in implementing deportation because it was based on the principle that voluntary return should be preferred over forced return.[153] The Italian procedure was more efficient in his view because it gave precedence to immediate coercive deportation.

With the clear goal of eluding the application of the Return Directive, the Italian government decided to make use of the exemption provided by article 2(b) of the Directive. This article states that Member States may decide not to apply the Directive to undocumented migrants who 'are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.' This article was intended for the cases of people

[151] See the Preamble of the Return Directive, at 2. On the negotiation process of the Return Directive, see Anneliese Baldaccini, 'The EU Directive on Return: Principles and Protests', *Refugee Survey Quarterly* 28, no. 4 (1 January 2009): 125.

[152] Return Directive, article 15.

[153] See the declaration of the Italian Home Affairs Minister during an audit before the Parliament on 15 October 2008. The entire intervention is available at http://documenti.camera.it/_dati/leg16/lavori/bollet/200810/1015/HTML/30/comunic.htm.

convicted of a crime, independent of their regular or irregular status, in order to preserve Member States' discretion in criminal law matters. However, as we have seen in the previous section, the 'Bossi Fini' and the 'Security Package' laws provided for two new criminal provisions: first, the clandestinity crime;[154] second, the crime sanctioning undocumented migrants who did not comply with the police's removal order.[155] In the view of the government, these two crimes fell within the exemption of article 2 and therefore made the Directive virtually not applicable to all the cases of undocumented migrants caught under those criminal provisions.

As noted by several commentators, the Italian government adopted the 'Security Package' in 2009 when the Directive had already been adopted (it was published in the EU Official Journal in December 2008), but the deadline for transposition was yet to pass. This points to the fact that the introduction of the clandestinity crime was probably a deliberate strategy to elude Italy's obligations to comply with EU law.[156]

Even if we accept the position of the then government and we assume that the exemption of article 2 was applicable, the Italian legal order was still in breach of European standards concerning many aspects regarding the administrative procedure of removal.[157] I will make three examples here: first, the Return Directive clearly stated that voluntary departure should be preferred, while the Italian norms provided for immediate forced return as the general rule;[158] this means that Italian legislation was in breach of article 7 of the Directive which requires that the undocumented migrant be guaranteed 'an appropriate period for voluntary departure of between seven and thirty days'.[159] Second, Italian law foresaw an entry ban for the returned migrant that could last for up to ten years, while the Directive provided for a maximum duration of five

[154] Art. 10 bis Immigration Law.

[155] Art. 14(5) Immigration Law.

[156] Favilli, 'L'attuazione in Italia Della Direttiva Rimpatri: Dall'inerzia All'urgenza Con Scarsa Cooperazione', 702; Baldaccini, 'The EU Directive on Return', 128.

[157] Rosa Raffaelli, "Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case," *European Journal of Migration and Law* 13, no. 4 (January 1, 2011): 467–89.

[158] Immigration Law, article 13(3). Giuseppe Amato, 'Un Sistema Incompatibile Con La Direttiva Ue Perché Non Privilegia Il Rimpatrio Volontario', *Guida al Diritto* 5 (29 January 2011).

[159] Return Directive, article 7(1).

years.[160] Third, in Italy, the administrative detention of irregular migrants was the rule and was supposed to always be applied, provided that there were places available in detention facilities; the Return Directive, instead, set up a system of case-by-case evaluation where the restriction of migrants' liberty should comply with the principle of proportionality and can be enacted only when necessary to implement the return and when no other less restrictive measure is available.[161]

We can draw two conclusions from this short overview: first, the Return Directive, although considered by national and international organizations supporting migrants a 'shameful' piece of EU legislation,[162] in many respects, granted migrants a higher level of protection than Italian laws in 2009. Second, in spite of the Interior Minister's declarations, there were many evident frictions between Italian law and the Return Directive, and the deadline for its transposition was approaching.

4. Mobilizing Supranational Law: who and how

While the previous sections outlined the situation in Italy and the EU at the time when the term for transposing the Return Directive was still pending, this section describes the events that took place after the deadline expired: from 24 December 2010 onwards. The present account combines judicial reporting with events recorded. The aim is to provide an insight on legal mobilization through an analysis that looks at who made the mobilization of the Directive possible and how. Many of the following insights come from interviews and consultation of sources that are non-conventional for legal research (newspapers, organization statements, blogs), in line with the bottom-up approach that guides this research.

[160] Return Directive, article 11.

[161] Return Directive, article 15.

[162] The Directive was accused of not guaranteeing the respect of migrants' fundamental rights. See the manifesto "Directive de la honte" at http://www.migreurop.org/article1336.html?lang=fr Indeed, the Return Directive, by setting a 'minimum standard' of protection, had the consequence of making Member States lower their standards where higher. Italy is an example: maximum detention was 60 days and it was extended until 18 months as soon as it was confirmed that that was the maximum period allowed by the Directive. EU Directives might have the effect of turning a floor into a ceiling, especially in the migration field.

4.1 Who

This section looks at the role that civil society actors played in creating the conditions for the emergence of the preliminary references to the CJEU. As said in the first chapter, I will refer to them using the term 'migrant supporters', whereby I refer to all the members of civil society that have mobilized in favour of migrants' rights. This term indicates a diverse group of subjects, ranging from NGOs, judges, and activists; in fact, even if not all of them directly participated in the proceedings, they played an important role outside of the courtroom.

1) Networks of lawyers and judges

ASGI. One of the most important networks is the Association for Juridical Studies on Immigration – in Italian, ASGI. This is a membership-based association that studies various aspects of migration (asylum, antidiscrimination, xenophobia, citizenship, etc.) from a legal perspective.[163] Among ASGI's members, there are many lawyers, academics, consultants, and civil society representatives. The association was founded by lawyers and scholars in 1990, and soon it became famous as a prominent network of experts and a reference point for all those interested in migration issues. Together with *Magistratura Democratica,* in 1999, ASGI founded a legal journal on migration studies, *Diritto Immigrazione e Cittadinanza*, currently considered one of the most important in the field.

Magistratura Democratica (MD). This is an Italian association of magistrates (a union-like association of judges and public prosecutors), founded in 1964, with the primary objective to promote a culture of democracy, rule of law, protection of minorities, and social justice.[164] This type of judicial progressive association is very much embedded in the Italian tradition of strong judicial independence and thorough judicial review, and similar experiences are common also to southern European states like France and Spain;[165] in fact, judicial associations from these European countries have created the

[163] ASGI website: http://www.asgi.it/chi-siamo/

[164] See the Association statute here: http://www.magistraturademocratica.it/chi-siamo

[165] Carlo Guarnieri, 'Courts and Marginalized Groups: Perspectives from Continental Europe', *International Journal of Constitutional Law* 5, no. 2 (1 April 2007): 199.

network *Medel,* of which MD is also part.[166]. In 1998, amidst vivid debates around the enactment of a migration reform,[167] within the criminal law group of MD, a new sub-group interested specifically in immigration was created ('Gruppo immigrazione'). It was this sub-group that, together with ASGI, created the abovementioned journal and promoted a debate around the topics of immigration and justice. Alongside the publication of the journal, MD's immigration group spread information and disseminated opinions, blogs, and articles among its members, also through other channels, like its mailing-list and the organization of conferences and education events. This, we will see, was crucial for the legal mobilization.

2) Educational institutions

In order to reconstruct the events under analysis, it is important to consider the role played by educational institutions and training initiatives which provided courses and lectures for legal practitioners on the new developments of EU law. Among them, particularly significant were the trainings organized specifically for judges. These were held either in the framework of judicial trainings, organized by the CSM - *Consiglio Superiore della Magistratura* (Higher Council of Judiciary), or by independent judicial associations, like MD, which in fact organized several events to raise awareness on the Return Directive.

3) Online legal platforms

Blogs and online journals also contribute significantly to triggering debate and disseminating information about the impact of the Return Directive on the Italian migration system. See, for instance, the websites of Melting Pot, specialized in migration law and policy.[168] A platform for debate that was particularly influential is an on-line legal journal specialized in criminal law: *Diritto Penale Contemporaneo*.[169] On its website, papers and judicial decisions related to the application of the Return

[166] *Magistrats Européens pour la Démocratie et les Libertés*, see their website: https://www.medelnet.eu/

[167] This eventually led to the adoption of the 'Turco-Napolitano' Law n. 40/1998, adopted on 6 March 1998.

[168] See http://www.meltingpot.org/

[169] See http://www.penalecontemporaneo.it/.

Directive in the Italian legal system were uploaded, almost in real time.[170] The blog posts were read by many academics, lawyers, and judges who engaged in heated discussions on the correct interpretation of the Directive. The close connection that exists between *Diritto Penale Contemporaneo* (blog and journal) and legal mobilization is also demonstrated by the fact that one of the members of its board, Professor Luca Masera, acted as a legal representative in the case of both *El Dridi* and *Sagor* before the CJEU.

4) Activists for migrants' rights

Equally important, even if less direct, was the role played by NGOs, social movements, and individual activists supporting the migrants' cause. After the adoption of the 'Security Package' Law in 2009, many people and groups mobilized and campaigned against the law and in solidarity with migrants. A national march was held in Rome on 17th October 2009, where migrants and their supporters protested against the government's reforms and its push-back operations in the Mediterranean Sea.[171] In fact, the dramatic events that brought about the shipwreck and death of hundreds of people in the proximity of Lampedusa Island[172] constitute the backdrop of this period of heated debate and intense political contestation on the issue of migration.

4.2 How? The planning stage

Having described the actors, this section focuses on how they created the conditions

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[170] Just to give some examples: Filippo Focardi, 'Ancora Sull'impatto Della Direttiva Comunitaria 2008/115/CE Sui Reati Di Cui All'artt. 14 Co. 5-Ter e 5-Quater d.Lgs. 286/1998', *Diritto Penale Contemporaneo*, 11 January 2011, https://www.penalecontemporaneo.it/d/313; Gian Luigi Gatta, ed., 'Art. 10 bis t.u. imm. e "direttiva rimpatri": un'altra ordinanza di rimessione alla Corte di Giustizia' Diritto Penale Contemporaneo (6 February 2012), https://www.penalecontemporaneo.it/d/1229-art-10-bis-tu-imm-e--direttiva-rimpatri--un-altra-ordinanza-di-rimessione-alla-corte-di-giustizia; Francesco Viganò, 'Il Dibattito Continua: Ancora in Tema Di Direttiva Rimpatri e Inosservanza Dell'ordine Di Allontanamento', *Diritto Penale Contemporaneo*, 18 January 2011, http://www.penalecontemporaneo.it/area/3-/26-/-/328-il_dibattito_continua__ancora_in_tema_di_direttiva_rimpatri_e_inosservanza_dell___ordine_di_allontanamento/.

[171] 200.000 people marched in Rome on 17 October 2009, see http://www.repubblica.it/2009/05/sezioni/cronaca/immigrati-8/manifestazione-razzismo/manifestazione-razzismo.html?ref=search

[172] "Strage di migranti a Lampedusa", La Repubblica, 20 agosto 2009, http://www.repubblica.it/2009/08/sezioni/cronaca/immigrati-10/lampedusa-strage/lampedusa-strage.html

that led to the emergence of so many preliminary references to the CJEU. I have divided the mobilization in three stages: the first was the planning stage during which the organized actors prepared themselves for the expiration of the term for transposing the Directive; the second stage, from February to April 2011, consisted in the mobilization against art 14(5) that led to the emergence of twelve preliminary references and to the *El Dridi* judgment; and the third stage, from July 2011 to February 2012, is the mobilization against art. 10bis that saw seven preliminary references emerge and led to the case of *Sagor*. Here, I will describe the first stage.

According to the classical definition, a legal mobilization starts by framing a will or a desire into legal terms.[173] Accordingly, migrant supporters first needed to frame their aim, which was reversing crimmigration, into the legal terms of the Return Directive. To this aim, as we shall see, migrant supporters embarked in a fine work of reinterpretation of the Directive, proposing a reading that emphasized its role as instrument for defending migrants' rights, rather than for implementing expulsions.

The expiration of the term for transposing the Return Directive was a decisive turning point. Indeed, the Italian government had publicly announced, already in 2008, that it had no intention to transpose the Directive because it was unnecessary.[174] This gave time to migrant supporters to explore which possibilities existed to obtain the application of the non-transposed Directive. In particular, the group of lawyers, legal academics, and judges from ASGI and MD were looking at the Directive as the last chance remained to strike down the Italian legislation. In fact, they had already tried several times to have a declaration of unconstitutionality by the Constitutional Court, but these proceedings did not bring the result they hoped for.[175]

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[173] See section 3.1, chapter 1. Zemans wrote that the law is mobilized 'when a desire or want is translated into a demand as an assertion of one's rights'. See Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System," *The American Political Science Review* 77, no. 3 (1983): 690–703; Other scholars developed the role of legal consciousness in the process of legal mobilization further and deeper. See for instance, William L.F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .," *Law & Society Review* 15, no. 3/4 (1980): 631–54.

[174] See what was said in section 2.

[175] See what was said before regarding the Italian Constitutional Court sentences n.5/2004, n. 250/2010, and n. 249/2010.

Under the EU law doctrine of direct effect,[176] all the provisions of a directive that are sufficiently clear, precise, and unconditional would become directly enforceable in the Member States' legal order once the deadline for transposition has passed. This means that, from the 24th December 2010, the Return Directive's norms that were clear, precise, and unconditional became directly enforceable by public authorities and judges who, conversely, also had to set aside all national provisions incompatible with them. Given the open and deliberate refusal by the Italian government to implement the Directive, its direct effect was anticipated and studied by the different stakeholders.

The publication of the article by Viganò and Masera deserves a special mention because of its huge influence.[177] At that time, the authors were both criminal law professors and members of the board of the journal *Diritto Penale Contemporaneo;* shortly before the deadline for transposition, they published a thorough analysis of the Return Directive vis à vis the Italian legislation, arguing that art. 14(5) of the Immigration law (as well as other norms) was irremediably in conflict with art. 15 and 16 of the Return Directive.[178] The authors argued that the Italian norm, by punishing an undocumented migrant with up to 5 years of detention, would disproportionally restrict migrants' rights to liberty. Moreover, art.14(5), by keeping migrants in Italian jails for several years, did not contribute to the implementation of their return, quite the opposite. According to Viganò and Masera, given this situation, in the aftermath of 24th December 2010, Italian judges had only two alternatives: one was to set aside art. 14(5), hence recognizing the supremacy of EU law; the second was to make a preliminary reference to the CJEU. For this second option, they even provided the text of the question to refer to the Court.[179] This article triggered a long and heated debate on the

[176] The idea behind this principle is that Member States should not be able to elude their EU obligations simply by not transposing Directives. Court of Justice of the European Union, *Yvonne Van Duyn*, C-41/74 (4 December 1974); Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press, 2014), 292.

[177] Francesco Viganò and Luca Masera, 'Illegittimità Comunitaria Della Vigente Disciplina Delle Espulsioni e Possibili Rimedi Giurisdizionali', *Rivista Italiana Diritto e Procedura Penale*, 2010, 560–96.

[178] As we saw in section 3, article 14(5) letter c of the Immigration Law provides that the undocumented migrant that fails to comply with the police order of leaving the country voluntarily should be sentenced to a term of imprisonment of between one and four years. This term may increase up to five years in case of reiteration (article 14(5) letter d).

[179] Viganò and Masera, 'Illegittimità Comunitaria Della Vigente Disciplina Delle Espulsioni e Possibili Rimedi Giurisdizionali', 33.

Diritto Penale Contemporaneo blog, which saw the participation of legal academics, judges, lawyers, and prosecutors who wrote comments and opinions but also sent documents (decisions and other materials) from ongoing proceedings.[180]

On the other hand, also the Italian government was preparing itself for the deadline for the Return Directive's transposition. Its first move was made by the Interior Minister through the national police chief, Manganelli. On 17th December 2010 (a week before the deadline), he circulated a communication to all the police stations and offices, making them aware of the content of the (un-transposed) Directive and of the possible 'future scenario' they might have to face.[181] In the communication, the police chief warned his subordinates to carefully motivate their removal orders in order that it emerged clearly that they are in line with EU law, in the view of possible judicial review actions.[182] This communication can be read, on the one hand, as a guilty admission: the police chief acknowledged that there was room to believe that the removal orders were in conflict with the Directive; on the other hand, it could be seen as an attempt to make Italian expulsion procedure in line with European standards. As we will see, many courts, lawyers, and scholars deemed the police chief communication as insufficient.[183]

The ball was now in the hands of Italian public prosecutors and criminal judges. They were facing a difficult dilemma: after 24 December, should they align with the government's position or affirm the incompatibility between Italian and EU law? But first, given the lack of transposition, they had to evaluate whether any norm of the Directive was sufficiently clear, precise, and unconditional: only in that case were they directly applicable in the Italian legal order; second, they had to assess whether these norms were conflicting with Italian Immigration Law.

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[180] Francesco Viganò, 'Direttiva Rimpatri e Delitti Di Inosservanza Dell'ordine Di Allontanamento Del Questore', *Diritto Penale Contemporaneo*, 21 December 2010, http://www.penalecontemporaneo.it/area/3-/26-/-/284-direttiva_rimpatri_e_delitti_di_inosservanza_dell__ordine_di_allontanamento_del_questore/; Focardi, 'Ancora Sull'impatto Della Direttiva Comunitaria 2008/115/CE Sui Reati Di Cui All'artt. 14 Co. 5-Ter e 5-Quater d.Lgs. 286/1998'; Viganò, 'Il Dibattito Continua: Ancora in Tema Di Direttiva Rimpatri e Inosservanza Dell'ordine Di Allontanamento'.

[181] Ministero dell'Interno, Dipartimento di Pubblica Sicurezza, "Cittadini Stranieri in Posizione Di Soggiorno Irregolare," December 17, 2010, Prot. 400/B/2010.

[182] Ministero dell'Interno, Dipartimento di Pubblica Sicurezza, 2.

[183] Fulvio Vassallo Paleologo, 'Direttiva Rimpatri e Stato Di Diritto - Un Commento Alla Luce Della Circolare Manganelli Del 17 Dicembre', *Progetto Melting Pot*, 7 January 2011, http://www.meltingpot.org/Direttiva-rimpatri-e-stato-di-diritto-Un-commento-alla-luce.html.

In order to help prosecutors and judges to make such evaluations, several courses and events were organised throughout Italy by the *Scuola Superiore della Magistratura* and other educational institutions, with the aim of preparing legal practitioners to deal with these issues. It is worth noting that many of the experts invited to speak were members of ASGI or MD, who were experts in the field, and these associations organized their informative events too.[184] In general, the issue of the direct effect of the Directive and its consequences on the Italian legal order were widely debated.

After the expiration of the deadline for the transposition of the Directive, Italian judges followed three different paths. Some of them continued to apply the Italian Immigration Law as it stood, without identifying any conflict with the Directive: they upheld the government view under which the Directive did not apply to criminal law provisions.[185] Others considered the Directive directly applicable, found a conflict between EU norms and Italian norms, and decided to set aside the articles of the Immigration law in compliance with the principle of supremacy.[186] Among those, it is worth noting the position taken by many chief prosecutors (the *Procuratori della Repubblica* of Lecce, Firenze, Roma and Milano)[187] who issued communications directed to their teams recommending them not to initiate criminal cases for the art. 14(5) crime because it should be set aside. Finally, twelve courts, from January 2011 to April 2011, decided that there was a problem of interpretation and made a request for preliminary reference to the CJEU (among these also the Italian Supreme Court).[188]

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[184] See for instance the conference organized by MD and ASGI together in Verona, just a few days before the deadline for transposition, on 15 January 2015. http://www.meltingpot.org/Direttiva-Rimpatri-I-materiali-del-Convegno-di-Studi-On.html#.W1r_1NgzZol

[185] See the website of *Diritto Penale Contemporaneo* for the list of cases. See for instance the Judgment of Tribunale di Verona, 20 January 2011, Judge Piziali.

[186] Among them: Judgment of the Tribunale di Aosta, 28 January 2011, Judge Tornatore; Judgment of the Tribunale di Nola, 17 February 2011, Judge Napolitano.

[187] Being internal communications, they are not public, but some of them were made available on the pages of *Penale Contemporaneo*. See Provvedimento by the Procura della Repubblica di Lecce, of 10 February 2011, Prot.n.556/2011 available at http://www.penalecontemporaneo.it/tipologia/8-/-/-/396-nota_del_procuratore_della_repubblica_di_lecce___10_febbraio_2011__inottemperanza_dello_straniero_all__ordine_di_allontanamento/ ; Nota del Procuratore della Repubblica di Milano, 11 marzo 2011, http://www.penalecontemporaneo.it/tipologia/8-/-/-/446-nota_del_procuratore_della_repubblica_di_milano__11_marzo_2011__inottemperanza_dello_straniero_all__ordine_di_allontanamento/

[188] Tribunale di Milano, *Assane Samb*, C-43/11 (24 January 2011); Tribunale di Ivrea, *Lucky Emegor*, C-50/11 (28 January 2011); Tribunale di Ragusa, *Mohamed Mrad*, C-60/11 (28 January 2011); Corte D'Appello Di Trento, *Hassen El Dridi*, alias Karim Soufi, Case C-61/11 (10 February 2011); Tribunale di Rovereto, *John Austine*, C-63/11 (11 February 2011); Tribunale di Bergamo, *Survival Godwin*,

Remarkably, although there were many frictions between Italian and EU law, all the twelve requests for preliminary rulings concerned article 14(5) and had been submitted by a criminal court (either by a Tribunal, an Appeal Court, or the Supreme Court). There was only one request, the thirteenth one, which came from a Giudice di Pace and addressed the legitimacy of article 10bis, the clandestinity crime; however, this was declared inadmissible by the CJEU because it lacked the description of the facts of the case.[189] These circumstances deserve attention because they reveal that not all national judges are equally willing and able to make references, and their rank and specialization play a role. I will discuss this further in section 8.

5. Second stage: The *El Dridi* reference

The first Italian reference on the Return Directive decided by the CJEU was that in the case of *El Dridi*.[190] This reference was not the first to be submitted, but it was given precedence over the others because the referring Appeal Court of Trento asked that the case was dealt with under the urgent procedure since the accused was in jail.[191]

The reference was submitted in the context of criminal proceedings against Mr Hassen El Dridi, a TCN migrant who received a first deportation order in May 2004, in Turin. He continued to stay irregularly in the Italian territory until May 2010, when he received the second order to leave within five days; at that time, the police could not enforce an immediate coercive deportation because of practical reasons (lack of transportation capacity and no places available in the detention centre) and, therefore, Mr El Dridi was *de facto* free again.[192] However, he was caught again a few months after, in September 2010, and this time he was prosecuted for the crime of art. 14(5)

C-94/11 (14 February 2011); Tribunale di Ragusa, *Mohamed Ali Cherni*, Case C-113/11 (7 March 2011); Tribunale di Santa Maria Capua Vetere, *Yeboah Kwadwo*, C-120/11 (7 March 2011); Corte Suprema di Cassazione, *Demba Ngagne*, C-140/11 (21 March 2011); Tribunale di Bergamo, *Ibrahim Music*, C-156/11 (1 April 2011); Tribunale di Frosinone, *Patrick Conteh*, C-169/11 (23 March 2011); Tribunale di Treviso, *Elena Vermisheva*, C-187/11 (31 March 2011).

[189] Giudice di Pace di Mestre, *Asad Abdallah*, C-144/11 (24 March 2011).

[190] Corte D'Appello Di Trento, *Hassen El Dridi, alias Karim Soufi*, Case C-61/11, OJ 2008 L 348, p. 98.

[191] Article 104b of the Court of Justice of the European Union's Rules of Procedure.

[192] This is the procedure of immediate coercive removal provided for by article 13 of the Immigration Law, see section 3.

because he did not comply with a removal order, and he was sentenced by the Trento Tribunal to one year of imprisonment. On 2 February 2011, during the appeal, the Trento Appeal Court referred a preliminary ruling to the CJEU.

The questions referred in *El Dridi* were remarkably similar to all the other eleven referrals, which in turn, reproduced the same questions mentioned in the article by Viganò and Masera. In particular, the Italian Court asked whether art. 15 and 16 of the Return Directive should be interpreted as precluding a Member State's legislation that provides for a sentence of a term of imprisonment of up to four years to an undocumented migrant solely on the ground that he has failed to comply with a deportation order. Moreover, the Court asked whether the Italian legislation violated the principle of sincere cooperation between the EU Member States[193] since it provided for criminal sanctions during the return procedure to avoid the application of the Return Directive.

Remarkably, the judges of the Trento Appeal Court were not part of the migrant supporters' network, and in fact, the MD - ASGI group was surprised by the news of the referral. As one of the judges in the MD group told me:

> We were thinking about whether to make the preliminary reference or not, when a Trento court anticipated us. He was not connected to the group, he had studied and read something on the lists[194] and he made the preliminary reference request. Then, we had to make up for it. Once the procedure [before the CJEU] started, we tried to join through our lawyers, and we went to support the reference as a group.[195]

The news that an Italian preliminary request on article 14(5) was about to be examined by the CJEU reached a Professor in EU Law, ASGI member, who contacted Professor Masera[196] (one of the authors of the influential article mentioned before). They immediately understood that the *El Dridi* reference was likely to become the first ruling on art.14(5), and they wanted to make sure that it would have gone well. They decided

[193] Article 4(3) TEU.

[194] The mailing lists of judges cited in the section before; they are very common among judges belonging to the same association but not limited to them only.

[195] Interview with the Tribunale di Rovigo judge, 26 March 2016, Venezia.

[196] Interview with Luca Masera, 26 January 2016, Brescia.

to contact Mr El Dridi's lawyer to offer their support: they came to the agreement that Professor Masera would act as defence lawyer in the part of the proceedings before the CJEU.

On 28 April 2011, the CJEU delivered its judgment declaring art. 14(5) partially at odds with the principles stated in the Return Directive. The Court, on the one hand, dismissed the argument of the government but, on the other, did not completely adopt the line of reasoning brought forward by Mr El Dridi's defence and the referring Court.

In its ruling, the CJEU started by confirming the direct effect of the Return Directive in the Italian legal order. As the Italian Government had failed to adopt the Directive by the prescribed time, individuals could invoke its provisions that are sufficiently clear, precise, and unconditional.[197] Among these provisions, is also article 15 and 16 of the Directive. The CJEU moreover dismissed the argument of the Italian government that wanted to rely on article 2 of the Directive to exclude its application; the Court noted that, even if Mr El Dridi was sanctioned with a criminal penalty, his proceedings originated from an administrative order of removal which falls entirely within the scope of the Directive. Also, the Advocate General, in his Opinion, highlighted the incongruence of the Italian government's argument: 'a Member State which has not adopted the provisions transposing a directive [..] cannot rely on the application of a right deriving from that directive.'[198]

As anticipated, the CJEU's decisive argument diverged from the one endorsed by the Italian Court and El Dridi's defence. In their view, Italian law was illegitimate because it was exceptionally severe in its sanctions and, therefore, it breached the principle of proportionality and migrant's rights to liberty.[199] Instead, the Court's reasoning was not right-based but effectiveness-based:[200] article 14(5) of Italian Immigration Law risked 'jeopardizing the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying

[197] Court of Justice of the European Union, *El Dridi,* C-61/11 PPU, ECLI:EU:C:2011:268 paragraph 46.

[198] See Opinion of the Advocate General Mazák, Case C-61/11 PPU, 1 April 2011, at 28.

[199] See Pleading of the Defence Counsel Luca Masera, Case C-61/11 PPU, Hearing of 30 March 2011, at 23.

[200] Raffaelli, 'Criminalizing Irregular Immigration and the Returns Directive', 482; Fabio Spitaleri, 'L'interpretazione della direttiva rimpatri tra efficienza del sistema e tutela dei diritti dello straniero', *Diritto, immigrazione e cittadinanza* 1, no. 1 (2013): 27.

third-country nationals.'[201] In the CJEU's view, a long imprisonment is illegitimate because it might delay the enforcement of the return decision and thereby undermine the effectiveness of the Return Directive.[202] On these grounds, the CJEU declared that the Return Directive precludes Member State legislation that provides for a custodial penalty against an undocumented migrant on the sole ground that he/she remains on the territory of that state, contrary to an order to leave.

Even if the argument of the Court of Appeal and of the defence lawyer was not upheld by the Court, the impact of the judgment was nevertheless the one they hoped for. On the very same day of the issuing of the *El Dridi* judgment, the Italian Supreme Court acquitted three undocumented migrants prosecuted under article 14(5), stating that the CJEU's ruling amounted to an *abolitio crimini* as its effects are equivalent to those deriving from the adoption of a new law.[203] Regarding the other preliminary references submitted by Italian courts on article 14(5), they were all removed from the CJEU's register because of their substantial overlap with *El Dridi,* which definitively solved the issue.

The *El Dridi* ruling had an immediate impact also in the political sphere. A couple of months after its pronouncement, in June 2011, the Italian government passed a new law, under urgent procedure, to make the national return system in line with the principles established in the Return Directive and by the CJEU.[204] The reason behind such a prompt reaction has probably to do with the government's intention to avoid an infringement procedure for transposition delay. However, instead of a proper reform, the Italian law-makers introduced some adjustments; for instance, it did not abolish the art. 14(5) crime, but it only removed the sanction of imprisonment so that the return procedure would not be delayed. For this and other reasons, the new law did not convince migration supporters and experts, and the mobilization continued.

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[201] Judgment in the Case of *El Dridi*, at 55.

[202] *El Dridi*, at 59.

[203] Corte Suprema di Cassazione Sez. I Penale, Notizie di Decisione (su questione nuova), sentenze 1590/2011, 1594/2011, 1606/2011, Cam. Cons. 28 aprile 2011. Natale, 'La direttiva rimpatri, il testo unico immigrazione ed il diritto penale dopo la sentenza El Dridi', 20.

[204] Law Decree n. 89/2011, Disposizioni urgenti per il completamento dell'attuazione della Direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari, 23 Giugno 2011, 11G0128.

6. The third stage: Preliminary references against the clandestinity crime

The late transposition of the Return Directive in July 2011 could have marked the end of the mobilization story. However, migration experts immediately pointed out that the transposition was still incomplete as the new Law Decree 89/2011 failed to incorporate all the amendments deemed necessary to set the Italian law in line with the European standards.[205] For instance, the Italian legislator did not provide for a period of voluntary return or for alternative measures to pre-removal detention, as required by the Return Directive.[206] Also, one of the most contested provisions of the Italian Immigration law had survived to the 2011 reform unscathed: the article 10bis, known as the clandestinity crime. As the graph at the beginning of the chapter shows, therein lies the reason why Italian judges kept referring preliminary questions to the CJEU on the Return Directive even after the judgment of *El Dridi* was issued.

As stated in section 2, the clandestinity crime sanctions any TCN that enters and stays in Italy irregularly with a high fine (from 5000 to 10000 euros).[207] Arguably, this crime bothers more migrants' supporters than migrants themselves. In fact, its sanction is very difficult to enforce: most of the irregular immigrants do not have traceable resources (or a bank account); it is true that, if the fine remains unpaid, the judge may substitute it with community work or house detention, but these are difficult to enforce against somebody who has no fixed address and has an interest in fleeing. In sum, the clandestinity crime was very important for the public opinion because of its symbolic value, but it was not important in practice. And yet, this symbol of crimmigration policies proved exceptionally resilient: it has survived several constitutional reviews[208] and a recent proposal for amendment by the Parliament.[209] Between 2011 and 2012,

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[205] Guido Savio, 'La nuova disciplina delle espulsioni dopo la legge 129/2011', *Melting Pot* (blog), 30 August 2011, http://www.meltingpot.org/La-nuova-disciplina-delle-espulsioni-dopo-la-legge-129-2011.html.

[206] Art. 7 and art. 15 of the Return Directive.

[207] Article 10bis of the Immigration Law 286/98 provides for the crime of irregular entry and stay of the foreign national; the article has been introduced by the 'Security Package' Law in 2009, see section 2.

[208] See what was said in section 4.1.

[209] The Law n. 67 of 2014 titled '*Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio*' contained a delegation of powers by the parliament to the government to enact a law that would have decriminalized certain crimes, among which there was also the 'clandestinity crime'. In spite of this, the Italian government decided not to implement the

article 10bis was also the object of ten preliminary references which asked the CJEU whether it was compatible with the Return Directive. As we shall see, seven out of these ten referrals came from the same judge (Revere's Giudice di Pace) and were all declared manifestly inadmissible. This means that, in reality, only four Italian judges submitted preliminary references to the CJEU on the clandestinity crime, and this circumstance makes the mobilization against art.10bis much smaller in scale than that against article 14(5). The following subsections examine the preliminary references submitted by Italian courts from the perspective of the actors on the ground, in order to shed some light on the origins of the judges' decision to refer.

6.1 Sagor

The case of Mr Sagor came before the Rovigo Tribunal by coincidence. Normally, the clandestinity crime is under the competence of the Giudice di Pace, a lay judge and the lowest in the Italian magistrates' hierarchy. However, the public prosecutor also charged Mr Sagor with an additional crime (i.e. the refusal to show identity documents to the police[210]); this joint accusation brought the case of *Sagor* under the competence of the Rovigo judge and gave him the chance to rule on the clandestinity crime. Finally:

> I was fighting against article 10bis since years. I wrote a series of articles and I went several times to Rome, to talk before the Higher Council of Judiciary[211] and explain them why the crime should not be applied. In sum, I was very engaged. But the real problem of art.10bis was that it falls under the competence of the Giudice di Pace. Being us professional judges, we weren't connected with them [who are lay judges], if not in rare occasions. So, we couldn't catch the 10bis.[212]

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decriminalization for reasons of 'political opportunity', i.e. the mutated international scenario after the so called 'refugee crisis'. See F.Q., 'Reato Di Clandestinità, Governo Rinvia Abolizione: "Prima Valutazione Di Opportunità Politica"', *Il Fatto Quotidiano*, 8 January 2016, http://www.ilfattoquotidiano.it/2016/01/08/reato-di-clandestinita-governo-rinvia-abolizione-prima-valutazione-di-opportunita-politica/2358988/.

[210] Article 6(3) of Legislative Decree No 286/1998 which states: 'A foreign national who …, without valid grounds, does not comply with the order to present his passport or other identification document, and his residence permit or other document to prove legal presence in the national territory, shall be imprisoned for up to a year and fined up to EUR 2 000.'

[211] *Consiglio Superiore della Magistratura*, the Italian magistrates' governing body.

[212] Interview with the Rovigo Tribunal judge, 26 March 2016, Venezia.

The Rovigo Tribunal judge was a member of MD and of the board of the journal *Diritto Immigrazione e Cittadinanza*.[213] He described the preliminary reference in *Sagor* as a 'collective effort': for the drafting of the preliminary reference, he was assisted by the experts in the network of ASGI-MD, and in particular, by Professor of EU law, Chiara Favilli. Again, the same network of lawyers, judges, and scholars behind the *El Dridi* case, mobilized to raise a preliminary reference in the case of *Sagor,* to dismantle another piece of the Italian crimmigration policy. The network's involvement is also evident by the fact that Professors Favilli and Masera represented Mr Sagor before the CJEU in Luxembourg.

But let us start from the beginning. The case for the incompatibility of the article 10bis with the Return Directive was a difficult one. First, the referring judge reiterated the same argument used in *El Dridi*: by sanctioning an irregular migrant with house detention, the Italian law-maker was undermining the effective enforcement of the return decision. However, art. 10bis, as we saw, provides for house detention only in exceptional cases: if the convicted person does not pay the fine and if community work cannot be enforced. Even if the judge made the case that this happens quite often in the case of irregular migrants, still this was not the strongest argument. The second argument regards the violation of the duty of sincere cooperation among Member States (art. 4 TEU). The Italian law-maker, according to the judge, introduced art.10bis to make use of the criminal law exemption of art. 2 of the Return Directive whereby it would have avoided its application (see what was said in section 3). In fact, the judge, when sanctioning the migrant, could also substitute the fine with a directly enforceable expulsion order. However, in this case, the migrants would be deprived of all the procedural guarantees provided by the Return Directive, such as the period for voluntary departure.

Something that further complicated the *Sagor* case was the intervention of two Member States in support of the Italian government. While no Member State intervened in *El Dridi* because of the tight schedule dictated by the urgent procedure, in *Sagor,* the German and the Dutch governments filed observations stating that art. 10bis does not affect the goals of the Directive since it provides for the criminal proceedings to be discontinued should the return become immediately enforceable.

[213] The journal founded by MD and ASGI, see section 4.

This time, the CJEU, in its judgment, gave Italy a significant leeway.[214] The Court confirmed its findings in *Achughbabian*[215] and held that Member States are free to enforce criminal sanctions against irregular migrants; moreover, they can also enforce return decisions in the form of criminal sanctions, but these have to guarantee all the procedural requirements of the Return Directive, otherwise it would be a way to outflank its application. Therefore, sanctioning the 10bis crime with a removal is possible only in the limited amount of cases where the period for voluntary returns and other guarantees do not apply. Instead, in line with *El Dridi,* the sanction of house detention was declared in conflict with the Directive since it might delay the removal.[216] The judgment of *Sagor* was rather disappointing for migrants' supporters. Nevertheless, the MD-ASGI network worked to frame and communicate the message of the decision in a way that was beneficial to their cause:

> We sold it as a partial victory, even if it was a partial defeat; but we were mostly interested in the political message. That is, that once again the Court of Justice declared another piece of the Security Package Law in contrast with EU law.[217]

Indeed, their message went through: the decision triggered a new debate on the opportunity to abolish the clandestinity crime, and the Parliament voted for its repeal (also because, after the 2013 elections, the majority in the Parliament was now in the hands of a center-left coalition).[218] However, for reasons of 'political opportunity',[219] eventually the center-left government abandoned the project to abolish the clandestinity crime and, although partially mutilated, the crime is today still in force.

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[214] Niovi Vavoula, 'The Interplay between EU Immigration Law and National Criminal Law – The Case of the Return Directive', in *Research Handbook on EU Criminal Law*, ed. Valsamis Mitsilegas, Maria Bergström, and Theodore Konstadinides, Research Handbooks in European Law Series (Cheltenham, UK: Edward Elgar Publishing, 2016), 312.

[215] Court of Justice of the European Union*, Achughbabian,* C-329/11 (6 December 2011).

[216] Court of Justice of the European Union, *Md Sagor, C-430/11*, ECLI:EU:C:2012:777 paragraph 35 ss.

[217] Interview with the Rovigo Tribunal judge, 26 March 2016, Venezia.

[218] Sara Anastasio and Salvatore Centonze, *Ingresso e Soggiorno Illegale Nel Territorio Dello Stato*, Il Diritto in Europa Oggi (Key Editore, n.d.), 17.

[219] "Reato di clandestinità, governo rinvia abolizione" Il Fatto Quotidiano, 8 gennaio 2016.

6.2 Mbaye and the preliminary references from the Giudici di Pace

In addition to *Sagor*, nine preliminary references have been submitted to the CJEU on art. 10bis, all by Giudici di Pace. At first glance, these numbers seem equal to those of the mobilization against art.14(5); except that, if we look deeper, we would realise they were made by only 3 judges: one request was submitted by the Giudice di Pace of Mestre, one by the Giudice di Pace of Lecce, and seven by the Giudice di Pace of Revere.[220] This reduces consistently the size of the mobilization. But are these references in some way connected to the mobilization described before? The interviews with the members of the MD-ASGI network reveal that Giudici di Pace, in general, are not involved in judges' associations and do not take part in their meetings and debates. This is because Giudici di Pace are not ordinary magistrates but honorary judges: they are temporarily appointed, do not follow the same career path, and have a different background and experience than professional judges. Also, at that time, Giudici di Pace were not taking part in judicial training programs (addressed only to ordinary judges), which excluded them from many initiatives organized to raise awareness on the new Directive. This has had an impact also on the quality of the preliminary references referred: many of them were declared manifestly inadmissible by the CJEU because they lacked a basic description of the facts of the case.[221]

The case of *Mbaye* is partially different.[222] This, more than a test case, was a crusade against art. 10bis. In the course of the proceedings, the defence lawyer challenged the clandestinity crime before three different top courts: (in order) the Constitutional Court, the Court of Justice, and the Supreme Court, and none of these challenges brought the

[220] Giudice di Pace di Mestre, *Asad Abdallah*, C-144/11; Court of Justice of the European Union, *Abdoul Khadre Mbaye*, C-522/11 (21 March 2013); Giudice di Pace di Revere, *Xiaomie Zhu and others*, C-51/12 (2 February 2012); Giudice di Pace di Revere, *Ion Beregovoi*, Case C-52/12 (2 February 2012); Giudice di Pace di Revere, *Hai Feng Sun*, Case C-53/12 (2 February 2012); Giudice di Pace di Revere, *Liung Hong Yang*, Case C-54/12 (2 February 2012); Giudice di Pace di Revere, *Ahmed Ettaghi*, Case C-73/12 (4 July 2012); Giudice di Pace di Revere, *Tam*, C-74/12 (13 February 2012); Giudice di Pace di Revere, *Majali Abdel*, C-75/12 (26 January 2012).

[221] These were the cases of: Giudice di Pace di Mestre, *Asad Abdallah*, C-144/11; Giudice di Pace di Revere, *Tam*, C-74/12; Giudice di Pace di Revere, *Majali Abdel*, C-75/12; Giudice di Pace di Revere, *Ahmed Ettaghi*, Case C-73/12.

[222] Court of Justice of the European Union, *Mbaye, C-522/11*, ECLI:EU:C:2013:190.

hoped result.[223] Behind this litigation strategy was the lawyer Salvatore Centonze, expert in migration law and author of a monograph on the clandestinity crime;[224] as far as we know, he was a lone wolf and acted independently from the MD-ASGI network.[225] The *Mbaye* preliminary reference was declared admissible, but it reached Luxembourg just a bit too late as the Court had already expressed its view in *Sagor* and only restated the same conclusion.

7. Mobilising the Return Directive: contesting crimmigration through EU law enforcement

Once the socio-political context of the Italian preliminary references is understood, we can answer the starting question of this chapter: Why did Italian judges devote so much attention to the Return Directive?

According to European integration scholars' account, the Italian case could be considered an example of 'decentralized enforcement' of EU law[226] or, in the light of civil society's involvement, a case of 'participation through law enforcement'.[227] In fact, the Italian government, in 2010, refused to transpose the Directive although the national return system was not in line with European standards. The rulings in *El Dridi* and *Sagor* raised attention to the inconsistencies between the national and the supranational frameworks, triggering a process of late transposition of the Return Directive. However, the decentralized enforcement account leaves one question unanswered: why, given that the majority of the EU Member States had not transposed

[223] Both the references to the CJEU and to the Constitutional Court were submitted too late: the two courts had already decided on the issue before (Corte Costituzionale, Sentenza n. 250/2011 and Court of Justice, *Sagor*). The text of the preliminary reference to the Constitutional Court can be found at this link: https://www.personaedanno.it/articolo/gdp-lecce-19-aprile-2010-est-c-rochira-il-reato-di-clandestinita-in-odore-di-incostituzionalita-sc

[224] Anastasio and Centonze, *Ingresso e Soggiorno Illegale Nel Territorio Dello Stato*.

[225] I only had an email exchange with lawyer Centonze, since he was not available for an interview.

[226] Pollack, *The Engines of European Integration Delegation, Agency, and Agenda Setting in the EU*, 163; Raffaelli, 'Immigration and Criminal Law: Is There a Judge in Luxembourg?'; Fornalé, 'The European Returns Policy and the Re-Shaping of the National', 144.

[227] Börzel, 'Participation Through Law Enforcement. The Case of the European Union'; Rachel A. Cichowski, 'Introduction Courts, Democracy, and Governance', *Comparative Political Studies* 39, no. 1 (2 January 2006): 3–21.

the Directive by the deadline of 24th December 2010,[228] did only Italian courts refer so many questions to the CJEU?

If we add to the picture the Italian socio-political context of the time, we can better understand the local meaning of these preliminary references, i.e. what the judicial enforcement of the Return Directive meant for the Italian context. What was at stake was not, or not mainly, the enforcement of EU law but the criminalization of migrants. A network of lawyers and judges wanted to prevent crimmigration, and they were ready to use any law or court to achieve this aim. This is evidenced by the fact that their legal mobilization started well before the adoption of the Return Directive: in fact, their first strategy was to mobilize the Italian Constitutional Court. This Court received a huge number of requests for constitutional review of the crimmigration norms, but it declared the norms only partially in conflict with the Italian constitution, leaving in place art.14(5) and art. 10bis.[229] The enforcement of the Return Directive was instrumental in bringing yet another challenge to a heinous national provision and to making a political statement against criminalization. And, this is quite ironic for a Directive that saw the light under the stigma of being the symbol of 'Fortress Europe'.

The analysis of the Italian social context also raises another interesting aspect of this mobilization. There were many Italian norms in conflict with the Directive which provided for a lower level of protection of migrants' rights; to mention just a few: Italian law provided an entry-ban of ten years for returned migrants, while the Directive set a

[228] See Commission Press Release, An effective and humane return policy: 8 Member States have yet to comply with the Return Directive, of 29 September 2011, available at: http://europa.eu/rapid/press-release_IP-11-1097_en.htm?locale=en

[229] See the following decisions from the Constitutional Court, all on preliminary references received on the art.10bis: Sentenza 250/2010, Ordinanza n. 252/2010, Ordinanza n. 253/2010, Ordinanza 318/2010, Ordinanza 320/2010, Ordinanza 321/2010, Ordinanza 329/2010, Ordinanza 343/2010, Ordinanza 3/2011, Ordinanza 6/2011, Ordinanza 13/2011, Ordinanza 32/2011, Ordinanza 64/2011, Ordinanza 65/2011, Ordinanza 72/2011, Ordinanza 75/2011, Ordinanza 84/2011, Ordinanza 86/2011, Ordinanza 95/2011, Ordinanza 100/2011, Ordinanza 131/2011, Ordinanza 135/2011, Ordinanza 144/2011, Ordinanza 149/2011, Ordinanza 154/2011, Ordinanza 158/2011, Ordinanza 161/2011, Ordinanza 162/2011, Ordinanza 193/2011, Ordinanza 200/2011, Ordinanza 252/2011, Ordinanza 306/2011, Ordinanza 65/2012, Ordinanza 84/2012, Ordinanza 175/2013.

maximum of five years,[230]Italian law did not grant a term for voluntary departure,[231] and neither provided for alternative measures to detention.[232]

Despite all these inconsistencies, the legal mobilization focused exclusively on challenging art.10bis and art. 14(5), the norms criminalizing immigrants. In my view, this can be explained with two considerations. One is what Natale called the criminalization's 'catalysing power' on jurists:[233] the choice of criminalizing a status is so strong that lawyers and judges reacted with an equally strong refusal and the associations supporting migrants mobilized to prompt the law reform. Second, the criminalization had the effect of shifting migration competences to the criminal judges and of overloading them with a huge amount of cases dealt with before by administrative courts. This extra load of cases, of limited criminal relevance, contributes to explaining why criminal judges were so inclined to refer. If the first is an ideological consideration, the second is a more practical one, but the two together are important to understand why migrant supporters decided to focus on these two articles and why Italian criminal judges proved inclined to refer. The result is that, in Italy, criminal judges, instead of acting as the right hand of the executive in the return system (as the government was hoping for), became actors of resistance and contestation against crimmigration.

The mobilization targeting art. 14(5) and art.10bis ended in 2012, with the half victory in the case of *Sagor.* For the sake of completeness, we should mention that a couple of years later, in 2014, a judge of the Tribunale di Firenze referred a new case on crimmigration, the *Celaj* case. Again, the case focused on one of the crimes introduced by the Bossi-Fini Law, art. 13(3) of the Italian Immigration Law, which provides for the immediate arrest of the undocumented migrant that violates an entry ban and punishes the crime with a prison sentence from one to four years.[234] The norm follows

[230] Art. 13(14) of the Italian Immigration Law, vs. art. 11.2 of the Return Directive.

[231] Art. 13(3) of the Italian Immigration Law, vs. art. 7 of the Return Directive.

[232] Art. 14(1) of the Italian Immigration Law, vs. art. 15 of the Return Directive.

[233] In Italian: "la potenza simbolica di una incriminazione è una scelta di politica del diritto talmente netta, da catalizzare inevitabilmente e in modo prepotente le energie dei giuristi". Natale, 'La direttiva rimpatri, il testo unico immigrazione ed il diritto penale dopo la sentenza El Dridi', 17.

[234] Art. 13(3) of the Immigration Law provides: "A foreign national against whom a removal order has been made may not re-enter the territory of the State without special authorization issued by the Ministry

the blueprint of an art. 14(5) crime, and for this reason, the Firenze judge argued that as in *El Dridi*'s judgment, also art.13(3) should be declared incompatible with the Directive because it delays the return procedure.[235] However, the CJEU adopted a different interpretation this time: it differentiated between the case of a migrant that enters the territory of a Member State irregularly for the first time (*El Dridi*) and that of a migrant that enters a second time by violating an entry ban (*Celaj*); in the Court's view, Member States are free to inflict a prison sentence for this second conduct.[236] The CJEU's reasoning appears too synthetic and rather weak and, in fact, was met with scepticism by commentators that underlined the incongruities between the different approaches taken by the CJEU in its case law.[237] But the most important aspect, in the light of this research, is the fact that the case of *Celaj* was not part of the legal mobilization that led to the emergence of *El Dridi* and *Sagor*.[238] In fact, the referring judge decided to refer the case autonomously and was not helped by the network of migrant supporters we saw in action;[239] also, Mr Celaj's lawyer was not an ASGI member and did not participate in the proceedings before the CJEU. This leaves us with the question of whether a better supported case would have reached a more favourable conclusion for the migrant, especially because, although nobody represented the migrant before the CJEU, five Member States intervened in support of the legitimacy of the Italian criminal provision.[240]

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for the Interior. In the event of infringement, the foreign national shall be liable to a term of imprisonment of between one and four years and shall be expelled by immediate deportation."

[235] Court of Justice of the European Union, *Celaj, C-290/14*, ECLI:EU:C:2015:640 paragraph 20.

[236] *Celaj*, paragraph 28.

[237] Anna Magdalena Kosińska, 'The Problem of Criminalisation of the Illegal Entry of a Third-Country National in the Case of Breaching an Entry Ban. Commentary on the Judgment of the Court of Justice of 1 October 2015 in Case C 290/14, Skerdjan Celaj', *European Journal of Migration and Law* 18, no. 2 (17 June 2016): 243–57; Andrea Romano, '"Circumstances...Are Clearly Distinct": La Detenzione Dello Straniero per Il Delitto Di Illecito Reingresso Nella Sentenza Celaj Della Corte Di Giustizia', *Diritto, Immigrazione e Cittadinanza*, no. 2 (2015): 109–24; Mario Savino, 'Irregular Migration at the Crossroads, between Administrative Removal and Criminal Deterrence: The Celaj Case', *Common Market Law Review* 53, no. 5 (1 September 2016): 1419–39.

[238] Court of Justice of the European Union, *Celaj, C-290/14*, ECLI:EU:C:2015:640.

[239] Interview with the Tribunale di Firenze Judge, 26 March 2016, Florence.

[240] Court of Justice of the European Union, *Celaj*, Opinion Advocate General Szpunar, Case C-290/14 (28 April 2015).

Having understood the scope of the mobilization and the reasons behind Italian judges' propensity to refer, can we say that the legal mobilization was a vehicle for migrants' participation? In a way, the fact that the target of the mobilization was a 'useless and detrimental' norm, such as the clandestinity crime, confirms that behind the mobilization there where groups supporting migrants but not the migrants themselves. Being accused of the clandestinity crime, in practice, does not change the situation of irregular migrants in a relevant way. Being irregular, they do not have a bank account, a regular job, a regular house, etc. Therefore, any sanction on their belongings or a house detention could hardly be enforced. Even in the worst possible case, i.e. when the fine is substituted with an expulsion, this is not a worsening of their situation: there is already an administrative procedure of return pending over them.

In sum, the several preliminary references before the CJEU cannot simply be explained as a law enforcement, but neither are they a migrants' mobilization. They were part of a larger mobilization, started before national courts, and conducted by lawyers, migrant supporter groups, and criminal judges that wanted to get rid of some provisions which were seen as contrasting with Italian constitutional principles. These crimmigration policies, because of their discriminatory character, were seen as 'radically compromising the democratic identity' of Italy.[241] The network of lawyers and judges that we have seen in action, stood up to defend migrants but also to defend Italian liberal values and constitutional identity.

8. Conclusion

The visionary forces of law oppose matter-of-fact forces. The law is not insulated from the rest of the world. It maintains multiple relationships with politics, morale, history...

At the European, and even more so at the international level, the law no longer operates under its various models and hierarchies; it compels us to produce an arranged pluralism - a harmonization process based on a set of universal principles. This is a precondition for countering the threat of orderly disorder, solely guided by market rules, and for protecting ourselves from a judicial imperialism at the service of American hegemony.

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[241] Ferrajoli, 'La Criminalizzazione Degli Immigrati (Note a Margine Della Legge n. 94/2009)', 13.

Between 2011 and 2012, a network of lawyers, judges, legal experts, and migration activists decided to mobilize the Return Directive before the CJEU to change Italian immigration law. At first glance, the cases of *El Dridi* and *Sagor* can be taken as an example of dialogue between supranational and national courts as a means to effectively enforce EU law. However, the analysis of the socio-political context of those years, the quantitative data on the number of preliminary references, and the interviews with the actors involved, shed light on how the enforcement of the Return Directive was instrumental in achieving another goal. The EU law mobilization aimed at contesting the crimmigration norms introduced a few years before in the Italian legal framework, in defence of migrants' rights and constitutional values.

The bottom-up analysis conducted also highlights the special features of this type of legal mobilization. Whilst legal mobilization is generally understood as consisting of 'bringing a claim, representing a claimant, and also submitting written briefs (*amicus curiae*) as third parties',[242] in this case it was carried out in a different way. The Italian norms at stake and the proceedings in which the preliminary references were formulated were criminal. This means that the person initiating the litigation was the public prosecutor and not the individual, who, instead, found himself/herself accused of a criminal act. Moreover, the CJEU, unlike the ECtHR, does not admit *amicus curiae* interventions, and interest groups are formally excluded from participating in preliminary ruling proceedings. These circumstances, together with the fact that the procedure before the CJEU is triggered by the national judge without necessarily taking into account the parties' intention, are normally able to hinder the pursuing of legal mobilization in its better known forms.

And yet, as this first case study shows, migrants' supporters managed to find a way to reach the Court of Justice. Networks of lawyers, immigration experts, and judges used online platforms, journals, training events, conferences, and mailing lists to spread their thesis that the Italian crimmigration norms were in conflict with the Return Directive. This thesis was particularly well received by criminal judges, who, since they are very involved in judges' associations, are particularly sensitive to arguments regarding the

[242] Rachel Cichowski, "Mobilisation, Litigation and Democratic Governance," *Representation* 49, no. 3 (September 1, 2013): 322.

respect of the legality principle and the accused's rights, and who were overloaded with migration cases.

By investigating the connections between migrants' supporters and criminal judges, the Italian case study also sheds new light on the role of judges in the mobilization. While judges are normally seen as institutional actors or even defenders of the status quo, in Italy, national judges stand out as key actors of legal mobilization. Indeed, judges did not just participate in the legal mobilization, but, especially in their organized forms (MD and the board of the journal *Diritto, immigrazione e cittadinanza*), they were proactively working towards the mobilization of the law.

Eventually, the mobilization before the CJEU did not prevent the criminalization of migrants in Italy. The case of *El Dridi* and *Sagor* have been amplified by civil society and had an impact on the Italian legal framework, but such impact is limited. Still today, in Italy, an undocumented migrant can be prosecuted and condemned for the clandestinity crime, and if he/she does not comply with a removal order, will also incur criminal sanctions. However, these sanctions are less heavy than before, and a long period of imprisonment is no longer admitted, neither in Italy nor in the rest of the EU. If they did not succeed in completely striking down the crimmigration norms, at least migrant supporters were able to significantly reduce their impact.

Chapter III. The UK

Mobilizing EU citizenship and free movement law in defence of marriage migration

This chapter explores how civil society organizations in the UK have mobilized EU free movement norms before the CJEU to oppose restrictive migration policies and expand British citizens and migrants' rights. At the end of the 1970s, Margaret Thatcher started a 'war on foreign husbands', based on the idea that marriage migration was a loophole to be fixed. Since then, restrictive migration rules have been introduced in the UK, with the aim of lowering the number of migrants that enter through family links. However, this goal became harder to achieve after that the right to free movement was extended so as to cover not only EU workers but also other EU citizens and their family members. In fact, as I show in the chapter, EU citizenship and free movement law had an important impact on the UK migration system as a whole; migrant supporters have relied on EU citizenship and free movement law to promote an interpretation before the CJEU that would help TCNs to reside in the UK with their British family members. Moreover, thanks to the principle of EU law supremacy, civil society organizations could use EU law to enhance the Home Office accountability for migrants' rights violations. Overall, these EU law provisions, as mobilized by migrant supporters, contributed to strengthening scrutiny over the executive and judicial review in the UK.

1. Introduction: Why the UK?

Over the years, British governments tried their utmost to shield the UK's migration policy from EU influence. The UK enjoys a special Treaty opt-out: it is not bound by any EU law adopted under the chapter on 'border check, asylum and immigration', unless it decides to opt-in.[243] Moreover, the UK is not bound either by the so-called *Schengen aquis*: the system of norms that regulates the abolition of internal border controls between the EU Member States. This means that the UK is exempted from the majority of the EU rules on migration and visa, and British law-makers can autonomously regulate the entry and residence of third-country nationals in their territory. Yet, despite these efforts, this chapter shows that migrant supporter groups managed to attract, under the scrutiny of the CJEU, part of UK migration law: the regulation of family migration.

In fact, the UK, despite its many exemptions, is still bound by EU primary law which comprises the norms on Union citizenship and free movement of persons. These norms regulate the rights of Union citizens to move, work, and reside in the Union. Notably, Union citizenship provisions grant free movement rights also to the family members of Union citizens, regardless of their nationality. This means that, if a Union citizen moves to the UK with his/her TCN family member, the latter is also covered by Union citizenship law and enjoys 'derived' free movement rights.[244] The focus of this chapter is precisely on these derived rights and on the legal mobilization before the CJEU concerning them.

As explained in the first chapter, the case studies analysed in this dissertation were selected according to quantitative data on the preliminary references submitted to the

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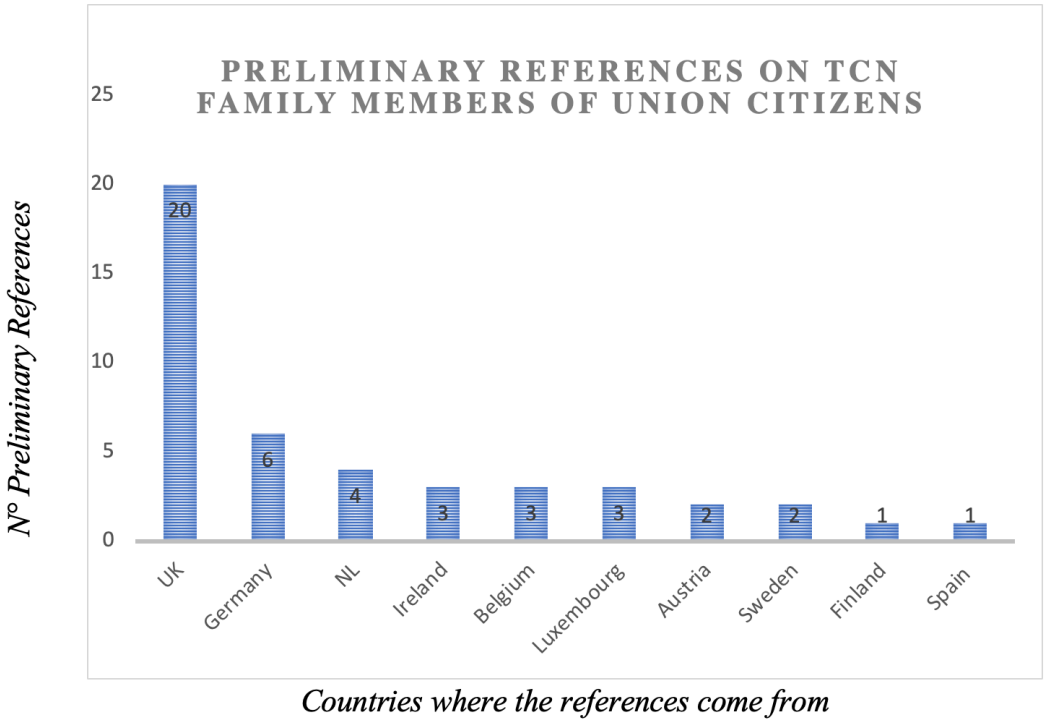
[243] See Protocol 21 on *The Position of the United Kingdom and Ireland*, annexed to the EU Treaties. The UK opted-in to most of the norms on criminal matters and police cooperation, but it did not to measures regarding migration and asylum. See list of UK's opt-ins at https://www.gov.uk/government/publications/jha-opt-in-and-schengen-opt-out-protocols--3 An important exception is the UK's opt-in to the Dublin Regulation and its recasts, but asylum seekers and refugees are not dealt with in my dissertation.

[244] Court of Justice of the European Union, *Baumbast and R*, C-413/99 (17 September 2002); Court of Justice of the European Union, *Ibrahim*, C-310/08 (23 February 2010); Court of Justice of the European Union, *Alarape and Tijani*, C-529/11 (8 May 2013).

CJEU. As mentioned, the UK is the country that has referred most questions regarding the rights of TCNs that are family members of Union citizens. The Court of Justice received, in total, around forty-five requests for preliminary rulings on this topic; of these, twenty came from the UK (Table 1).

Table 1: Number of preliminary references to the CJEU on TCN family members of Union citizens by country of reference (until May 2018).



These data present an interesting puzzle. Why did British judges refer so many questions in such a specific field? Was there any role for civil society actors?[245] How does litigation relate to the migration debates in the UK? This chapter will outline the findings of an empirical research conducted in the UK, that consisted in interviewing key actors involved in litigation and analysing public debates and media coverage. The aim is to understand the procedural, political, and social factors behind the preliminary references under examination. In line with the goals of this dissertation, the focus will

[245] As explained in chapter I of this thesis, the number of preliminary references is only an indicator; it works as a hint that a legal mobilization could have occurred. However, a legal mobilization can well consist of only one test or strategic case. This was the case of *Chavez,* a case referred from the Netherlands, that was brought strategically to the attention of the CJEU to extend the rights of TCN family members of static Union citizens. See Court of Justice of the European Union, *Chavez*, C-133/15 (10 May 2017).

be on who convinced British judges to mobilize EU law before the CJEU, why, and how.

The first part of this chapter analyses the political context surrounding the preliminary references, i.e. the interplay of the EU and migration in the British public and political discourses. The second part will investigate more closely the preliminary references, focusing on the conditions which led British judges to refer questions and, specifically, what role was played by British civil society. In particular, the chapter illustrates who were the main promoters of the litigation and what was its local and political meaning.

The UK case-study shows that migrant supporters used the preliminary references as a legal strategy to resist deportation of TCN family members. Given the lack of protection offered by UK and ECHR law, migrant supporters turned to EU free movement law, trying to stretch its boundaries so as to cover also TCN family members of British citizens. The presence of a 'support structure'[246] of EU lawyers and NGOs was key: they understood the potential of free movement law for defending migrants' rights and seized the opportunities offered by supranational litigation. This chapter argues that these preliminary references on TCN free movement rights should be read within the broader context of migrant supporters' long struggle to hold the executive (the Home Office) accountable for its violations of migrants' rights.

2. Understanding migration in the UK: The historical and political context

The UK's migration policy, its colonial past, and its relationship with the EU are three pieces of the same puzzle: we cannot understand one without the others. This becomes evident if we place British migration and citizenship laws in their historical context. In the UK, the main instruments regulating people movement were introduced as part of the process of emancipating the British nation from its imperial past, which mostly took

[246] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, 1 edition (Chicago: University of Chicago Press, 1998).

place in the years from 1948 to 1981.[247] I consider this period the constitutive phase of British migration and citizenship law, and sub-section 2.1 deals with it. Sub-section 2.2 focuses on the issue at the centre of the litigation analysed in this chapter: the regulation of secondary movement, also called marriage migration or family reunion. Sub-section 2.3 explains the shift in migration policy that took place from 1997 on, and introduces the concept of 'human rights culture', which is central for this chapter. In sum, sub-section 2.1 is the necessary preamble to the policy on marriage migration described in sub-section 2.2 and, together with 2.3, provide the historical background that is indispensable to understand the UK perspective over migration and the EU today.

The goal of this historical and political overview is to point out the significance of the advent of European rights for the British context. Indeed, as authors like Joppke argued, and as this section will show, Britain's success in controlling migration was largely due to the fact that the government's restrictive policy did not encounter any judicial challenge. The UK does not have a written constitution and its judiciary is rather 'docile' towards the executive;[248] the government enjoys great discretion in controlling migration, at the expense of migrants' rights. This section serves as a premise to the main argument of this chapter, that will be illustrated and demonstrated in section 3 and 4: EU rights and the CJEU constituted powerful tools for restricting and opposing the British executive's migration policy.

2.1 The constitutive phase of British migration and citizenship law

The end of the Second World War marked the start of the process of re-defining the British identity as a nation state. This process consisted mainly in dealing with decolonization and in 'shedding the vestiges of [the British] empire'.[249] An important part of this process consisted in providing citizenship to the subjects of the empire; in fact, until then, all people born or naturalized in the territory of the empire enjoyed the

[247] In 1948 was adopted the first citizenship reform, and in 1981 the last, which completed this period of citizenship and nation building.

[248] Joppke, *Immigration and the Nation-State*, 103.

[249] J. M. Evans, 'Immigration Act 1971', *The Modern Law Review* 35, no. 5 (1972): 508.

status of 'British subjects' and, interestingly, there was no such a thing as a British citizenship.[250]

The situation changed with the British Nationality Act of 1948, which turned the imperial subjects into Commonwealth citizens.[251] All people from the UK and its colonies enjoyed an equal status with equal political, social, and residence rights in the UK, regardless of whether they came from London or from Delhi.[252] Remarkably, Commonwealth citizenship was granted also to imperial subjects from former colonies, like Canada, so as to maintain a relationship between the UK and its Commonwealth. Within the broad group of Commonwealth citizens, some also enjoyed the status of Citizen of the United Kingdom and the Colonies (hereinafter, CUKC). This status was granted only to the people from Britain and its present colonies. Remarkably, the status of CUKC does not correspond to the modern British national citizenship because it recognised equal status and rights to all the people under the British government, from the UK to Jamaica.

The establishment of such an expansive citizenship reflects the resilience of the British imperial mentality: decolonization was a primary concern for the British government. This came at a cost: the Nationality Act of 1948 virtually opened the UK's door to hundreds of millions of people coming from the Commonwealth who had the right to enter and reside as citizens; apparently, British '[p]olicy-makers accepted the transformation of the United Kingdom into a multicultural society as the price of supporting the ties between Britain and the Old Dominions'.[253]

The British post-war liberal attitude towards its borders can also be explained with the serious labour shortage that the UK was experiencing, which made it very attractive for people from the colonies in search of work. Between 1951 to 1971, the census

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[250] Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain*, British Politics and Society (London: Frank Cass, 2003), 1.

[251] Randall Hansen, *Citizenship and Immigration in Postwar Britain* (Oxford University Press, USA, 2000), 35.

[252] Anja Wiesbrock, *Legal Migration to the European Union*, Immigration and Asylum Law and Policy in Europe, v. 22 (Leiden; Boston: Martinus Nijhoff Publishers, 2010), 79.

[253] Hansen, *Citizenship and Immigration in Postwar Britain*, 19.

registered an exponential increase in foreign-born population, especially from Jamaica and India.[254] Clearly, their migration was facilitated by the residence and movement rights they enjoyed as Commonwealth citizens or CUKC.

The first problems emerged in the 1960s when an economic recession started hitting the UK and the unemployment rates grew. Confronted with these new difficulties, the British attitude towards migration changed, and public opinion became more openly hostile towards non-white immigrants.[255] The racist component of this new sentiment emerged also from the fact that white immigrants, such as the Irish or East Europeans, who also moved to the UK in high numbers during the post-war period, did not face the same hostility.[256] Such public aversion towards non-white immigrants first led the Conservative and then the Labour government to endorse a reduction in the number of immigrants coming from certain Commonwealth countries; they embraced the idea that being a Commonwealth citizen, a CUKC, or holding a British passport was not enough to enter the UK, and they started introducing new migration controls aimed at distinguishing between wanted and unwanted citizens.[257] The UK experienced the very singular situation of migration controls being enforced against its own citizens, with the aim of differentiating between those who fully belonged, and those who did not.

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[254] Home Office and Office for National Statistics, 'Immigration Patterns of Non-UK Born Populations in England and Wales in 2011', Part of 2011 Census Analysis, Immigration Patterns of Non-UK Born Populations in England and Wales in 2011 Release, 17 December 2013, 14. See also, Stephen Small and John Solomos, 'Race, Immigration and Politics in Britain: Changing Policy Agendas and Conceptual Paradigms 1940s–2000s', *International Journal of Comparative Sociology* 47, no. 3–4 (1 August 2006): 239.

[255] The tensions between British and immigrant minorities became evident during the so-called 'race riots' of 1958 in Nottingham and Notting Hill, but also through polls that consistently proved population anti-migration stance Marcus Collins, 'Immigration and Opinion Polls in Postwar Britain', *Modern History Review* 18, no. 4 (2016): 8–13. At that time, nationalist and racist conceptions of the British state were gaining consensus, especially thanks to the campaign of MP Enoch Powell, who heavily shaped public perceptions and ultimately influenced conservatories policy. See Dixon, "Thatcher's People," 172 and Small and Solomos, "Race, Immigration and Politics in Britain," 243.

[256] The conclusion by the Committee on Social and Economic Problems 1955, reported by Layton-Henry, openly argued that problems arising from non-white migration do not arise in case of Irish migration because the last are of the same race as UK's inhabitants. See Zic Layton-Henry, 'Britain: The Would-Be Zero-Immigration Country', in *Controlling Immigration: A Global Perspective*, ed. Wayne Cornelius, Philip Martin, and James Hollifield, Stanford University Press, 1994, 274.

[257] Conservative and Labour governments adopted two Commonwealth Immigrants Acts, one in 1962 and a second in 1968.

In the 1960s, British law-makers started a process of immigration reform to reduce the number of people moving to the UK. With this aim, a number of acts were adopted: the Immigrants Act of 1962, the Commonwealth Immigrants Act of 1968, the Immigration Appeals Act of 1969, and the Immigration Act 1971. These Acts did not formally affect the mechanism of citizenship allocation, but they *de facto* took away citizenship rights from many non-white Commonwealth citizens and CUKC. The 1971 Act was the culmination of this process: under this provision, the rights to enter and reside in the UK depended on whether a person was a 'patrial' or not. The notion of 'patriality' designated those born in the UK territory or with an ancestral connection with the UK. Hardly anyone from, say, Jamaica or Zimbabwe had British ancestors; therefore, like aliens, they became subject to migration controls.[258] On the contrary, many 'white' citizens from the Old Commonwealth (i.e. Australia, New Zealand, and Canada), despite not being CUKC, had British ancestors and easily acquired rights to reside in the UK.

Some authors see this backlash towards CUKC newcomers as a consequence of a citizenship regime that was flawed since the outset. The 1948 Nationality Act had included 'ethnolinguistically diverse people' under the same status, and this created a discrepancy between citizenship and national identity: 'Britishness had to be detached from the institutions of citizenship. […] It was thus only through migration control, whose purpose was to denote who belonged to Britain, that Britishness was gradually taking shape in the 1960s and 1970s.'[259] However, this emerging concept of 'Britishness' implicitly conveys the idea that the British identity cannot be one of many colours but can only be of just one: white. It is not by accident that the need to redefine 'Britishness' emerged as a reaction to so-called 'coloured' (*sic*) Commonwealth citizens moving to Britain.

The 1971 Act represented a significant step forward in the process of definition of the British nation-state, but it also attracted much criticism for grounding the idea of British

[258] Joppke (n 7) 104. For a definition of 'patriality' under the Immigration Act and a detailed description of the provisions in the law, see Evans (n 226) 509.

[259] Karatani, *Defining British Citizenship*, 4.

identity on racist premises.[260] In the UK, however, such criticisms remained confined outside the Parliament and did not result in any institutional political opposition to anti-immigration policies. The reason probably lies in the fact that both Labour and Conservative parties, at different stages, supported the tightening of controls over who can enter the UK. As Hansen noted, the Labour party 'has criticized restrictive migration policies in opposition and extended them in office'.[261]

The debates which took place from 1948 to 1981 are important also because, for the first time, migration became an issue of great political salience in the UK, capable of determining electoral results by itself. The 'numbers game' then started: politicians began to obsessively check migration statistics, promising reduction in the migrants' inflow to their electorate.[262] Their tough policies proved successful: in the 1980s, net migration was close to zero, earning Britain the title of the 'zero-immigration country'.[263]

Joppke explained the effectiveness of the UK migration policy with the broad powers enjoyed by the executive (i.e. the Home Office). Notably, the Immigration Act 1971 conferred on the Home Office the power to make Immigration Rules: norms that regulate how border controls are conducted and how immigration-related decisions are taken by immigration officials.[264] Moreover, compared to continental states like Germany, the UK presents 'docile courts and the lack of constitutional protections for immigrants';[265] this 'absence of constitutional and judicial constraints on the

[260] In the words of Dixon: 'Patriality was justified as defining those who "belonged to Britain": but this was no more than the corollary of a racist definition of those who did not "belong".' David Dixon, 'Thatcher's People: The British Nationality Act 1981', *Journal of Law and Society* 10, no. 2 (1983): 162.

[261] Hansen, *Citizenship and Immigration in Postwar Britain*, 222.

[262] Joppke, *Immigration and the Nation-State*, 102; Small and Solomos, 'Race, Immigration and Politics in Britain', 247.

[263] Hence, this is the title of the chapter by Layton-Henry, 'Britain: The Would-Be Zero-Immigration Country'.

[264] See Section 1(3) of the Immigration Act 1971.

[265] Joppke, *Immigration and the Nation-State*, 104.

executive[…] allows the Home Office to devise and execute immigration policy as it sees fit.'[266] In sum, the Home Office enjoys huge discretion and little accountability.

Because opposition to anti-migration policies struggled to emerge at the national level, migrant supporter groups sought to challenge the migration reforms using international law. Around 300 CUKC, thanks to the support of groups like the Joint Council for the Welfare of Immigrants (JCWI),[267] lodged complaints against the UK's immigration policy before the Council of Europe (this became famous as the *East-African Asians* case).[268] The European Commission for Human Rights declared British immigration legislation discriminatory on the grounds of race and colour[269] because it treated the CUKC as 'second-class citizens'.[270] However, because of a political deadlock, the international proceedings never reached a formal conclusion, and the case was removed from the register in October 1977, leaving the UK government unpunished.[271]

The described seminal period of British migration and citizenship policies ended in 1981, when the newly elected Thatcher' government adopted the British Nationality Act. The 1981 Act fixed the inconsistencies present in the previous system, i.e. the fact that immigration controls were enforced against who was formally a British citizen. The 1981 Act established the patriality test as the main criterion to acquire citizenship

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[266] Joppke, 10. It is interesting to note that the Home Office, in displaying its duties, is formally exempted from the prohibition of racial discrimination. Elspeth Guild, 'European Developments. The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations', *Industrial Law Journal* 29, no. 4 (1 December 2000): 416–23; Terri E. Givens and Rhonda Evans Case, *Legislating Equality: The Politics of Antidiscrimination Policy in Europe* (Oxford, New York: Oxford University Press, 2014).

[267] Harlow and Rawlings, *Pressure Through Law*, 502.

[268] Andrew Drzemczewski, 'A "Non-Decision" of the Committee of Ministers under Article 32 (1) of the European Convention on Human Rights: The East African Asians Cases', *Modern Law Review* 41 (1978): 338.

[269] Since the proceedings never reached a formal conclusion, the report was only available many years later. See Drzemczewski, 'A "Non-Decision" of the Committee of Ministers under Article 32 (1) of the European Convention on Human Rights: The East African Asians Cases'.

[270] See European Commission on Human Rights, *25 Cases of Citizens of the United Kingdom and Colonies v. United Kingdom,* 4478/70, 4486/70, 4423/70, 4423/70, 4416/70, 4417/70 , 4418/70 (October 10, 1970), at 205. British law would have also been in violation of the Fourth Protocol of the European Convention for Human Rights (which enshrines the principle that 'no one shall be deprived of the right to enter the territory of the State of which he is a national'), but the British government never ratified it.

[271] Drzemczewski, 'A "Non-Decision" of the Committee of Ministers under Article 32 (1) of the European Convention on Human Rights: The East African Asians Cases', 341. The reference for the 'non-decision' is the Committee of Ministers' Deputies, Resolution DH (77) 2, October 21, 1977.

in the UK and abolished the *ius soli* principle. Eventually, the British nation obtained its (less generous) citizenship.

In this first stage of British migration policy, the governments' efforts focused on reducing primary migration from the Commonwealth. Once this goal had been achieved through the 1960s and 1970s migration reforms, the UK government set up a new target: restricting secondary movement migration, also called family migration, i.e. the immigration of spouses or family members who wanted to join their relatives in the UK. The next sub-sections will show how the British government pursued this goal and how the changed international context, this time, came in its way.

2.2 The regulation of family migration

Family migration was not of primary concern in the first stage of British migration policy. The legislation adopted during the 1960s and 1970s, while striving to reduce the entry of Commonwealth citizens and CUKC, provided a rather lenient regime for family reunification. The Immigration Act 1971, which laid the basis for the UK's migration framework, stated at Section 1(5):

> 'The rules shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed.'

This provision is interesting for two reasons. First, the 1971 Act, while dismantling almost all non-patrial Commonwealth citizens' rights to move, granted those already settled in the UK a statutory right to be joined by their family, confirming that family migration was not seen as a problem.

Secondly, the 1971 Act talks about 'wives', not about spouses, and this was not a lapse. The norm did not grant migrant women settled in the UK a right to family reunion: the legislator feared that this could have been used by male foreigners abroad to circumvent migration controls and entry to the UK via marriages of convenience. In the words of

the Minister of State, Charles Waddington: 'It would be absurd if, having tightened up the work-permit system to prevent young men coming here and going on to the labour market, we were to allow these same young men to come here by using marriage as a device.'[272] It seems that British policymakers were indulgent towards secondary movements as long as they did not entail bringing male foreigners to the UK. Especially sham marriages, or marriages of convenience, became a persistent concern of British policymakers and influenced all policies in this field.

The first provision that openly tackled marriage migration was the so-called 'husband ban', enacted by the Labour government in 1969, which prevented the entry of all male Commonwealth citizens via marriage migration, with few exceptions.[273] The ban was lifted five years later, in 1974, by the new Labour government which acknowledged the indefensibility of such blatant gender discrimination. At the same time, however, the Home Office amended the Immigration Rules so as to enable immigration officers to refuse entry clearance to foreign partners whose relationship was suspected to be non-genuine. In particular, foreign husbands were asked questions such as whether they intended to live with their wives in the UK, to test if they concluded marriage solely for migration purposes or not. These tests however were not considered sufficient by the conservatives, and their leader Margaret Thatcher made the 'war on foreign husbands' one of the main points of her electoral campaign in the 1970s.[274] As soon as Thatcher took office as Prime Minister in 1979, her government reintroduced the 'husband ban'.

At first, Thatcher's ban operated by requiring that the female sponsor had to be either born in the UK or have a parent born in the UK. This provision was effective in cutting off most applications, but its discriminatory character exposed it, again, to many criticisms. Therefore, in 1983, the government introduced new Immigration Rules targeting, this time, the detection of marriages of convenience. These new Rules shifted

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[272] Quoted in House of Commons, 1986, ii. 108, cited in Joppke, *Immigration and the Nation-State*, 118.

[273] Helena Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the United Kingdom', in *The First Decade of EU Migration and Asylum Law*, ed. Elspeth Guild and Paul Minderhoud (Martinus Nijhoff Publishers, 2011), 354.

[274] Zic Layton-Henry, "Britain: From Immigration Control to Migration Management," in *Controlling Immigration: A Global Perspective*, Stanford University Press (Wayne A. Cornelius, Takeyuki Tsuda, Philip L. Martin and James F. Hollifield, 2003), 304. Joppke, *Immigration and the Nation-State*, 120.

the burden of proof from the immigration officer to the husband abroad who now had to demonstrate that the marriage was genuine and that its 'primary purpose' was not migration.[275] Especially the 'primary purpose' test was very difficult to overcome, and it represented the main obstacle to family reunions.[276] British women protested and lobbied against the new rules and obtained their husbands' partial exemption from the test.[277] However, this again fuelled the claims of race discrimination.

Also, this time, migrant supporters resorted to the Council of Europe to challenge the government migration law. In the case of *Abdulaziz, Cabales and Balkandali*, three non-British women applied to the European Court of Human Rights claiming that the British legislation violated their rights to family life and to non-discrimination by impeding their husbands from joining them in the UK.[278] Like in the *East Asian Africans* case, the JCWI and other groups supporting migrants organised the litigation.[279] The proceedings concluded with a half victory for the applicants. The ECtHR found that British Immigration Rules did not violate the right to family life: the duty to respect family life does not oblige the UK to admit a non-citizen partner within its territory; moreover, the Court noticed that the three women could enjoy family life in their husbands' countries of origin.[280] However, the Court did find the British rules discriminatory on the grounds of sex because they treated applications differently depending on whether the sponsor was a man or a woman. Compelled by the ruling, the British government reformed the law again. However, it decided to 'level down'

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[275] Statement of Change of the Immigration Rules, HC 251, par. 57(a)

[276] Joppke reports data published by the House of Commons in 1986, according to which, in 1982, before the Rules amendment, the 82 per cent of foreign husbands' rejections were justified under objective grounds (like the wife's citizenship); after the amendment, in 1984, the 87 per cent of the husband rejections were motivated on primary purpose grounds. See Joppke, *Immigration and the Nation-State*, at 125.

[277] Patrial women's husbands were only subjected to the primary purpose test. Layton-Henry, 'Britain: The Would-Be Zero-Immigration Country', 288.

[278] European Court of Human Rights, *Abdulaziz, Cabales and Balkandali,* No. 9214/80; 9473/81; 9474/81 (28 May 1985). The right to family life is protected under Article 8 of the European Convention of Human Rights.

[279] Harlow and Rawlings, *Pressure Through Law*, 503. The case originated by the grassroots movement called 'Immigration Widows Campaign', which was based in the Islington Law Centre. See section 4 of this chapter.

[280] European Court of Human Rights*, Abdulaziz, Cabales and Balkandali,* No. 9214/80; 9473/81; 9474/81 paragraph 68.

the protection:[281] it removed the abovementioned Section 1(5) of the Immigration Act 1971 which contained the only (men's) family right provided by British law.[282] Now, men and women were equally deprived of their rights to family reunification.

The regulation of secondary migration remained firmly restrictive throughout the Conservative governments of the 1980s and 1990s. The primary purpose rule kept dominating the procedure for family reunification, putting a cap on marriage migration and creating the so-called 'immigration widows'.[283] NGOs reported that when cases of rejection based on the primary purpose rule were challenged in court, judges struggled with its interpretation, leading to the creation of a contradictory jurisprudence.[284] Still, with this rule, the UK managed to keep secondary movements under control, reconfirming itself, also in this respect, as the zero-immigration country.

2.3 The New Labour's government: a policy shift?

After eighteen years of continuous Conservative government, Tony Blair's 'New Labour' won the elections in 1997, marking the beginning of a new phase for British migration policy. With an 'unprecedented policy reversal',[285] the Labour government actively engaged in policy reforms to attract migrants to Britain by raising the number of work permits issued every year. A positive attitude towards immigration was also demonstrated during the negotiations for the 2004 EU enlargement: the UK was among the few MS that did not apply any constraint to the new Union citizens coming from eastern European countries, who immediately enjoyed free movement rights in the

[281] Deborah Brake, 'When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law', *University of Pittsburgh School of Law Working Paper Series*, 1 November 2004.

[282] The Immigration Act 1988 removed the Section 1(5) of Immigration Act 1971; Joppke, *Immigration and the Nation-State*, 114. See also Harlow and Rawlings, *Pressure Through Law*, 504, where the authors report the JCWI's account of the time where they noted how, despite the change in the law, the actual situation remained the same: the refusal rates for women spouses remained the same while the one for men spouses increased. Despite the ECtHR's condemnation, migration controls in the UK continue to discriminate on the grounds of gender.

[283] Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the United Kingdom', 357.

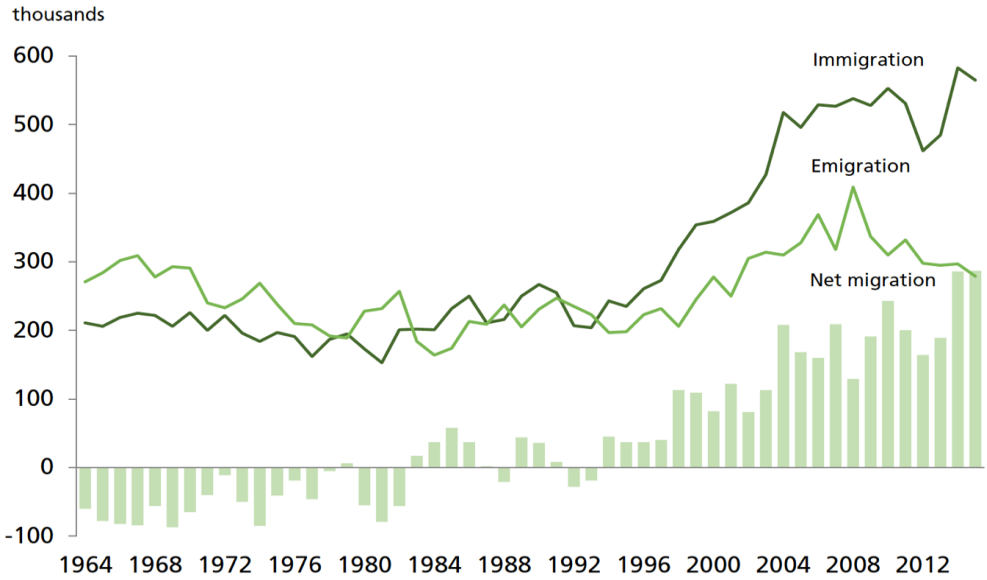
[284] David Pannick, 'The Primary Purpose Rule: A Rule with No Purpose' (London: Young JUSTICE, 1993), 8.

[285] Randall Hansen, 'Paradigm and Policy Shifts: British Immigration Policy, 1997-2011', in *Controlling Immigration, a Global Perspective*, ed. James Hollifield, Philip Martin, and Pia M. Orrenius, Third Edition (Stanford University Press, 2014), 119.

UK.[286] As Table 2 below shows, New Labour's migration policies displayed a big effect by increasing the number of migrants coming to the UK in an exceptional way.

The motivation behind New Labours' migration policy probably lay in a strong economy and a high demand for workers.[287] The city of London became the symbol of UK's economic transformation: during the 1990s, it transformed into the cosmopolitan financial capital that we know today, generating a huge demand for high-skilled international labour. Accordingly, the type of migration that the UK experienced also changed; 'a sort of "superclass" of international migrants emerged: highly skilled, highly paid economic jetsetters who are able to choose between a set of benefit packages offered by governments instead of companies'.[288] It seemed that, for once, market economy and employer lobbying prevailed over Britain's long-standing anti-migration stance.

Table 2: International migration in the UK, 1964 - 2015.[289]



[286] According to the reconstruction made by The Guardian, this was mainly due to a miscalculation. The Home Office, in 2003, produced a report saying that the UK will receive between 5000 and 13000 migrants from Eastern EU countries per year, while the Office for National Statistic estimated that between 2004 and 2012, the net inflow of migrants from the new members was 423,000. https://www.theguardian.com/news/2015/mar/24/how-immigration-came-to-haunt-labour-inside-story

[287] Zic Layton-Henry, 'Britain: From Immigration Control to Migration Management', in *Controlling Immigration: A Global Perspective*, ed. Wayne A. Cornelius et al., Stanford University Press, 2003, 330.

[288] 'Commentary', Randall Hansen at 339.

[289] Oliver Hawkins, 'Migration Statistics' (House of Commons Library, 7 March 2017), 11.

Remarkably, New Labour's change of route was limited to 'desired migration', and the government maintained a restrictive attitude towards 'unwanted migrants'. They introduced legislation against irregular migrants, ('bogus') asylum seekers and, again, sham marriages.[290] Regarding the latter, the government, on the one hand, maintained its electoral promise to abolish the primary purpose rule because it was too arbitrary.[291] On the other hand, it issued a new law stating that a TCN who wanted to marry in the UK needed a special authorization ('certificate of approval') issued by the Home Department, proving their regular stay in the UK.[292]

Arguably, the most important reform adopted by New Labour was the Human Rights Act of 1998 (HRA). Its declared intent was to 'bring rights home' by making the rights of the ECHR directly enforceable before British courts, in view of building a human rights culture in the UK.[293] The HRA had far-reaching consequences on the British constitutional system, especially because it empowered the judiciary.[294] Under the HRA, courts can review the acts of public authorities and declare them unlawful if they breach human rights; judges must also interpret British law in a way that is compatible with the HRA,[295] and when this is not possible, higher courts can issue a 'declaration of incompatibility'.[296] By these means, the HRA contributed to an ongoing process of constitutional reform leading judges to play a more important role vis à vis the executive.

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[290] Gaby Hinsliff and Martin Bright, 'Labour Fuels War on Asylum', *The Guardian*, 6 February 2005, sec. Politics, https://www.theguardian.com/politics/2005/feb/06/immigration.immigrationandpublicservices.

[291] Labour Party Manifesto 1997 (http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml).

[292] Immigration Regulations 2005 (SI 2005/15) and Asylum Immigration (Treatment of Claimants) Act 2004. Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the United Kingdom', 356.

[293] The Human Rights Act: the DCA and Home Office Reviews, page 43.

[294] England and Wales already had their Bill of Rights of 1689, but this is not binding on the entire UK and provides a very limited list of rights.

[295] Section 3 of the HRA.

[296] Section 4 of the HRA. Higher courts are the High Court, the Court of Appeal, and the Supreme Court. The declaration of incompatibility does not affect the validity of the law, though. The idea of Parliament sovereignty and its exclusive power of making the law is maintained.

Since most of the litigation in the migration field takes the form of a challenge to an administrative act of the Home Office (e.g. a deportation order), this constitutional change bears important consequences for migrants. An important example of the HRA's impact concerns the abovementioned rule that required TCNs to show a 'certificate of approval' in order to marry in the UK. With civil society's support,[297] three couples brought a judicial challenge to the law, raising the claim that it was in breach of their human rights protected by the HRA. The couples won the case before the High Court which issued a declaration of incompatibility.[298] Eventually, the litigation led politicians to reconsider the norm, and it was repealed.[299]

2.4 Conclusion: exposing the Home Office to judicial review?

The historical overview conducted in this section pointed out how migration was a central topic in the UK political debate since the second half of the twentieth century. Public opinion was very concerned with the number of migrants arriving in the UK, and the British governments, from 1962 to 1997, managed to keep migration inflow at its minimum by implementing a very restrictive migration policy. This earned the UK the name of 'deviant case': while most European countries professed restrictive approaches towards immigration but continued to experience large-scale immigration, the UK translated its restrictive promises into facts.[300] How did the British governments managed to keep immigration under control? Joppke's answer lies in 'the Home Office absolutism in immigration policy'.[301] The executive was very effective in delivering

[297] The Joint Council for the Welfare of Immigrants intervened in all the stages of the proceedings, and the Aire Centre intervened before the Court of Appeal and the House of Lords.

[298] High Court, *Baiai and others v. Secretary of State for the Home Department,* [2006] EWHC 823 (Admin). The Joint Council for the Welfare of Migrants and, at a second stage, the AIRE Centre intervened to support the claim of incompatibility with the ECHR and the HRA.

[299] Another example of how the HRA was used to defend migrants' rights is discussed in Parnesh Sharma, *The Human Rights Act and the Assault on Liberty: Rights and Asylum in the UK* (Nottingham: Nottingham University Press, 2011).

[300] Gary P. Freeman, 'Britain, the Deviant Case', in *Controlling Immigration: A Global Perspective*, ed. Wayne Cornelius, Philip Martin, and James Hollifield (Stanford University Press, 1994), 297.

[301] Joppke, *Immigration and the Nation-State*, 137. See also Hansen, *Citizenship and Immigration in Postwar Britain*, 25;

migration policies because it had no institutional constraints: British courts were docile, and individual rights were not protected from law-maker's interference. Also Sterett noted how: 'Britain is one of the most centralized and least rights-oriented states in Europe. […] It has no established way of shaping majoritarian choice to account for any minority concerns.'[302]

Against this backdrop, the 'progressive enlargement of British judges' constitutional role' assumes a great importance.[303] This constitutional process started about fifty years ago, before the adoption of the HRA, and affected the separation of powers between the judiciary, on the one hand, and the executive and the legislative, on the other. Constitutional lawyers traced the origin of this constitutional change to three different factors.[304] First, the tradition of constitutional review, coming from the USA and continental Europe, exerted its influence on the UK legal culture. Then, the accession to the European Community provided British judges with a power that they never had before: to scrutinize UK law vis à vis a superior source, EU law, and to set aside the conflicting national legislation; this was a constitutional revolution for a country based on parliamentary sovereignty. And last, as said in the previous section, the strengthening of individual rights' protection via the introduction of the HRA. This new legal setting 'rejuvenated the judges'[305] who were previously supine in front of the parliament and the executive.[306]

The strengthening of the judiciary *vis à vis* other powers holds important consequences for the migration field. In fact, migration legal actions generally start with an individual

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[302] Susan Sterett, 'Caring about Individual Cases: Immigration Lawyering in Britain', in *Cause Lawyering: Political Commitments and Professional Responsibilities*, by Austin Sarat and Stuart A. Scheingold (New York: Oxford University Press, 1998), 294.

[303] Anthony King, *The British Constitution* (Oxford: Oxford University Press, 2010), 115.

[304] King, chap. 5; Roger Masterman and I. Leigh, eds., *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives*, first edition, Proceedings of the British Academy 183 (Oxford: Published for the British Academy by Oxford University Press, 2013).

[305] Lord Neuberger's opening address to the PLP annual Judicial Review Trends and Forecasts conference, on October 17, 2017. Available at: http://www.publiclawproject.org.uk/resources/265/the-role-of-the-judges-in-a-post-referendum-world

[306] King, *The British Constitution*, 119.

challenging an executive's act and asking for an appeal or a judicial review;[307] moreover, the huge majority of judicial review cases are in the field of migration.[308] Because many migration decisions have important repercussions on migrants' human rights, the HRA is an important tool for scrutinizing the Home Office. Finally, and importantly for this chapter, judicial empowerment is a necessary precondition for legal mobilization: British judges' mutated disposition towards the executive created new opportunities for legal mobilization, both at the national and at the EU level. Unfortunately, it seems that this trend has been recently reversed by the 2010-2015 Coalition Government which adopted reforms in 2013 and 2014 that severely restricted migrants' access to justice (we will discuss them in section 7).

The next section will focus on the EU influence over UK migration law. As said in the introduction, this chapter focuses specifically on litigation for the rights of TCNs that are family members of Union citizens; therefore, the next section provides an overview of the relationship between UK migration law and EU law in the field of marriage migration and explains the EU laws that were relied upon for legal mobilization.

3. The advent of EU free movement rights and their impact on the UK's migration framework

The Treaty does not touch any of the matters which concern solely the mainland of England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the

[307] In the British system, appeals and judicial reviews are different legal actions decided by different bodies. As the law stands, the judicial appeals of an immigration decision are decided by the first-tier Tribunal and second-tier Upper Tribunal (Immigration and Asylum Chamber) and concern the facts and the merits of the case. Instead, judicial reviews are more complex and longer proceedings, under the competence of Administrative courts and (to a less extent) of the Upper Tribunal; these reviews concern errors of law. Important reforms have been introduced in 2013 and 2014 that greatly limited immigrants' rights to appeal, as I will discuss in section 7.

[308] Susan Sterett, 'Judicial Review in Britain', *Comparative Political Studies* 26, no. 4 (1 January 1994): 435; Robert Thomas and Joe Tomlinson, 'A Design Problem for Judicial Review: What We Know and What We Need to Know about Immigration Judicial Reviews', *UK Constitutional Law Association* (blog), 16 March 2017, https://ukconstitutionallaw.org/2017/03/16/robert-thomas-and-joe-tomlinson-a-design-problem-for-judicial-review-what-we-know-and-what-we-need-to-know-about-immigration-judicial-reviews/.

Treaty is like an incoming tide. It flows into the estuaries and up the river. It cannot be held back….[309]

In 1988, Prime Minister Margaret Thatcher began her 'Bruges speech', congratulating the conference's chairman for the courage demonstrated in inviting her to speak about the European Community: 'it must seem rather like inviting Genghis Khan to speak on the virtues of peaceful coexistence!'[310] The speech is emblematic of Thatcher and the Conservative party's hostile attitude towards European integration; an attitude that later became known as Euroscepticism.[311] The UK joined the European Economic Community in 1973, and its forty-two years of membership have been punctuated by several frictions and crises.[312] Looking back, it is easy to recognise the warning signs of the UK's decision to leave in 2016.

In her study, Darian-Smith uses the debates surrounding the construction of the Tunnel Channel connecting England to France to depict Britons' attitude towards the EU. She notes that British people look at the EU through their colonial-past lenses: 'England finds itself taking on the role of colonized, subject to the politico-economic power of the EU'.[313] Through the same lenses, the Britons looked at the abolition of the internal border controls in Europe: people from the Commonwealth and irregular migrants could now reach the UK more easily.[314] Remarkably, Darian-Smith's analysis resonates well with the arguments put forward 17 years later by the 'Leave' campaign in the Brexit referendum, where the rhetoric of 'taking back control' and the quest for fully governing the UK's borders and migration were at the forefront. Migration and membership of the EU have always been linked in British public debate.

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[309] Lord Denning in *Bulmer v. Bllinger* [1974] CH 401 at 418.

[310] Margaret Thatcher, Speech to the College of Europe ("The Bruges Speech"), 20 September 1988, College of Europe Archive.

[311] Simon Usherwood and Nick Startin, 'Euroscepticism as a Persistent Phenomenon*', *JCMS: Journal of Common Market Studies* 51, no. 1 (1 January 2013): 1–16.

[312] Just two years after its accession, the UK issued the first referendum on its membership: the United Kingdom European Communities membership referendum held on 5 June1975.

[313] Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe*, University of California Press, 1999, 4.

[314] This is a widespread perception, although the UK is not part of the Schengen Agreement which abolished border checks between EU Member States.

Britain's concerns over migration shaped its European integration path. Over the years, the UK negotiated several exemptions from EU migration laws, with the aim of minimizing its influence over national policy. The Protocols on the UK's possibility to opt-in and opt-out are the clearest example of this attitude.[315] First, the UK obtained an opt-out facility: the possibility of being exempted from the Schengen Agreement and the related rules about the abolition of internal border checks. Then, the UK stipulated, through another Protocol, an opt-in clause that modulates its participation in the Area of Freedom Security and Justice. As noted in the introduction, the UK, in principle, is not bound by any measure pertinent to that Area, which includes the European migration and asylum policy; when, and if, the UK government wants to participate in a specific measure, it can opt in.

Yet, the UK could not escape the impact of EU citizenship and free movement law on its legal order. In fact, these are part of EU primary law, and the UK could not 'opt-out' from them: it is equally bound as any other MS. These norms have an indirect impact on its migration policy because they regulate the entry and residence of EU migrants and their TCN family members, as we shall see in the next subsection. This turned out to be particularly problematic, especially because EU law consistently proved more liberal than British migration law.

3.1 The Surinder Singh legacy and reverse discrimination

EU law recognises free movement rights to both EU citizens and their family members, regardless of their nationality; they can travel and reside without restriction in the territory of all the MS for up to three months.[316] After that period, subject to them being 'economically active' or 'self-sufficient' and being covered by a health insurance, Union citizens and their family members have an indefinite right to reside in the host MS and they must be treated equally to national citizens.[317] Limitations and conditions apply, especially in case a Union citizen is considered a threat to national security,

[315] See Treaty of Amsterdam, Protocol integrating the Schengen acquis into the framework of the European Union and Protocol (No 21) on the Position of The United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, Annex to the TFUE.

[316] Article 21 of the TFEU, further detailed and expanded in the Citizenship Directive 2004/38.

[317] Article 18 of the TFEU and Article 24 of the Citizenship Directive 2004/38.

public order or public health, or in case he/she turns out to be an 'unreasonable burden on the public finances of the host Member State';[318] however, these limitations have been interpreted narrowly by the CJEU, which was the first promoter of the idea that 'Union citizenship is the fundamental status of Member States' nationals'.[319]

The reason why TCN family members enjoy free movement rights lies in the necessity to fully guarantee the rights of Union citizens. These would be deterred from moving to another Member State if their family members could not join them abroad. In *O. and B.*, the CJEU specified that TCN family members do not have autonomous rights but rather 'derived' rights because they are 'consequential to and dependent on [those] of the Union citizen'.[320] Accordingly, TCN family members enjoy the same freedom and benefits granted to Union citizens, but, at the same time, their status and the legitimacy of their stay depends entirely on that of their Union citizen family member.

The free movement rights recognised to Union citizens and their families are fairly generous and have created some odd situation. In the UK, the disparity between British immigration law and EU law led to what became famous as 'reverse discrimination': EU migrants residing in the UK enjoy more family rights than British nationals in their own country.[321] In order to obtain a family visa, a TCN family member of a UK citizen needs to give proof of a 'minimum income', have a good knowledge of English, pay a very high application fee, etc. These and other requirements do not apply to EU migrants and their TCN family members.

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[318] Court of Justice of the European Union, *Baumbast and R, C-413/99*, ECLI:EU:C:2002:493 paragraph 90.

[319] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, at paragraph 31.

[320] Court of Justice of the European Union, *O. & B.*, C-456/12 (12 March 2014).

[321] This has been acknowledged even in the case law of the CJEU, see Court of Justice of the European Union, *Metock*, C-127/08 (25 July 2008).

Table 3: Requirements for family reunification: on the left, the requirements when the sponsor is a UK citizen, on the right, when the sponsor is an EU mobile citizen.[322]

Requirements for a TCN family member of a UK citizen	Requirements for a TCN family member of an EU migrant
• Pay the visa fee (£3,500) • Show a minimum income (at least £18,600 a year with no children) • Spouse: Minimum age (18) and proof that relationship is genuine and subsisting • Have a good knowledge of English (B1 or B2) • Give information on previous applications • Pay the healthcare surcharge	• Proof of relationship • The EU migrant is a worker or has sufficient resources.

In this respect, the case of *Surinder Singh,* referred to the CJEU in 1990, set the tone of the following years-long discussions.[323] The case concerned a couple, a British and an Indian citizen, who moved to Germany to work and returned to the UK two years later. British authorities refused to grant Mr Singh a residence permit, and he appealed this decision invoking the free movement rights that he acquired as the spouse of a Union citizen in Germany. In its ruling, the CJEU held that a British citizen, who returns to the UK after having exercised free movement rights in Germany, retains free movement rights for her and her family. The idea is that a TCN spouse must enjoy '[a]t least the same rights of entry and residence as would be granted to him or her under Community law, if his or her spouse chose to enter and reside in another Member State'.[324] Again, the CJEU adopted a functionalist rationale according to which TCNs' rights are instrumental to ensure Union citizen's free movement: the citizen would be deterred

[322] These requirements are laid down in the British Immigration Rules and are often subject to change. These were the requirements in force until 2017, when I conducted the investigation in the UK. See also ILPA information sheet, "Family Migration: sponsoring a partner under the Immigration Rules and the minimum income requirement", available at: http://www.ilpa.org.uk/resources.php/33128/information-sheet-family-migration-sponsoring-a-partner-under-the-immigration-rules-and-the-minimum-

[323] Court of Justice of the European Union, *Surinder Singh*, C-370/90 (7 July 1992).

[324] Court of Justice of the European Union, *Surinder Singh*, C-370/90 (7 July 1992), at 23.

from exercising her free movement rights in the first place if she knew that she would face problems upon return to her home Member State.

With the *Surinder Singh* decision, the CJEU extended the scope of the protection of EU free movement law so as to cover the situation of Union citizens who return to their home Member States with their (TCN) family members. As I will show, the *Surinder Singh* case had widespread consequences in the UK; the generous interpretation that the CJEU gave to Union citizenship and free movement norms acted as a catalyst, making people whose residence rights were denied under British law, ask for EU residence rights instead.

Although British lawmakers diligently incorporated EU free movement law into British law, studies show that the rights of Union citizens and their family members are not fully protected in the UK.[325] Shaw, Miller, and Fletcher noted that there still exists a 'friction between UK Immigration Law and EU Free Movement Law',[326] which affects particularly the area of the rights of TCN family members of Union citizens. This area is characterized by a high rate of refusal of residence applications by the Home Office and a high level of litigation.[327] It seems that, more than being a problem of transposition of EU law, there is an issue over its restrictive interpretation by the Home Office. The reluctance of British authorities is a key factor to understand the legal mobilization analysed in the following sections: indeed, many of the people whose application for family reunification was refused, turned to courts and claimed free movement rights.

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[325] The UK transposed the Citizenship Directive 2004/38 with the adoption of the Immigration (European Economic Area) Regulations 2006, SI 2006 No. 1003. Amended by The Immigration (European Economic Area) (Amendment) Regulations 2009, SI 2009 No. 1113. The Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011 No. 1247. The Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012 No. 1547; The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012, SI 2012 No. 2560

[326] Jo Shaw, Nina Miller, and Maria Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction Between UK Immigration Law and EU Free Movement Law* (Edinburgh Law School Citizenship Studies, 2013).

[327] Shaw, Miller, and Fletcher, 23. '[T]he UK authorities routinely take longer than they are permitted to decide upon applications by TCN family members, have erred in the manner in which they have applied the rules relating to the evidencing of family relationships, and have been less than careful in their management of documentation and correspondence.'

The following sections show how individuals, supporter groups, and lawyers saw in EU free movement law an opportunity not only to obtain a residence permit but also to challenge and transform UK migration law, to make it less restrictive, to expand its personal scope, or to circumvent its application.

4. The UK Legal Mobilization

The historical overview pointed out how, from 1962 to 1997, migration policy in the UK was characterized by the 'zero-immigration' target: anti-migration positions led the political scene and successfully established a very restrictive system of migration controls, with little recognition of migrants' rights. This anti-migration stance was endorsed by both the Conservative and the Labour party, leaving migrants and their supporters without political representation and with little grounds to challenge the Home Office judicially. When the Thatcher era came to an end, new legal tools became available to defend migrants' rights: the Human Rights Act (HRA), incorporating the ECHR into British law, and Union citizens' rights which had been strengthened by the case-law of the CJEU. In addition, the traditionally docile British judiciary has gradually become more powerful, thanks to the accession to the European Community and the new review power acquired, also thanks to the HRA. This change in the British constitutional framework opened new important opportunities for legal mobilization. Migrants' rights supporters transformed HRA and EU law into crucial tools to enhance the scrutiny over the activity of the Home Office and to challenge any of its acts which are in breach of migrants' rights.

The second part of this chapter shows how the CJEU became a venue to challenge British migration policy for otherwise politically unrepresented migrants. The focus is on the preliminary references in the field of TCN migrants who are family members of Union citizens. I argue that migrants' supporters have relied on the CJEU to expand migrants' rights and constrain the activity of the Home Office; this was possible especially thanks to the wide range of associations supporting the migrants' cause and to the presence of lawyers specialized in EU law who litigated in court against the Home Office.

4.1 Learning from British mobilizations in other fields

Legal mobilization in the UK has been the object of scholars' investigations and debate probably more than any other EU country. Harlow and Rawling noted that, in Britain, legal mobilization as a social phenomenon experienced a relevant expansion forty years ago: during the 1970s and 1980s, groups representing minorities 'had shifted their attention […] towards the use of legal techniques to secure given objectives'. The authors interpreted this shift as a reaction to the closure demonstrated by the conservative governments, and especially Thatcher's, towards their campaigns.[328] In their account, because the most traditional ways of lobbying and campaigning proved unsuccessful, organizations in support of minorities have put in place a litigation strategy. This is an argument that we see often in the legal mobilization field, and also Hilson, in his comparative analysis of three UK cases (in the fields of environment, animal rights, and gender equality), stated that the lack of political opportunities might have influenced the choice of social movements to adopt a litigation strategy.[329] Importantly, he pointed out that the openness or closeness of political and legal opportunity is only one factor that has to be considered together with the availability of resources and the ideology of the social movement considered.[330]

Also Alter and Vargas, in their study on the use of EU law and the Court to advance gender equality in the UK, pointed out that litigation was a second-best, yet successful strategy for UK groups.[331] The authors noted that the UK equality body 'turned to a litigation strategy when its other efforts at influencing the national political agenda failed'.[332] And, as pointed out also by other authors, this European litigation strategy yielded important results:[333] the equality body gained access to the CJEU through

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[328] Harlow and Rawlings, *Pressure Through Law*, 48.

[329] Hilson, 'New Social Movements', 239.

[330] Hilson, 241.

[331] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies'.

[332] Alter and Vargas, 458.

[333] Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK'; Barnard, 'A European Litigation Strategy'.

preliminary references and obtained the enforcement of the more protective EU law standards into the British legal system.

However, studies conducted in the environmental sector led to a less positive evaluation on the use of EU litigation strategies in the UK. In his article on British preliminary references to the CJEU, Golub first pointed out that, in general, the UK is one of the EU MS that refer the least; then, he analysed a series of cases in the field of environmental protection to show how British courts refrain from making references to the CJEU (even last-instance courts) and often do not apply EU law.[334] In Golub's view, the reason behind this lack of references lies in the special attitude of British judges who 'loathe to make referrals' and are 'unwilling to co-operate with the ECJ in promoting European integration.'[335] According to his account, British judges' particular disposition towards EU law and the CJEU is a result of domestic political factors, and in particular of the 'Euro-pessimism' that dominates the political debate in the UK.[336]

Looking at these opposite findings, it seems that while in the field of gender equality the CJEU has been successfully used as means for enhancing women's rights, in the field of environmental protection, access to the CJEU has been denied. On the basis of this, we should also expect that the number of preliminary references from the UK must vary greatly depending on the subject-matter dealt with. This points to a flaw in Golub's argument: how can British judges be reference-adverse in certain fields and not in others? If the British hostility lies in Eurosceptic discourses, shouldn't these affect all judges in the same way? For Stone Sweet and Brunell, this flaw was enough of a reason to dismiss Golub's argument as non-convincing.[337]

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[334] Jonathan Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', *West European Politics* 19, no. 2 (1 April 1996): 369.

[335] Golub, 368.

[336] Golub, 377.

[337] Stone Sweet and Brunell argue: 'UK judges are not 'loath' to co-operate with the ECJ compared with judges in other member states. UK judges refer more references in some areas than some other national judges, and fewer references in some areas than some other national judges.' Stone Sweet and Brunell, 'The European Court and the National Courts', 88.

In general, the studies that try to explain reference variation by focusing only on national judges' behavioural factors,[338] i.e. on whether they are 'reference-prone' or 'reference-adverse', expose themselves to the same criticism. They assume that the decision to refer depends entirely on the national court, which is true in the law (art. 267 TFEU) but arguably disproved in practice. Even if data on the general reference rate in the UK confirm Golub's hypothesis that British courts are among the most reference-adverse in Europe,[339] this does not hold true in the subject-field object of this chapter where UK courts referred more than any other court in the EU. Alter's hypothesis on lower courts being more prone to refer is not confirmed either (only six out of twenty references came from first-instance courts). But, even more importantly, by adopting a bottom-up approach, this study offers a different perspective on how the preliminary mechanism works, thereby emphasizing the role of the parties, of the politics behind litigation, and of the networks that support litigants.

5. Who mobilizes EU free movement law in the UK?

As mentioned in the introduction, British courts have referred a striking number of preliminary references to the CJEU regarding the rights of TCN migrants, specifically those of Union citizens' family members. If we take a court-centric approach, we would conclude that British judges are especially inclined to refer. Also, according to other studies' findings, we would expect that these preliminary references originated from first-instance tribunals. However, at least in the migration field, these findings do not hold true, and we need to find an alternative explanation.

Building an explanatory theory that focuses only on courts and judges' propensity to refer is rather unsatisfactory because it is too narrow. Judges do not operate in a vacuum: to make a reference, judges need a case where a migrant's lawyer asks to review a Home Office's act vis à vis EU law standards. Also, in most instances, the lawyers of the parties are the ones who point out to the judges the absence of *acte clair*

[338] Morten Broberg and Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation?', *European Law Journal* 19, no. 4 (1 July 2013): 489.

[339] Broberg and Fenger, 500.

and the need to consult the CJEU. In light of this, I argue that to understand the high number of references regarding TCN rights in the UK, we need to understand who supports migrants' lawsuits and who provides them expertise in EU law. This change of perspective in the analysis, also called 'standpoint shift', characterizes the legal mobilization approach.[340]

Judges who are willing to refer and the presence of groups and lawyers supporting migrants are important conditions for the emergence of a legal mobilization, provided that access to courts is granted. Since the cost of litigation is very high in the UK, one might expect that this can prevent the use of courts by minority groups and their supporters; indeed, the UK has been labelled an 'inhospitable environment' for legal mobilization.[341] However, the cost of proceedings is in part mitigated by the fact that legal aid is a long-standing tradition in the British context.[342] Also, charities and NGOs often intervene in proceedings as third-parties, whereby they have the possibility of having a say without bearing the costs of litigation. These third-party interventions are analogous of the US' *amicus curiae* and have become more common in recent years: they are an excellent way to reach public attention at a relatively low cost.[343] When NGOs file a third-party intervention, the public relevance of the case becomes apparent, both to the deciding judge and to the broader public. However, this does not mean that the cases without third-party interventions have no public interest component: as the three legal mobilization cases that I analysed show (section 6), often migrant supporters operate behind the scenes.

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[340] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK', *Law & Society Review* 46, no. 3 (1 September 2012): 526.

[341] Vanhala, 529. Beyond litigation costs, Vanhala bases her evaluation on the fact that the UK is characterized by "a traditional distaste for enshrined rights, a legal culture privileging parliamentary sovereignty and the comparatively slow nature of new social movement development when considered in light of many other European nations (Rootes 1992)." To this, she adds the "conservative" nature of the English judiciary. Each of these factors are the object of analysis in this chapter, which points out how the advent of EU rights and culture affected and opened up the LOS of the UK.

[342] Harlow and Rawlings, *Pressure Through Law*, 243. To access legal aid, a person must pass a means test and a merits test: only people with relatively low income and with reasonable prospects of success will receive the benefit.

[343] To obtain permission to intervene, third-parties need to convince the court that their intervention will make a relevant contribution to the case, will not negatively affect the parties, and will be non-partisan. Indeed, sometimes, the interest of the intervener might conflict with that of a party, leading the latter to oppose a permission for an intervention. See Rule 54.17 Rule 52.11 of the Civil Procedure Rules. See also Public Law Project, 'Third-party intervention – A practical guide', PLP Guides for Practitioners, 2008.

In this section, I describe the groups and the professionals who give support to migrants with the aim of defending and strengthening their rights, as well as of enhancing scrutiny over the Home Office's activities. I divided the actors into three categories: the first is that of (publicly funded) legal advisory centres, the second is composed of charities (NGOs) with a legal focus, and the third of lawyers with an expertise in EU and migration law. But first, a clarification is necessary: in the British system, a lawyer can be either a solicitor or a barrister; the first is in charge of establishing a first contact with clients, interacting with them, and preparing the documents for the case in courts. The barristers, instead, are specialized lawyers that usually intervene in complex cases and have the specific task to represent the client in court, following solicitors' instructions.

Below, I provide a list of associations and groups that act in court in support of migrants, but it is not exhaustive. I have identified these actors because they were active in or linked to cases that have been referred to the CJEU, but probably there are many others that have been as active as these but less visible or less lucky in reaching the CJEU. Still, having a list is useful to give an idea of the rich and lively scene of migrant support groups operating in London and of the UK's well-established tradition of legal mobilization. In my view, this stands in contrast with Joppke's observation that there has been no dissent against the anti-migration policy in the UK: dissent took the form of grass roots organizations, charities, and social movements; it may be they have not been active within the British Parliament or in party politics, but they made their voice heard in the streets and, particularly relevant to this chapter, in court.

5.1 Legal Advisory Centres

As mentioned before, the UK had been historically very concerned with the problem of access to court and has a long-standing tradition of legal aid.[344] The field of migration is no exception: the Immigration Act 1971 provided for the grant of 'financial support for organizations helping persons with rights of appeal';[345] this was realized through

[344] First introduced with the Legal Aid Act of 1949.

[345] Section 23 of the Immigration Act 1971. 'The Secretary of State may with the consent of the support for Treasury make grants to any voluntary organisation which organisations provides advice or assistance

the creation of an *ad hoc* institution, the United Kingdom Immigrant Advice Service (UKIAS), in charge of providing free legal advice to migrants. In the same years, during the 1970s, legal aid reached its maximum expansion, enabling lawyers to represent the more disadvantaged groups in society, among which are migrants. These circumstances led to the creation of many legal advisory centres across the UK, either managed by the UKIAS or sponsored by local councils; these centres have among their staff migration lawyers who work as solicitors under legal aid schemes. The UKIAS was split into two different organizations in 1993: one called the 'Immigration Advisory Service' and the other called 'Refugee and Migrant Justice'. These centres sponsored and supported many litigation proceedings in the field of migration and refugee law, until the day when cuts to the legal aid forced them to close (see section 7).

Another important part of the British civil work/associations' history is the Islington Law Centre; it was established in the 1970s and is based, as the name suggests, in the Islington borough, in North-East London. The Islington local council provided the Law Centre with some funds and grants which were used to employ staff, mainly community workers and solicitors. Don Flynn, who worked at the Centre for eleven years, told me that in the 1970s it was the hub for many associations active in the neighbourhood: trade unions, environmental organizations and 'all sorts of community activists.'[346]

> There was a team of lawyers at the heart of the Law Centre. But then, in addition, there were people like me, who were getting out of the office and going to the local housing estates, or wherever, in order to see what the problem was, what people were experiencing, and then seeking to find a solution.[347]

When Don Flynn started working at the Islington Law Centre, its work dealt mainly with public sector housing. Don proposed addressing also the migrants' situation and the Centre offered him a two-day intensive training course on basic immigration law: 'In those days, after two days of immersion in immigration law you were amongst the

for, or other services for the welfare helping persons with rights of, persons who have rights of appeal under this Part of this of appeal.'

[346] Don Flynn, Interview of 14 December 2016, London.

[347] Don Flynn, Interview of 14 December 2016, London.

leading experts on the issue.'[348] As soon as the Centre advertised that they were working on immigration, a long queue of people formed in front of its door: immigration was clearly a common grievance in the community. In the Islington Law Centre, Don Flynn discovered his passion for the field of migration, to which he has dedicated four decades of work. He started to work at the Islington Law Centre as a community worker in 1977, then he worked for the Joint Council for the Welfare of Immigrants, and finally, in 2006, he established his own NGO, Migrants' Rights Network.[349]

[The Immigration Advisory Centre acted as solicitor in the case of *McCarthy*, 434/09]

5.2 Charities working in the field of migrants' rights

The Joint Council for the Welfare of Immigrants

During the 1960s, another important institution for migrants' rights emerged: the Joint Council for the Welfare of Immigrants (JCWI). It was founded in September 1967 following a meeting of more than 200 representatives of different ethnic minorities in a Southall cinema.[350] The aim was to create an apolitical organization capable of bringing immigrants' groups together that had previously been divided by different political views. Southall is a neighbourhood in London also known as 'Little India', due to its large immigrant community from South-East Asia. The first leader of JCWI was indeed a representative of the Indian Workers' Association of Southall, Vishnu Sharma.[351] The JCWI's work consists of a combination of casework, strategic litigation, policy campaigns, and training for migration lawyers. It also monitors the government's (and the Home Office's) activities, and it does not receive government funding to preserve its independence. Most likely, this is the reason why it is 'perennially overworked and underfunded'.[352]

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[348] Don Flynn, Interview of 14 December 2016, London.

[349] http://www.migrantsrights.org.uk/

[350] Matthew Hilton, *A Historical Guide to NGOs in Britain: Charities, Civil Society and the Voluntary Sector Since 1945* (Palgrave Macmillan, 2012), 158.

[351] http://www.iwasouthall.org.uk/

[352] Harlow and Rawlings, *Pressure Through Law*, 521.

The JCWI is today still one of the leading national, independent legal charities specialised in British immigration law. Don Flynn worked many years for them, and so described their work in strategic litigation:

> That was literally at the level of saying – look, we are looking for a case that has got these features in it. If you have got anybody coming to visit your centre who has got these features in it, please let us know because we think there is a basis to challenge the way in which the government has chosen to interpret this aspect of law.[353]

[The JCWI acted as solicitor in the case of *Akrich*, C-109/01; it brought several cases before the ECtHR, among them the well-known '*South East Asians'* and '*Asian Wives'*, discussed in section 2]

The AIRE Centre

The Advice for Individual Rights in Europe (AIRE) Centre is a British charity with a European focus. Despite being very well known in all of Europe and having brought hundreds of cases before national and international courts, the AIRE centre is a surprisingly small charity with limited resources, which counts only eight lawyers among its staff. The AIRE Centre was set up by her founder, Nuala Mole, 'specifically to assist individuals to obtain the rights they are guaranteed by international agreements but that they have not been accorded by their national authorities'.[354] They achieve this goal through different activities: by conducting or intervening in litigation both at the national and international level (before the ECtHR especially), by supporting and advising lawyers and organizations working in their same field, and by providing legal advice to individuals and legal training to judges and lawyers all around Europe.

The AIRE centre is based in London, and from its office, monitors the activity of the European courts. They produce monthly a legal bulletin which summarises legal

[353] Don Flynn, Interview of 14 December 2016, London.

[354] Catharina Harby, 'The Experience of the AIRE Centre in Litigating before the European Court of Human Rights', in *Civil Society, International Courts and Compliance Bodies*, ed. Tullio Treves, 2005, 41.

decisions from the ECtHR in several European languages (e.g. Albanian, Serbian, Romanian) so as to facilitate the awareness of European rights. Moreover, they have 'case watch' in the British courts: people that advise them if an interesting case has been brought, so that they can decide whether to intervene or not in the proceedings.[355] In fact, in the UK, because of limited resources and high litigation costs, the AIRE centre normally acts as a third-party intervener, with few exceptions. To fund its activities, the AIRE Centre counts in part on legal aid (which is not sufficient) and on private donors.

[The AIRE centre intervened or acted as solicitor in the cases of *Rahman*, C-83/11; *Alarape and Tijani*, C-529/11; *NA*, C-115/15; *MA, BT, DA,* C- 648/2011; *N.S.*, C-411/10]

Public Law Project

The Public Law Project (PLP) was founded in 1990, with the object of aiding people who historically have had little or no access to public law remedies. The PLP states three main aims on its website: 'to increase the accountability of public decision makers; to enhance the quality of public decision making; and to improve access to justice.' In their view, judicial review is intrinsically linked to the public interest: it is not only finalized to obtain a just redress for the litigant, but it is also a form to enhance the accountability of the public administration, so as to increase the standard of its decisions. The charity is based in London and relies on a small number of staff (among them solicitors) who undertake casework, training, campaigns, and research.

[PLP's lawyers acted as solicitors in the cases of ZZ, C-300/11 and *Tolley*, C-430/15]

5.3 Migration Practitioners

Immigration Law Practitioners' Association (ILPA)

[355] Interview with Adrian Berry, London, 23 November 2016.

The initial lack of expertise in the migration field was addressed with the creation of the ILPA. This is a network of immigration practitioners and legal academics, which has its own official journal, the *Journal of Immigration, Asylum and Nationality Law*, and its website.[356] ILPA offers training to its members and regularly publishes information material on the most recent law reforms. Although ILPA generally does not directly participate in litigation for migrants' rights, its members do. Also, the ILPA's advisory service offered expertise and support to groups such as JCWI.

When the EU came to play a bigger role in the field of migration, a sub-committee in ILPA decided to focus on EU law; members of other charities were also part of the sub-committee, like Don Flynn and Nuala Mole of AIRE (see before), together with EU law professors like Elspeth Guild, who is now the chair of the sub-committee, and non-British migration experts, like Kees Groenendijk. Indeed, the presence of international experts testifies the sub-committee's goal of building a transnational network of EU law migration experts.

Barristers specialized in EU law

As we saw, charities and legal advisory centres often rely on their staff lawyers to bring cases and represent people before domestic and international courts. However, these lawyers normally act as solicitors, and when their cases arrive at courts, and especially the highest jurisdictions, they need to rely on barristers to advocate for their clients in court. In London, according to Barrister Simon Cox:

> there is a very strong and committed immigration bar. I guess, thirty people who specialized in immigration, who always represent immigrants and never represent the government, conscious about trying to advance migrants' rights.[357]

Indeed, if we look at the names of who represents migrants before the CJEU, we realize that there are often the same names that appear. Someone might argue that this is in conflict with the UK 'cab-rank rule', according to which barristers should be impartial, and accept whatever case is proposed to them. For instance, if the Secretary of State of

[356] See ILPA website: http://www.ilpa.org.uk/

[357] Interview with Simon Cox, London, 18 November 2016.

the Home Department asks one of these migration barristers to represent the Home Office, he/she must accept the mandate. The 'cab-rank' rule was originally conceived to guarantee that even the person charged with the more ignominious crimes has access to judicial representation by a barrister; but, this is also a way for the government to test the loyalty of barristers.[358] However, in practice, things work differently, as my interviewees told me: barristers, if they wish so, can simply refuse to represent the Home Office by saying they are 'too busy', and there will be no consequences.[359]

London sees a high concentration of courts and tribunals and, next to these, illustrious law firms. This environment, on the one hand, increases competition among practitioners and even among charities and NGOs; on the other, it facilitates the exchange of information and the prolificacy of litigation. As Barrister Adrian Berry told me:

> What is true about free movement litigation is that we are quite involved, we are not just waiting in that kind of reactive way for clients to be in need our assistance, we are actually trying to find points to develop the law.[360]

The procedure for the submission of preliminary reference confirms barristers' proactive role: in British courts, it is common practice that, first, the parties agree on the questions and the statement of facts;[361] then, the court, eventually amending the text proposed, orders the reference.

Internal and inter-institutional competition affects barristers, also if they work for public interest organizations. They are very publicity-conscious: they know that if their case arrives at an international court, they will gain in terms of reputation and career or the organization represented can get the attention of possible donors. However, the search for publicity might negatively impact on the cases: it might create a conflict between the interest of the individual party (who normally prefers a swift trial with the

[358] Interview with Elspeth Guild, London, 16 November 2016.

[359] This was confirmed by both the interviews with Barristers Simon Cox and Adrian Berry.

[360] Interview with Adrian Berry, London, 23 November 2016.

[361] At times, discussion upon the text of a reference does not proceed smoothly. Simon Cox told me that, for instance, in the cases of *McCarthy* (see later) and in that of *ZZ* (C-300/11), the back and forth with the barristers representing the Home Office lasted months.

best possible individual outcome) and the barrister or the public organization's goal which might prefer a longer trial with broader collective impact and an international outlook. Also, internal competition can lead lawyers and members of civil society to avoid sharing information on the cases, threatening cooperation and mutual learning.

6. Stretching the boundaries of EU free movement law: Three cases of legal mobilization in the field of marriage migration

This section analyses three selected preliminary references that British courts have submitted to the CJEU. In line with the scope of this chapter, they are all in the field of the rights of TCNs who are family members of Union citizens. Specifically, the three rulings deal with cases where EU free movement law was invoked for static citizens: the so-called 'purely internal situations'. In the cases of *Akrich*, *Zhu and Chen*, and *McCarthy,* a Union citizen and her TCN relative adopt strategic behaviours in order to fall into the protection of EU free movement law; this was because EU law is more generous than UK law and gives the applicants better chances to avoid deportation.

My choice fell on these three cases, among the twenty submitted by British courts, for two reasons.[362] First, they are a good example of how migrant supporters try to stretch the boundaries of EU free movement law through the CJEU's rulings. In fact, British preliminary references often concern situations that the Home Office considers regulated only by national law, and migrant supporters try to bring these under the scope of EU law. *Surinder Singh* (see section 3) was the first in this string of cases: the

[362] Court of Justice of the European Union, *Surinder Singh, C-370/90*, ECLI:EU:C:1992:296; Court of Justice of the European Union, *Baumbast and R, C-413/99*, ECLI:EU:C:2002:493; Court of Justice of the European Union, *Carpenter*, C-60/00 (11 July 2002); Court of Justice of the European Union, *Nani Givane and Others*, C-257/00, No. ECLI:EU:C:2003:8 (9 January 2003); Court of Justice of the European Union, *Kaba*, C-466/00 (11 April 2000); Court of Justice of the European Union, *Akrich*, C-109/01 (23 September 2003); Court of Justice of the European Union, *Zhu and Chen*, C-200/02 (19 October 2004); Court of Justice of the European Union, *Ibrahim, C-310/08*, ECLI:EU:C:2010:80; Court of Justice of the European Union, *McCarthy*, C-434/09 (5 May 2011); Court of Justice of the European Union, *Rahman and Others*, C-83/11 (5 September 2012); Court of Justice of the European Union, *Czop and Punakova*, C-147/11 and C-148/11 (6 September 2012); Court of Justice of the European Union, *Alarape and Tijani, C-529/11*, ECLI:EU:C:2013:290; Court of Justice of the European Union, ZZ, C-300/11 (4 June 2013); Court of Justice of the European Union, *Onuekwere*, C-378/12 (16 January 2014); Court of Justice of the European Union, *McCarthy e a.*, C-202/13 (18 December 2014); Court of Justice of the European Union, *CS*, C-304/14 (13 September 2016); Court of Justice of the European Union, *NA*, C-115/15 (30 June 2016); Court of Justice of the European Union, *Lounes*, C-165/16, (14 November 2017); Court of Justice of the European Union, *Banger*, C-89/17 (12 July 2018).

CJEU was asked to extensively interpret EU law in order to cover the situation of EU citizens returning to their home Member State with their TCN spouses. *Surinder Singh* showed that EU free movement law can be relied upon also when the Union citizen is in her/his home country, and migrant supporters envisaged there an opportunity to fill the gaps in protection left by the restrictive UK family migration law.

The second reason behind my case selection is practical: these three cases are among those where I managed to obtain enough empirical insights so as to reconstruct their behind-the-scene story in a satisfactory way. For this, I am grateful to the interviewees who shared their experiences with me: solicitors working for the organizations supporting migrants, barristers, and one national judge. The interviews were particularly useful to understand the strategic component of the cases and the role that migrant supporters played.

6.1 Akrich, C-109/01

In 1997, Mrs Helina Akrich visited the JCWI's immigration legal advice service, and there she met Don Flynn. She is a British national married to a Moroccan national, and she asked Don Flynn for help since her husband was undocumented and risked deportation. The husband, Mr Akrich, had a complicated immigration history: he entered the UK in 1989 and lived there discontinuously for eight years, most of the time undocumented. He was deported from the UK in 1991, returned in 1992, and was deported again a few months later. Mr Akrich managed to enter the UK illegally once again and, in 1996, he married Helina, now Mrs Akrich. Despite being the spouse of a British citizen, Mr Akrich was not, according to British Immigration rules, entitled to a residence permit in the UK because he had received (more than one) deportation order.[363]

Don Flynn told me that he knew many couples in a situation similar to that of Mrs and Mr Akrich, and he gave them all the same advice: they should move to an EU Member State for at least six months, work there, and obtain a resident permit in virtue of their

[363] Immigration Rules 320 and 321 and Court of Justice of the European Union, *Akrich, C-109/01*, ECLI:EU:C:2003:491 paragraph 24.

EU rights to free movement. From a foreign Member State, they can apply again for leave to enter the UK but this time on the basis of the *Surinder Singh* rule: as spouses of British nationals that used their free movements rights and returned. Mr and Mrs Akrich decided to follow Don's suggestion: they spent six months in Ireland, and Mr Akrich then applied again from there for a UK residence permit but this time relying on his newly-acquired free movement rights.

Don's advice is basically 'reverse discrimination' operationalized: British rules treat British nationals worse than EU migrants; therefore, the Akrich couple tried to fall within the protection of the free movement rules. Don Flynn helped Mr and Mrs Akrich to prepare the documents necessary to stay in Ireland regularly; then, after some months, he assisted Mr Akrich in filing his application for leave to enter the UK as a family member of a Union citizen.

However, something in Mr Akrich's application went wrong. He applied at the British embassy in Dublin, and when the couple was interviewed about their original decision to move to Ireland, Mrs Akrich replied, maybe with too much honesty: 'we had heard about EU rights, staying six months and then going back to the UK'.[364] The Home Office rejected their application on the basis that Mrs Akrich had not genuinely exercised her Union citizen's rights, but that she moved to Ireland deliberately to evade the application of British immigration law.[365] Remarkably, EU law does not require that EU rights should be exercised 'genuinely' or not be used to 'evade' British law; these are principles that, instead, come from the UK's family migration law (think of the primary purpose rule). The Home Office's interpretation of EU law appears deeply informed by the logic of British immigration rules.

Mr Akrich appealed against the Home Office rejection, with Don Flynn acting as solicitor. The proceedings focused on the issue of whether the Home Office could refuse a British citizen and her partner a residence permit solely on the basis of their intentions: they had moved to another Member State to evade British law. Upon request

[364] *Akrich,* paragraph 36.

[365] *Akrich,* paragraph 37.

of Mr Akrich's lawyers, the court decided to submit a preliminary reference to the CJEU to shed light on the issue.

Don Flynn considered the legal issue 'boringly mundane': intentions have never been relevant to decide whether Union citizens and their family enjoy the right to free movement. Indeed, the CJEU dismissed the Secretary of State's argument very quickly. However, probably in response to the UK government's submission, the Advocate General Geelhoed decided to raise a couple of new issues in his opinion; first, whether the TCN spouse needed to be legally present on the territory of the first Member State in order to enjoy free movement rights in the Union citizen's home Member State; then, whether EU law should also require that the Union citizen and the TCN had not concluded a marriage of convenience.[366] Since the Advocate General's opinion is published only after the hearing, the parties did not have any chance to reply to these newly emerged issues. The CJEU accepted the view of the Advocate General and restated the need to avoid marriages of convenience and to verify whether Mr Akrich was residing in Ireland legally.[367] This interpretation introduced new limits upon free movement law and shaped the rights of Union citizens and their TCN spouses. According to Don Flynn, it was an attempt by the Advocate General and the CJEU to show that they were taking the UK government's concerns seriously.

- Impact of the Akrich decision

In *Akrich*, the CJEU introduced a more restrictive interpretation of free movement rights: to enjoy free movement rights in a Member State, the TCN family member needs to show that his/her prior residence in another Member State was lawful. Notably, this was completely irrelevant for Mr Akrich's situation: the Akrich couple were legally residing in Ireland. Eventually, Mr Akrich was able to obtain a residence permit as the spouse of a Union citizen and legally the UK legally.

[366] Opinion of Advocate General Geelhoed, *Akrich*, C-109/01, 27 February 2003, paragraphs 7 and 10. In the Advocate's General Opinion, and to a certain extent also in the CJEU decision, it seems implied that Mr Akrich was also undocumented in Ireland. From my interview with Don Flynn, instead, it was clear that Mr Akrich entered Ireland with a visa obtained in virtue of his being a spouse of a Union citizen worker and was therefore legally resident.

[367] Court of Justice of the European Union, *Akrich, C-109/01*, ECLI:EU:C:2003:491 paragraph 61.

Regarding the broader impact of the case, the *Akrich* decision undoubtedly represented a step back for migrants' rights: the new condition that the CJEU introduced made the enjoyment of free movement rights by TCN family members more difficult. Moreover, the CJEU judgment arrived in a period when the UK government was very concerned with the problem of EU law being used to circumvent UK immigration law; obviously, the Akrich couple's strategic use of EU law was badly received by the Home Office. Just one month after the publication of the *Akrich* judgment, the UK government proposed a law reform that was later adopted as the Asylum Immigration Act 2004;[368] the Act, among other things, aimed at tackling sham marriages[369] and provided that, to get married in the UK, a TCN needs the consent of the Home Office (in the form of a 'Certificate of Approval'). In this way, the right to marry in the UK was granted only to those who were already legally residing in the UK.

Along this line, Wray argues that the real target of the introduction of the Certificate of Approval scheme was the 'widespread abuse of the right to remain acquired by the non-EEA spouses of EEA nationals.'[370] Although the UK Government justified the law reform with an alleged general increase in the number of sham marriages, 'the legislation seems disproportionate to the proven extent of the problem.' Pilgram noted how the Home Office itself confirmed Wray's intuition in its submission in *Bilai*: 'the government defended this measure as necessary, inter alia, to mitigate the ample possibilities to, and the actual prevalence of, abuse of EC law.'[371] Eventually, the CJEU overturned its conclusions in *Akrich* with the judgment rendered in *Metock* in 2008.[372] The Court held that a Member State's requirement of a prior lawful residence would seriously obstruct the exercise of the freedom of movement granted to Union citizens and their TCN family members by the EU Treaties and, therefore, it is prohibited.

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[368] Asylum Immigration (Treatment of Claimants) Act 2004.

[369] See the Explanatory Notes of the Asylum Immigration Act 2004, at 4.

[370] Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the United Kingdom', 364.

[371] Lisa Pilgram, 'Tackling "Sham Marriages": The Rationale, Impact and Limitations of the Home Office's "Certificate of Approval" Scheme', *Journal of Immigration Asylum and Nationality Law* 23, no. 1 (2009): 27.

[372] Court of Justice of the European Union, *Metock, C-127/08*, ECLI:EU:C:2008:449.

6.2 Zhu and Chen C-200/02

This is yet another emblematic case of how free movement provisions can be used in 'purely internal situations'. Mrs Chen and Mr Zhu are a couple of Chinese nationality who decided to have and raise their second child, Catherine, in the UK. With this aim, Mrs Chen first travelled to Belfast, Northern Ireland, to give birth so that Catherine could obtain Irish nationality by virtue of the *ius soli* principle provided by Irish law and applied extraterritorially on the entire island of Ireland.[373] Then, Mrs Chen and new-born Catherine moved to Cardiff, where they asked for a permit to reside in the UK. Their request was based on the fact that Catherine is an Irish national and a Union citizen and therefore, she enjoys residence rights in the UK. Mrs Chen, for her part, claimed a derivative right to reside by virtue of her being Catherine's mother.[374]

The Secretary of State refused their application. It held that Catherine, in her brief life, never moved from a Member State to another: she was born in the UK (Northern Ireland), and she lived there ever since; therefore, neither Catherine nor her mother were entitled to EU free movement rights, and theirs was an 'attempted abuse'.[375] Nevertheless, Mrs Chen appealed the decision in court, and her lawyers successfully convinced the first-instance judge (Immigration Appeal Authority) to refer a question to the CJEU[376], giving the CJEU the opportunity to clarify whether the UK practice was lawful or not under EU law.

[373] Section 6(1) of the Irish Nationality and Citizenship Act of 1956 provided that any baby born on the island of Ireland is entitled to acquire Irish nationality. The *ius soli* principle was instead removed from British law with the British Nationality Act of 1981; therefore, Mrs Chen's daughter did not acquire British nationality.

[374] Under art. 1 of Directive 90/364, nationals of Member States and their family members enjoy residence rights in another Member State provided that they are covered by sickness insurance and have sufficient resources during their period of residence. However, not all family members qualify for such residence rights, but only those who are "dependent relatives in the ascending line of the holder of the right of residence and his or her spouse." See Council Directive 90/364/EEC of 28 June 1990 on the right of residence (repealed by the Citizenship Directive 2004/38).

[375] Joshua Rozenberg, 'EU Backing for Chinese Mother's Right to Live in Britain', *The Telegraph*, 19 October 2004, sec. News, https://www.telegraph.co.uk/news/uknews/1474555/EU-backing-for-Chinese-mothers-right-to-live-in-Britain.html.

[376] Interview with Adrian Berry, London, 23 November 2016.

The strategical nature of the *Zhu and Chen* case was apparent also for the CJEU, which observed:

> It is common ground that Mrs Chen took up residence in the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to enable her to acquire the right to reside, should the occasion arise, with her child in the United Kingdom. [377]

It went largely unnoticed instead that the *Zhu and Chen* case did not start as an attempt to circumvent the British legislation (as the UK government claimed[378]) but rather the Chinese one-child policy law.[379] In fact, when pregnant Mrs Chen moved to England, the Chinese government was still enforcing a very strict birth control, which forbade couples to have more than one child. The key to understand *Zhu and Chen* tortuous story is knowing one of the exceptions recognised by Chinese law: couples can have a second child only if the baby is not of Chinese nationality and does not reside in China. This explains why the couple embarked on a European adventure to give Catherine not only an Irish passport but also a UK residence permit.

The strategy behind Mr Zhu and Mrs Chen's case was designed, once again, by two London-based migration lawyers: barristers Ramby De Mello and Adrian Berry. They had been contacted by the commercial law firm that was assisting Mrs Chen in Cardiff, because of their long experience in litigating EU citizenship rights.[380] The lawyers knew that to get around Chinese law, the main obstacle was to obtain a residence permit outside China for Mrs Chen and her daughter. In fact, once Catherine had acquired Irish nationality, she would have been entitled to reside in Ireland, but her mother would not. And there came the idea of framing their situation in terms of EU free movement rights: Catherine holds the status of Union citizen, with the attached rights to move and reside

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[377] Court of Justice of the European Union, *Zhu and Chen, C-200/02*, ECLI:EU:C:2004:639 paragraph 9.

[378] *Zhu and Chen,* paragraph 34.

[379] Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law – Making European One', in *EU Law Stories*, by Fernanda Nicola and Bill Davies (Cambridge University Press, 2017), 201–23.

[380] Kochenov and Lindeboom, 228. This was confirmed during my interview with Adrian Berry, held in London in November 2016.

in any of the EU Member States; and Mrs Chen, being her mother, could enjoy derived residence rights as a Union citizen's family member.

Notably, when the *Zhu and Chen* case was referred, the CJEU had not developed its jurisprudence on the derived rights of TCN family members of Union citizens, for decisions like *Baumbast* and *Zambrano* were yet to come.[381] This makes the lawyers' strategy particularly visionary, for they claimed that the EU Treaties' provisions are directly binding on the UK government. Their argument was based on two considerations: first, Article 18 EC (now Article 21 TFEU) gives Catherine a directly enforceable right to move and reside in any Member State, regardless of the fact that she had never lived in a Member State different from the one where she was born (the UK). Second, they argued that Mrs Chen was also covered by EU free movement law as she is the mother of a Union citizen and the mother is, in a way, 'dependent' on her daughter. In fact, Directive 90/364 granted derivative residence rights to the relatives in the ascending line only if they are 'dependent' on the Union citizen.[382] The barristers proposed a broad interpretation of such requirement: Mrs Chen is 'dependent' on her eight-months daughter in terms of her migration status.[383]

It took two years for the CJEU to decide on the issue, and in the meantime, the judgment in *Baumbast* was delivered. For *Zhu and Chen,* the CJEU relied greatly on the principles established there, by reasserting the binding force of the Union citizenship rights enshrined in the Treaties. Catherine, despite having never exercised her freedom of movement, was declared to be entitled to right of residence in the UK. In so doing, the CJEU rejected the UK government's view that Mrs Chen was trying 'improperly to exploit the provisions of Community law'.[384] Regarding Mrs Chen's permit, the CJEU did not agree with the lawyers' view of the mother being dependent on her eight-month

[381] While the case of *Zambrano* (which is a landmark judgment in the field of the derived rights of TCN parents of Union citizen children) will be issued several years later, the case of *Baumbast* had been referred by a British Court in 1999, and the CJEU issued its decision in September 2002, few months after the referral in *Zhu and Chen* case. See Court of Justice of the European Union, *Baumbast and R, C-413/99*, ECLI:EU:C:2002:493.

[382] See art. 2(2) of the now repealed Council Directive 90/364/EEC of 28 June 1990.

[383] Kochenov and Lindeboom, 'Breaking Chinese Law – Making European One', 221. Kochenov and Lindeboom's chapter referred to paragraph 23 and 25 of the first-instance judge's decision.

[384] Court of Justice of the European Union, *Zhu and Chen, C-200/02*, ECLI:EU:C:2004:639 paragraph 34.

old daughter: 'the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her.'[385] The CJEU adopted instead a functional interpretation: Catherine was completely dependent on her mother, so that deporting Mrs Chen 'would deprive the child's right of residence of any useful effect'. For the sake of Catherine's right, her mother and carer should be allowed to live in the UK.

The *Zhu and Chen* case became famous for expanding free movement rights, and it is ascribed to the line of cases by which the CJEU has constructed the constitutional foundation of Union citizenship.[386] However, it is worth noting that the economic situation of Mr Zhu and Mrs Chen put them aside from most TCN migrants. Mr Zhu is a businessman, he works as the director, and is the majority shareholder of a thriving Chinese company. Interestingly, he could have obtained residence rights through one of the foreign-investor schemes that the UK offers (so-called 'golden passport' or 'golden visa').[387] To be sure, EU citizenship law was not the only chance to get a permit for Mrs Chen and her family; however, it was probably the cheapest solution available, and it went very well for them eventually.

- Impact of the *Zhu and Chen* decision

While according to EU law scholars the *Zhu and Chen* judgment 'helped shape European law, moving the Union forward',[388] British media described it in a very different way: it was a defeat for the Home Office and an advancement of the position of TCNs who abuse EU free movement law and the Irish *ius soli* rule. The case was depicted in this way both in the UK and in Ireland, and it led to a double backlash. First, at the judicial level: the first-instance judge who made the reference to the CJEU was considered responsible for the Home Office debacle, and the President of the Immigration Upper Tribunal issued a circular stating that, from that moment on, first-

[385] *Zhu and Chen,* paragraph 44.

[386] Michael Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *Inter Alia: University of Durham Student Law Journal* 2006 (2006): 77.

[387] European Commission, 'Investor Citizenship and Residence Schemes in the European Union, COM(2019) 12 Final' (Brussels, 23 January 2019).

[388] Kochenov and Lindeboom, 'Breaking Chinese Law – Making European One', 201.

instance judges should abstain from making a reference to the CJEU. Even if the circular is allegedly in breach of the EU norms regulating the preliminary mechanism procedure,[389] it remained available on the Upper Tribunal's website for years, and *de facto*, first-instance judges have referred less after this case.

Remarkably, the *Zhu and Chen* case had its strongest (negative) impact transnationally. The case received media attention in the Republic of Ireland where it was brought as an example of 'baby tourism' or of how migrants exploit the Irish *ius soli* principle.[390] *Zhu and Chen* supplemented and reinforced the common place about TCN pregnant women flying to Ireland and giving birth on Irish soil, only to obtain residence rights in the UK. The case triggered a political debate about whether it was still appropriate to maintain the *ius soli* rules, and even before the CJEU ruled on the case, the Irish lawmakers held a referendum on the issue. Ultimately, a large majority of Irish citizens expressed a preference for repealing the *ius soli* principle, and the Irish Citizenship Law was amended accordingly.[391]

Although *Zhu and Chen* clearly is a strategic litigation case (in the sense that the parties strategically sought a reference to the CJEU to promote their interpretation of EU free movement law), can we define it as a legal mobilization case? According to the definition adopted in chapter I, a litigation amounts to a legal mobilization when it features two elements: it pursues a social, political or collective aim and features the presence of collective actors. Although *Zhu and Chen* had an important impact on the interpretation of EU law, the litigation was mainly pursued for the private interest of Mr Zhu and Mrs Chen. Also, the only 'collective actor' of the case is Barrister Andrew Berry, who is committed to the cause of free movement, but who was simply doing his

[389] Indeed, ILPA filed an infringement case before the EU Commission but with no result.

[390] Rozenberg, 'EU Backing for Chinese Mother's Right to Live in Britain'; Clare Dyer, 'Ruling Exposes Immigration Loophole', *The Guardian*, 20 October 2004, sec. UK news, https://www.theguardian.com/uk/2004/oct/20/eu.immigrationandpublicservices; Rainer Baubock et al., eds., *Acquisition and Loss of Nationality|Volume 2: Country Analyses : Policies and Trends in 15 European Countries* (Amsterdam University Press, 2010), 293, https://doi.org/10.5117/9789053569214.

[391] This is the 'Twenty-Seventh Amendment of the Constitution of Ireland Referendum', held on 11 June 2004. In the debate before the referendum, the *Zhu and Chen* case was explicitly mentioned as an example of people abusing the *ius soli* in Ireland.

job, i.e. serving his clients' best interests. In conclusion, *Zhu and Chen* does not seem to feature the collective character necessary to define it as a legal mobilization.

6.3 McCarthy C-434/09

We have seen in the *Akrich* case how the restrictive UK policy on marriage migration can induce British citizens to invoke their European free movement rights within their home country. The case described below, *McCarthy*, has many things in common with *Akrich*. Both cases started with a British woman asking for a permit for her undocumented TCN husband; since UK Immigration Rules give their husbands no right to a residence permit, they asked for help from legal advice centres, which set up an EU litigation strategy and brought their case to the CJEU. However, Mrs McCarthy's judicial history did not conclude as positively as Mrs Akrich's.

Mr George McCarthy, Mrs McCarthy's spouse, is a Jamaican citizen who entered the UK with a visitor permit in 2002; that same year, he met Mrs McCarthy and they decided to get married.[392] When his visitor permit was about to expire, Mr McCarthy asked for leave to remain as the spouse of a British citizen, but his request was refused under the UK's Immigration Rules; at the time of the proceedings, he was living in the UK without a permit. The couple, who wanted to live together, asked for help from the Immigration Advice Service (IAS), a public legal advisory service.[393] The solicitors said that British law offered scarce or null opportunities for regularizing Mr McCarthy's situation; however, they noticed that Mrs McCarthy held dual citizenship: she was, by birth, a citizen of the UK and Ireland, like many Britons of Irish ascendance.[394] Such dual citizenship, in the solicitors' view, could give the couple a chance because Mrs McCarthy could obtain an EU residence permit based on her being an Irish citizen living in the UK. In fact, under Article 16 of the Citizenship Directive, 'Union citizens who have resided legally for a continuous period of five years in the host Member State

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[392] *England and Wales Court of Appeal, McCarthy v Secretary of State for the Home Department, Case No: C5/2007/2454 (2008).*

[393] IAS is one of the two organizations into which the UKIAS split in 1993, the second being the Refugee and Migrant Justice. See section 5 of this chapter.

[394] According to the last British census of 2011, there are 35.596 people living in England who hold British and Irish passports. Data is available on the UK national statistics' website: https://www.ons.gov.uk/

shall have the right of permanent residence there.'[395] Once Mrs McCarthy obtained the permit, Mr McCarthy could apply for a residence permit as the spouse of a Union citizen migrant.

Once again, the lawyers were building up a strategy grounded on the fact that, in the field of marriage migration, EU migrants are better placed than UK citizens. And it seems that, during those years, relying on the Citizenship Directive was a common strategy used by dual nationals to obtain a permit for their TCN family members.

'That was a weird case', Simon Cox, the barrister representing Mrs McCarthy, told me.[396] During the administrative stage, the Home Office refused Mrs McCarthy's application for permanent residence because she was not a 'qualified person' under EU law: she was not a worker, self-employed, or a self-sufficient Union citizen, but she lived on benefits and, therefore, she did not have the right to reside under Article 7 of the Citizenship Directive.[397] It seems that the Home Office was mainly concerned with Mrs McCarthy's economic situation and did not consider her British nationality an obstacle for the enjoyment of free movement rights.

Instead, when Mrs McCarthy challenged the Home Office's rejection in court, the Tribunal decided to dismiss her appeal on a different ground. The judges saw a problem in the fact that she was a British national who had resided in the UK her entire life as a citizen, and not by virtue of her free movement rights.[398] This same argument was then upheld by the Court of Appeal, where Lord Justice Pill stated that 'a United Kingdom citizen resident in the United Kingdom cannot, by virtue of also having Irish nationality, claim a permit which may be granted by virtue of the Directive.'[399] In the judges' view, Mrs McCarthy did not qualify for an EU permanent residence permit because despite

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[395] Directive 2004/38 at article 16(1).

[396] Interview with Simon Cox on 18 November 2016.

[397] Article 7 of the Citizenship Directive 2004/38. An account of the British case law on the 'qualified persons' is provided by Paul Minderhoud, 'Directive 2004/38 and Access to Social Assistance Benefits', in *The Reconceptualization of European Union Citizenship*, by Elspeth Guild, Cristina Gortázar Rotaeche, and Dora Kostakopoulou (Brill Nijhoff, 2014), 83.

[398] Paragraph 25 of the Tribunal decision reported in the judgment of the Court of Appeal at 29.

[399] See *McCarthy* Court of Appeal's decision at 32.

having resided legally in the UK for more than five years, she did so by virtue of her being a British citizen and without exercising her free movement rights.

Interestingly, the judges brought forward this interpretation on their own initiative, without the Home Office asking for it.[400] Barrister Simon Cox told me that the Home Office would not have supported such interpretation: 'The policy of the Home Office at that time was to treat dual citizens as they were just Irish, they didn't want to treat dual national worse because they are also British.'[401] In fact, throughout the proceedings, the Home Office insisted on stating that the problem was not Mrs McCarthy's British passport, but the fact that she had never been economically active or self-sufficient, as the Citizenship Directive requires.

After having lost the first two stages of the proceedings, Mrs McCarthy's lawyers saw in the CJEU their last chance to win the case. While the Court of Appeal considered it not necessary to consult the CJEU,[402] eventually Mrs McCarthy's barristers convinced the House of Lords to ask for a reference, by arguing that under the *CILFIT* doctrine,[403] the court of last instance must refer.[404] However, it took several weeks for the two parties to reach an agreement about the questions to refer. Eventually, one question reflected the argument brought forward by the Court of Appeal, and the other the Secretary of State's position; both focus on the personal scope of the Citizenship Directive: was an Irish-UK citizen a 'beneficiary' within the meaning of Article 3 of the Citizenship Directive, notwithstanding that she or he has always lived in the UK? And, under the Citizenship Directive, did a person reside legally in the UK even if she or he is economically inactive?

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[400] See the summary of the argument of the lawyer representing the Home Office in the appeal decision, at 29. This was confirmed by Simon Cox during the interview.

[401] Interview with Simon Cox, 18 November 2016, London.

[402] See paragraph 34 of the judgment by the Court of Appeal.

[403] Court of Justice of the European Union, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, C-283/81, of 6 October 1982, ECLI:EU:C:1982:335.

[404] The order of referral was issued during the pre-trial phase, i.e. during the hearing concerning the leave for appeal before the House of Lords. *McCarthy* was one of the last requests for preliminary reference issued by the House of Lords, which, shortly after (October 2009), has been replaced by the newly instituted UK Supreme Court.

The answer of the EU judges was not positive for Mrs McCarthy and other dual nationals in the UK. Relying on a 'literal, teleological and contextual' interpretation,[405] the CJEU stated that:

> [I]n so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.[406][407]

In so doing, the CJEU restricted the personal scope of the Citizenship Directive, which, from the case of *McCarthy* on, did not apply anymore to dual nationals who have always lived in one of the two countries of which they possess nationality. The Court also excluded the application of Article 21 TFEU (Union citizens' freedom of movement) since the administrative decision at stake (the rejection of her permanent residence status) does not deprive Mrs McCarthy of her right to live in the UK or in another MS.[408] Furthermore, the CJEU noted that dual nationals' family members, like Mr McCarthy, do not enjoy free movement rights in the UK either since these 'are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family.'[409] This clarification has not been requested, and this suggests that the CJEU judges had in mind that the request for a EU permit was strategic to obtain a permit for her husband. Barrister Simon Cox noted that: 'Probably, the CJEU had enough of EU law being used for non-EU citizens and thought that they have gone far enough in intruding in Member States' migration policy'. Also, in his opinion, Mrs McCarthy 'didn't fit [the CJEU's] image about what EU law is about: she had not moved, worked. If she was a bit more 'economic' probably the result

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[405] Court of Justice of the European Union, *McCarthy, C-434/09*, ECLI:EU:C:2011:277 paragraph 31.

[406] *McCarthy,* paragraph 39.

[407] Court of Justice of the European Union, *McCarthy, C-434/09*, ECLI:EU:C:2011:277 paragraph 39.

[408] *McCarthy,* paragraph 49. For a commentary on the interpretation of article 21 TFEU in the *McCarthy* case, see Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, by Maurice Adams et al. (A&C Black, 2014), 41.

[409] Court of Justice of the European Union, *McCarthy, C-434/09*, ECLI:EU:C:2011:277 paragraph 42.

would have been different.'[410] This somehow echoes scholars' comments of the decision that noted how '[i]ndividual circumstances rather than a systematic and predictable interpretation of the EU Treaty rules seem to guide the Court's rulings.'[411]

- Impact of *McCarthy* decision

The *McCarthy* judgment was received with scepticism by EU law scholars[412] and with disappointment by migration lawyers in the UK. These questioned whether it was appropriate to seek a reference to the CJEU in such a weak case.[413] The preliminary ruling, with its European-wide effect, did not only affect the losing party in the case, Mrs McCarthy and her husband, but also shrank the rights of TCN family members of dual nationals. The British government adopted a specific amendment to the EEA Regulation to 'make it clear that a person will not be regarded as an EEA national where they are also a United Kingdom national.'[414] The CJEU's decision in *McCarthy* closed one of the main channels that TCN spouses were using for obtaining a residence permit in the UK.

However, a recent development in the CJEU's case law partly vindicated dual citizens and their spouses residing in the UK. The case of *Lounes,* also from a British court (High Court), gave the opportunity to the CJEU to review its interpretation.[415] Mr Lounes is the husband of a Spanish national who, after many years of life in the UK, acquired British citizenship. The referring court asked whether, upon having been naturalized British, she ceased to be covered by Directive 2004/38 in the UK, or whether she must still be considered a beneficiary of free movement and Union

[410] Interview with Simon Cox, 18 November 2016, London.

[411] Peter Van Elsuwege, 'Court of Justice of the European Union European Union Citizenship and the Purely Internal Rule Revisited. Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department', *European Constitutional Law Review* 7, no. 2 (June 2011): 324.

[412] "The distinction drawn by the Court between McCarthy and Garcia Avello is also, with great respect, utterly unconvincing." According to Elspeth Guild, Steve Peers, and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press, 2014), 49.

[413] This was confirmed in my interviews with solicitors who are members of ILPA network.

[414] Amendment of The Immigration (European Economic Area) Regulations 2012, number 1547/2012 of 19th June 2012. Available at http://www.legislation.gov.uk/uksi/2012/1547/made

[415] Court of Justice of the European Union, *Lounes, C-165/16,* ECLI:EU:C:2017:862.

citizenship rights for her and for her husband. The CJEU this time read the issue differently and stated that, although she lost the rights conferred by the Citizenship Directive, she still holds her Treaty rights (art. 21 TFEU). In particular, since she had exercised her free movement rights in the past, and she had integrated in the UK to the point of becoming a citizen, her husband is entitled to a derived right to reside in the UK with her.[416] The Court therefore indirectly recognised that art. 21 TFEU implies a right to family life, which cannot be denied to the Union citizen only because she acquired the host Member State's citizenship.[417]

Admittedly, this sort of judgment seems to make the rationale behind the attribution of Union citizenship rights more obscure, rather than clarifying it. However, *Lounes* undoubtedly represents a little step forward for dual nationals and their family members in the UK, and in the post-Brexit scenario, it will probably become a useful decision to rely upon for the many Union citizen migrants who will apply for British nationality and who have a TCN partner.

7. The Home Office's reaction

We have seen that, in the UK, specific legal and socio-political conditions created new opportunities for legal mobilization, that have been seized by NGOs, law centres, human rights barristers, and migrants' groups. However, opportunities for legal mobilization are not static.[418] While groups supporting migrants were actively engaging in litigation to challenge the action and the legislation of the Home Office, the government fiercely responded in courts. It is not rare, in the UK, to see the government

[416] In the CJEU's words: "Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38. The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU". Judgment in *Lounes,* at par. 62

[417] Court of Justice of the European Union, *Lounes, C-165/16,* ECLI:EU:C:2017:862 paragraph 60; Vincent Réveillère, 'Family Rights for Naturalized EU Citizens: "Lounes"', *Common Market Law Review* 55, no. 6 (1 December 2018): 1863.

[418] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK', 525.

appealing a case until the last stage, even if this entails spending public money in costly litigation. The government has also relied on the preliminary reference mechanism to put forward its interpretation of EU law and, generally, it does this with the aim of narrowing down migrants' individual rights.[419] According to a lawyer that I interviewed, the Home Office does not do this often though, because it considers the CJEU a 'liberal court'.[420]

Besides litigation, one of the UK government's main strategies to counteract pro-migrants' litigation was to limit access to court. The 2010-2015 Coalition Government introduced two important reforms in this sense: the first was to abolish migrants' rights to appeal in court, with the only exception of asylum and human rights cases, substituting it with administrative review;[421] the second was the legal aid reform (LASPO) of 2012, whereby it removed financial support for many areas of civil and administrative law, like housing, family law, welfare benefits, and migration.[422] Migrants are now eligible for legal aid only if their case concerns international protection, human trafficking, domestic violence, and personal liberty; otherwise, they need to apply for 'exceptional funding', but the chances of success are slim.[423]

The legal aid reform had a huge impact, both for migrants and UK nationals; according to official data, there was a drop of 70% in the number of cases which received legal aid, and only 5% of the applications for exceptional funding were accepted.[424] While

[419] For instance, this happened in the case of *Tolley* (C-430/15), on social security, where the counterpart was represented by solicitors from PLP. This information was obtained through an interview with members of PLP, acting as solicitors in the case for Mrs Tolley.

[420] Interview with Adrian Berry, 23 November 2016, London.

[421] The government first abolished the right to appeal for family visitors with the Crime and Courts Act 2013, s 52. Then, the 2014 Appeals and Immigration Act cut most of the appeal rights, leaving only three possible grounds for appeals: human rights, asylum rejection, and aylum revocation (probably because of European standards requiring an adequate remedy for such cases). The impact of these reforms is huge, especially because administrative review is by no means comparable with having the case reviewed by a judge. For more detail, see: Robert Thomas, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions', in *Access to Justice: Beyond the Policies and Politics of Austerity*, ed. Ellie Palmer et al. (Oxford: Hart Publishing, 2016), 123, https://doi.org/10.5040/9781474203456.

[422] Legal Aid, Sentencing and Punishment of Offenders Act 2012, entered into force on 1 April 2013.

[423] Rowena Moffatt and Carita Thomas, 'And Then They Came for Judicial Review: Proposals for Further Reform', *Journal of Immigration, Asylum and Nationality Law* 28, no. 3 (2014): 237–53.

[424] See the official report by the National Audit Office, Implementing Legal Aid Reforms. Available at https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf

the government's declared aim was to reduce the amount of immigration cases, the LASPO also had tremendous repercussions on the activity of law centres and legal charities working for migrants' rights, leading many of them to close. An eminent example is the Immigration Advisory Service (IAS).[425] This service was the UK's largest NGO, providing representation and advice in immigration and asylum law; IAS represented in court, among others, the *McCarthy* case and the *N.S.* case, that is one of the leading cases in the field of asylum.[426] These charities had a direct impact on the development of EU immigration and asylum law, and now they do not exist anymore.

The British governments distinguished themselves by their concerns regarding the CJEU's influence over the Member States' policy and by their attempts to limit the Court's powers. In 1996, during an intergovernmental conference, the John Major government proposed to introduce a complaint mechanism for Member States whereby they could ask to review the CJEU's decisions, in order 'to make the [then] ECJ more politically accountable and to limit the cost of ECJ decisions'.[427] Alter defined this British proposal as 'the most serious [challenge] to date because it went beyond rhetoric to articulate and specify an anti-ECJ policy.'[428] More recently, former Prime Minister Cameron proposed, during the negotiation that preceded the Brexit vote, to 'control migration from the European Union' by 'addressing ECJ judgments that have widened the scope of free movement in a way that has made it more difficult to tackle this kind of abuse'.[429] In Cameron's view, the CJEU and its case law were responsible for the alleged migration problem affecting the UK; the Court enabled Union citizens and their TCN family members to 'abuse' free movement provisions.

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[425] Owen Bowcott and legal affairs correspondent, 'Tens of Thousands Lose Support as Immigration Advisory Service Closes', *The Guardian*, 11 July 2011, sec. Law, https://www.theguardian.com/law/2011/jul/11/immigration-advisory-service-closes-blames-government; 'Legal Aid Cuts Leave Migrants and Asylum Seekers Vulnerable', *The Guardian*, 15 July 2011, sec. Law, http://www.theguardian.com/law/2011/jul/15/legal-aid-cuts-migrants.

[426] Court of Justice of the European Union, N.S. and M.S., C-411/10 and C-493/10 (3 March 2011).

[427] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 467; Pollack, *The Engines of European Integration Delegation, Agency, and Agenda Setting in the EU*, 180.

[428] Alter, 'Who Are the "Masters of the Treaty"?', 140.

[429] Letter of Prime Minister David Cameron to Donald Tusk, 10 November 2015, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_11_15_donaldtuskletter.pdf.

It goes without saying that another event that will have major consequences on migrants' rights is the UK's withdrawal from the EU. Brexit might deprive UK citizens and migrants of many rights: free movement law might no longer apply, and Union citizens and their (TCN) family members risk losing their right to reside in the UK. The restrictive British immigration law will apply indiscriminately to all non-UK nationals. After the UK's departure from the EU, moreover, people in the UK will not be able to rely on the CJEU and on the preliminary reference mechanism anymore; this means that British law will not be subject to a supranational scrutiny and to EU law standards. In my view, this has important implications for the respect of the rule of law in the UK and leaves many interrogatives open; only in some years will we know whether the 'European culture of rights' has penetrated deeply enough in the British legal system to survive in the post-EU era.

8. Conclusions

> *Our sovereignty has been taken away by the European Court of Justice... No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses-to the dismay of all.*[430]

This chapter deals with the legal mobilization for migrants' rights before the CJEU in the UK. The chapter started with a simple observation: British courts have referred a high number of questions to the CJEU on the same issue, the rights of TCNs who are family members of Union citizens. The chapter analyses UK migration in a historical perspective, assessing the role of litigation for migrants' rights within the UK's broader political context, assessing how opportunities for legal mobilization evolved in the last decades.

Scholars do not have a univocal account about the legal opportunity structure in the UK. Vanhala describes it as 'an inhospitable environment for legal mobilization', because of the lack of constitutional rights, the doctrine of parliamentary sovereignty, 'the slow nature of social movements', and the 'conservative' nature of the English

[430] Lord Denning, 1990, cited by Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2002), 56.

judiciary.[431] Kilpatrick, on the contrary, in a comparative study about the application of the EU Equal Pay Directive for men and women in the UK and in France, takes Britain as a successful case of cause lawyering. In her account, trade unions representing women obtained the judicial enforcement of the Directive, thanks to the key support of the UK Equal Opportunity Commission that offered institutional support and expertise during litigation.[432] While legal culture does not play a role in her comparative study, Golub instead placed it at the centre of his analysis: he defined British judges as reference-adverse, arguing that this is the result of the climate of hostility towards the EU that was created by the UK governments in the 1970s and 1980s.[433]

Throughout this chapter, I pointed out three elements that, in my view, created opportunities for legal mobilization by migrants' rights supporters. The first is the British political context. The high salience of the migration issues in the UK and its very polarized debates led the anti-immigration stance to establish itself firmly in the government, leaving no room for political opposition representing migrants' interests. This might have convinced minority groups to turn to courts, when no other political venue was available.[434] Moreover, the governments' fierce anti-immigration stance also means that migrants in the UK face a very difficult situation; British law recognises them few rights, and they often need to rely on European or international norms to safeguard their rights.

The second element that I identified is the evolution of the judicial role in the UK. Political scientists and constitutional scholars pointed out that, in the past, the UK lacked a strong scrutiny over the executive action. This regarded also the Home Office, which is responsible for enforcing migration policy. In the 1960s, a gradual process of constitutional reform started, that culminated with a British 'rights revolution': the UK

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[431] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK', 529.

[432] Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK', 41.

[433] 'British judges were not immune to the prevailing political climate of Euro-pessimism. While the British Government resisted European integration in the Council of Ministers, British judges demonstrated their wariness for the European project by withholding references from the ECJ which could have been used to hasten integration.' Golub, 'The Politics of Judicial Discretion', 377.

[434] See section 3.

accession to the EEC and the adoption of the HRA deeply changed the position of the judicial power vis à vis the executive. Judicial scrutiny over acts of public authority importantly increased in quantity and quality, and judges became more inclined to scrutinize the Home Office activity under EU and ECHR standards. Unfortunately, the recent restrictions introduced on migrants' rights to appeal risk reversing this trend and pose a real threat to British rule of law.[435]

The third element is the capacity of groups to organize and mobilize EU law for migrants' rights. Although Joppke has noted that the 'unitary British state did not provide any point of entry for immigrant-friendly dissent', I showed how groups like JCWI have been present in the UK public life since the 1960s. These groups mobilized migrants' rights several times before either domestic, international, and EU courts; this has been possible because they often have in-house lawyers, rely on an experienced group of EU law barristers loyal to the migrants cause, and receive (less and less) financial support from legal aid. To be sure, the intensity and efficacy of the legal mobilization efforts has increased substantially over time: the first cases challenging marriage migration before the Human Rights Committee of the Council of Europe were a failure, while more recent legal mobilization was more effective. However, this success attracted the hostility of the last governments, which are seeking to obstruct opportunities for legal mobilization.

The impact of the legal mobilization is difficult to assess in the UK case. As shown, the CJEU's decisions were often disappointing for migrants' rights supporters, and at times, even detrimental for their cause (see *Akrich* and *McCarthy,* but also *Zhu and Chen* for its impact on Ireland). However, many cases referred from the UK, that I have not analysed in detail in this chapter, led to an important expansion of Union citizens and TCN migrants' rights. In fact, some of these UK referred cases, like *Baumbast*,

[435] Thomas, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions'.

Carpenter or *Alarape and Tijiani*,[436] are 'foundational citizenship cases', whereby the CJEU has emancipated Union citizenship from its 'market roots'.[437]

But, more importantly, the outcome of a legal mobilization does not necessarily coincide with the outcome of single proceedings. It should be measured with, at least, two different sets of considerations: whether the individual migrant benefitted from the proceedings, and whether the Home Office will adjust its actions in the future according to the possibility of incurring another legal challenge. This is what legal mobilization scholars call 'perception of the threat of litigation', [438] and looks at courts not as rule-makers and sanction-providers but in their capacity of generating messages to the broader community. Also King noted that: 'ministers, civil servants and other public officials no longer simply act and then wait to see whether their actions will be reviewed. They act knowing that their actions may be reviewed. Whenever they act, they thus need to take the possibility of judicial review into consideration.'[439] Under this view, the litigation impact is far more difficult to measure than the concrete impact of a decision. In fact, the litigation threat can be more effective in bringing about social change and in shaping public authorities' attitudes than a single judicial victory; however, to that effect, immigrants must be granted full access to courts, and the British government's last reforms might cast a long shadow on future legal mobilization in the UK.

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[436] Court of Justice of the European Union, *Baumbast and R, C-413/99*, ECLI:EU:C:2002:493; Court of Justice of the European Union, *Carpenter, C-60/00*, ECLI:EU:C:2002:434; Court of Justice of the European Union, *Alarape and Tijani, C-529/11*, ECLI:EU:C:2013:290.

[437] Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship through Its Scope', in *EU Citizenship and Federalism: The Role of Rights*, by Dimitry Kochenov (Cambridge: Cambridge University Press, 2017), 207.

[438] Charles Epp, 'Implementing the Rights Revolution: Repeat Players and the Interpreting of Diffuse Legal Messages', *Law and Contemporary Problems* 71, no. 2 (1 April 2008): 47; Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994), 280.

[439] King, *The British Constitution*, 126.

Chapter IV. The Netherlands

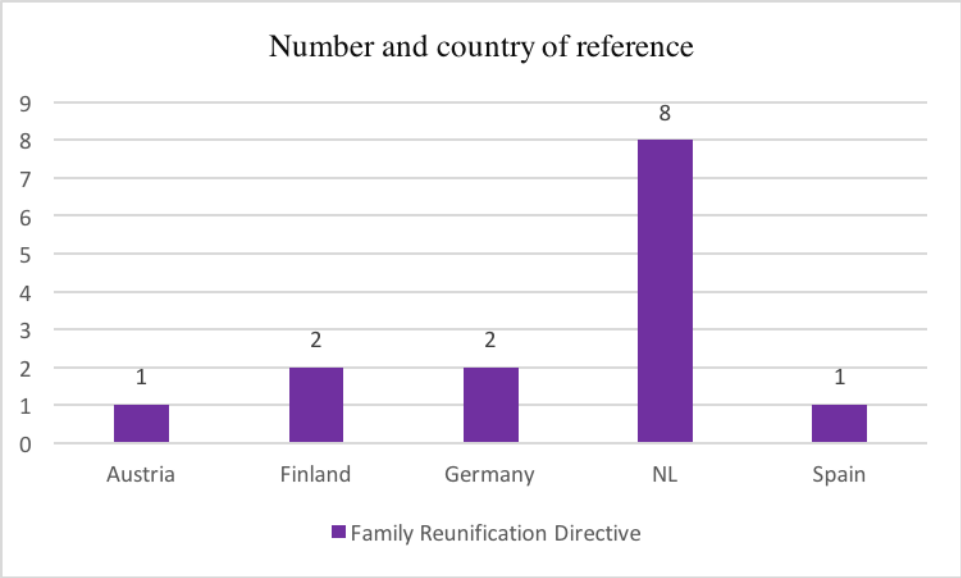
Mobilization for a different integration

This chapter presents the Dutch case-study on how the Family Reunification Directive 2003/86 has been mobilized before the Court of Justice of the EU. Different scholars have noted that, in the Dutch context, this Directive 'backfired': while the Dutch government had actively supported its adoption, eventually the Directive had an unexpected constraining effect on the adoption of successive restrictive migration policies. While this backfire effect has been explained with the Dutch government's shift in preferences and with the autonomy of the CJEU, this paper provides an additional explanation. Relying on a law-in-context analysis and on elite interviews, this paper argues that migrants' rights defenders transformed the Directive into an instrument to expand migrants' rights and to challenge the Dutch assimilationist integration model. Besides shedding light on the behind-the-scenes dynamics of legal mobilization, this chapter also offers a reflection on the conditions under which an EU norm can become a tool to promote values different from those that inspired its adoption.

1. Why the Netherlands?

From a superficial analysis of the Court of Justice's case law database, it is immediately clear that the Netherlands has a special relationship with the Family Reunification Directive 2003/86.[440] From 3 October 2005, when the Family Reunification Directive entered into force, to May 2018, the CJEU has received thirteen requests for preliminary rulings concerning its interpretation, eight of which came from Dutch courts. To be sure, the Netherlands is among the Member States that refer the most, together with Germany and Italy;[441] this is especially true in the migration field, where a fifth of all preliminary references came from Dutch courts.[442] However, Dutch references significantly outnumber that of any other Member State, including Italy and Germany. In fact, so far, most of the Member States have never requested a preliminary ruling on the Family Reunification Directive, and Austria, Finland, Germany, and Spain have referred only one or two (see Table 1).

Table 1: Requests for preliminary rulings concerning the Family Reunification Directive (October 2005-May 2018).



[440] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:l33118.

[441] Broberg and Fenger, 'Variations in Member States' Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation?', 492.

[442] Around 60 references of a total of 320 come from the Netherlands. These are data that I have gathered by relying on the CJEU official online database of case law (https://curia.europa.eu/jcms/jcms/j_6/en/). I have cross-checked my data with the 'Quarterly Overview of CJEU judgments and pending cases' issued by the Centre for Migration Law of the Nijmegen University, available at https://www.ru.nl/law/cmr/documentation/cmr-newsletters/.

The second reason why I chose the Netherlands as a case study, in line with the rationale underpinning my case selection, is the fact that the references submitted to the CJEU regard an issue connected to a public debate. In the Netherlands, most of the references on the Family Reunification Directive focus on the civic integration requirements, a provision that has been very controversial for many years.[443] In 2005 and 2006, the Dutch law-maker has adopted two laws that reformed the integration system;[444] these made TCN's admission and permanence in the Netherlands conditional upon the passing of a test on Dutch language and society. The laws were met with strong opposition by migrants' rights supporters, a circumstance that corroborated my idea that the Netherlands could have featured a case of legal mobilization.

From a comparative perspective, the Dutch preliminary references present a puzzle. In fact, the Netherlands is by no means the only country that limits the right to family reunification by imposing integration requirements: also Germany, Austria, France, Denmark, and Latvia have similar provisions;[445] however, these countries did not produce a similar amount of references (see table 1 above).[446] In the course of my analysis, I will tackle the following questions: How can we explain the high number of

[443] These are: Court of Justice of the European Union, *Imran*, C-155/11 PPU (10 June 2011); Court of Justice of the European Union, *K and A*, C-153/14 (9 July 2015); Court of Justice of the European Union, *C and A*, C-257/17 (7 November 2018); Court of Justice of the European Union, *K*, C-484/17 (7 November 2018).

[444] 2005 Act on the Civic Integration from abroad (*Wet Inburgering Buitenland*) and the 2006 amendment on the 1998 Civic Integration Act (*Wet Inburgering*). See section 3 for further comments on these reforms.

[445] Henri Labayle and Yves Pascouau, 'Study on the "Conformity Checking of the Transposition by Member States of 10 EC Directives in the Sector of Asylum and Immigration" Done for DG JLS of the European Commission End 2007', n.d., 102, http://odysseus-network.eu/wp-content/uploads/2015/03/2003-86-Family-reunification-Synthesis-.pdf.

[446] Until May 2018, the CJEU received eight references for a preliminary ruling concerning specifically the issue of integration measures or conditions, five of which are from the Netherlands: Court of Justice of the European Union, *Imran*, C-155/11 PPU, ECLI:EU:C:2011:387 (the Netherlands); Court of Justice of the European Union, *Dogan*, C-138/13 (July 10, 2014) (Germany); Court of Justice of the European Union, *P and S*, C-579/13 (June 4, 2015) (the Netherlands); Court of Justice of the European Union, *K and A*, C-153/14, ECLI:EU:C:2015:453 (the Netherlands); Court of Justice of the European Union, *Genc*, C-561/14 (April 12, 2016) (Denmark); Court of Justice of the European Union, *Yön*, C-123/17 (August 7, 2018) (Germany); Court of Justice of the European Union, *C and A*, C-257/17, ECLI:EU:C:2018:876 (the Netherlands); Court of Justice of the European Union, *K*, C-484/17, ECLI:EU:C:2018:878 (the Netherlands).

Dutch references? What were the conditions that provide fertile ground for these references? Was there any role for civil society?

The quantitative data on the preliminary references and the debates behind the civic integration requirements lie at the origin of my case selection. Since other scholars have turned their attention to the implementation of the Family Reunification Directive in the Netherlands, the next sub-section will explain their views and how my research can make an original contribution to the discussion.

1.1 A Directive that backfires

The impact of the Family Reunification Directive on the Netherlands' migration policy has been the object of study in political and legal scholarship. According to Groenendijk: 'all those involved in the negotiations on the new Directive underestimated the far-reaching effects the Directive will have on the national immigration law and practices of the Member States.'[447] Groenendijk was personally involved in the Directive's negotiations[448] and foresaw the barrier-effect that the Directive would have had on the restrictive Dutch migration policy.

In similar fashion, Bonjour and Vink emphasized the constraining effect of the Directive in the Dutch context. They claimed that, although the Dutch government initially supported the adoption of the Directive, 'Europeanization backfired': 'The Directive came to have an unexpected constraining effect, first as a result of the Court's jurisprudence, and second because the preferences of Dutch politicians have shifted ever further beyond what the Directive will allow.'[449] The authors explained at length how Dutch politicians' policy preferences shifted towards the right after 2002, as the national election marked a surge of the far-right and of xenophobic parties.[450] However,

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[447] Kees Groenendijk, 'Family Reunification as a Right under Community Law', *European Journal of Migration and Law* 8 (2006): 220.

[448] He was representing five Dutch NGOs in the Standing Committee of Experts on international immigration, refugee, and criminal law, Groenendijk, 221.

[449] Saskia Bonjour and Maarten Peter Vink, 'When Europeanization Backfires: The Normalization of European Migration Politics', *Acta Politica* 48 (2013): 404.

[450] See section 3 of this chapter.

they did not indulge on the CJEU's role: in their view, the Court departed from Member States' preferences in its case-law because it is an autonomous actor.[451] Therefore, while the important role of the CJEU case-law is acknowledged, we have still little insight into the processes that led to such a 'backfire'.

This chapter, in line with the legal mobilization scholarship, is not satisfied with the definition of courts as fully autonomous actors. As Epp noted: 'Even liberal judges armed with control of their dockets and an entrenched bill of rights, however, cannot make rights-supportive law unless they have rights cases to decide, and the process of mobilizing cases rests on far more than judicial fiat.'[452] In other words, no court can acquire cases on its own motion; even if the CJEU was fully autonomous, it could not develop its case-law without the preliminary reference requests that it received on the Family Reunification Directive. And, only by investigating who has mobilized this Directive before national courts, how, and why, can we fully understand why it came to play such a constraining role in the Dutch context.

This chapter argues that the preliminary references in the field of integration requirements are the result of a legal mobilization endeavour. Academics, lawyers, and organizations for migrants' rights decided to rely on courts and, in particular, on the CJEU, to challenge national legislation that negatively affects the right to family reunification in the Netherlands.

The sections that follow set the scene for the analysis of the Dutch case. They explain the political and historical background of immigration in the Netherlands. This analysis covers a period that goes from the 1950s to 2005, when the law on integration requirements, the object of this chapter, was adopted. This not only explains the backdrop of the mobilization, but it also traces some of the conditions that have made the legal mobilization possible. Section four explains the negotiation that led to the adoption of the Family Reunification Directive, and how this EU law instrument was introduced in the Dutch legal context. The second part of this chapter is devoted to the

[451] The two authors briefly mention Marks' theory of multilevel government, that sees the CJEU as an autonomous supranational actor of European integration, that 'acts in a way that may not reflect the wishes of (all) member states'. Bonjour and Vink, 'When Europeanization Backfires', 401.

[452] Epp, *The Rights Revolution*, 15.

analysis of the concrete dynamic of the mobilization. After having presented the actors behind the mobilization (section 5), and the elements in Dutch legal procedure that either constrained or facilitated the mobilization (section 6), I will describe two cases (*Imran* and *K and A*) where the Family Reunification Directive was mobilized against the civic integration test (section 7). In the last section, I draw some conclusions on the conditions that made the backfire possible.

2. Immigration in the Netherlands: debates and challenges

After the Second World War, the Netherlands underwent a process that transformed it from an emigration to an immigration country. Like the UK and other Western European states, the first consistent influx of migrants arrived in the second half of the twentieth century. Some of them came from its former colonies: mainly people from Indonesia and Suriname that decided to leave their countries because of the uncertain future or the unstable political situation resulting from their country's declaration of independence from the Netherlands (which was respectively in 1945 and 1975). Another consistent influx of immigrants arrived in the Netherlands in the 1970s. These were attracted by the advanced Dutch industrial economy, in the context of what has been called '*postindustrial* migration';[453] this was the case of people coming from Italy, Spain, Morocco, and Turkey. [454] The arrival of Turks was particularly facilitated by a labour agreement concluded between the Turkish and the Dutch governments, the goal of which was to remedy the unemployment of the first and to fill the labour gap in the latter state.[455] Finally, a third wave of immigrants came to the Netherlands to seek asylum, during the 1980s and 1990s.[456] These immigrant influxes have contributed to turning the Netherlands into the nation that we know today: with the second biggest

[453] Douglas S. Massey, 'Why Does Immigration Occur? A Theoretical Synthesis', in *The Handbook of International Migration: The American Experience*, ed. Charles Hirschman, Philip Kasinitz, and Josh DeWind (Russell Sage Foundation, 1999), 35.

[454] Kees Groenendijk and Eric Heijs, 'Immigration, Immigrants and Nationality Law in the Netherlands, 1945-98', in *Towards a European Nationality, Citizenship, Immigration and Nationality Law in the EU*, ed. Randall Hansen and P. Weil (London: Palgrave, 2001), 144.

[455] Liza Mügge, *Beyond Dutch Borders: Transnational Politics among Colonial Migrants, Guest Workers and the Second Generation* (Amsterdam University Press, 2010), 42.

[456] Groenendijk and Heijs, 'Immigration, Immigrants and Nationality Law in the Netherlands, 1945-98', 144.

Turkish community in Europe, its exotic shops and Chinatowns, and with the fame of being a country capable of accommodating a highly diverse population.

To be sure, the Netherlands learned how to accommodate diversity long before the twentieth century migration flows. Since its foundation 200 years ago, Dutch society has always been composed of different political, religious, and social groups, stuck together thanks to a strong consensus culture; that is why 'tolerance was more or less a practical necessity in a divided and fragmented society.'[457] Emblematic, in this regard, is the twentieth century Dutch phenomenon of 'pillarization': religious and class divisions were structured into four main groups ('pillars'), i.e. Catholics, Protestants, Liberals, and Socialists. All Dutch social life was organized around these four pillars. Although the Netherlands was officially 'depillarized' in the 1960s, divisions and fragmentations remained but simply developed along different lines.[458] In the 1970s, when the new immigrant population became consistent, its ethnic and socioeconomic diversity opened a new important cleavage in Dutch society, which is of concern for Dutch policy-makers still today.

To address this new cleavage in Dutch society, policymakers put forward two different strategies: first, in the 1980s, the Netherlands embraced a multicultural approach, developing a progressive minority policy; then, at the end of the 1990s and beginning of 2000s, the policymakers revised their previous commitments and adopted a more assimilationist approach towards minorities, distancing themselves from multiculturalist ideals. To be sure, these two different approaches to integration are not as radically divergent as mainstream accounts tend to represent them: the Netherlands has never been a fully-fledged supporter of multiculturalism nor has it become its fiercest opponent.[459] However, this periodization of Dutch approaches to integration is useful to understand the political shift that occurred in the early 2000s, which is also

[457] Wim Voermans, 'A 200-Year-Old Constitution: Relic or Enigma?', in *The Dutch Constitution beyond 200 Years: Tradition and Innovation in a Multilevel Legal Order*, ed. Giuseppe Franco Ferrari, Reijer Passchier, and Wim Voermans (Eleven International Publishing, 2018), 14.

[458] Voermans, 15.

[459] Maarten P. Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth.', *Political Studies Review* 5, no. 3 (September 2007): 337–50.

the backdrop of the legal mobilization studied in this chapter. In the following subsection, I will further describe the evolution of Dutch integration policies.

2.1 The Netherlands as a model of multicultural society

In the 1980s, as mentioned, Dutch policymakers decided to embrace a progressive stance towards ethnic minorities and integration. This choice was propelled, to a certain extent, by the publication of an influential report by the Scientific Council for Government Policy (WRR) in 1979.[460] The report warned the government about the fact that, contrary to its expectations, many immigrants arriving in the Netherlands were there to stay: many of them, even if initially considered as temporary labour force, or guest workers, would not return to their countries of origin. Moreover, the report shed light on the disadvantaged conditions in which these ethnic minorities were living: because of 'a cumulation of adverse socio-economic and cultural factors', they were relegated 'at the bottom of the social ladder'.[461] The report had a huge influence on the government, which changed its stance on ethnic minorities. It released a policy document (the *minderhedennota*) that enshrined its new goals: reducing the gap between ethnic minorities and 'indigenous population' and creating a more just society that gives equal opportunities to all.[462] The resulting policy on minorities (*minderhedenbeleid)* provided for different measures aimed at promoting the participation and emancipation of minorities in society, also by providing that the receiving community made an effort to accommodate diversity.

An important measure that reduced disparity in the legal status was to open up access to citizenship for people with a migration background. The government achieved this by amending the requirement for naturalization and by making Dutch naturalization

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[460] Vink, 340. See also Ricky Van Oers, Betty De Hart, and Kees Groenendijk, 'The Netherlands', in *Policies and Trends in 15 European States*, ed. Rainer Baubock et al., vol. 2, IMISCOE Research (Amsterdam University Press, 2006), 402. The WRR report is available online: WRR - The Netherlands Scientific Council for Government Policy, 'Ethnic Minorities' <https://english.wrr.nl/publications/reports/1979/05/09/ethnic-minorities> accessed 30 August 2018.

[461] WRR - The Netherlands Scientific Council for Government Policy, 'Ethnic Minorities', 9 May 1979, IX, 17.1979, https://english.wrr.nl/publications/reports/1979/05/09/ethnic-minorities.

[462] Van Oers, De Hart, and Groenendijk, 'The Netherlands', 12. Ricky Van Oers, *Deserving Citizenship: Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Martinus Nijhoff Publishers, 2013), 43.

policies more liberal.[463] The 1985 Dutch Nationality Act,[464] adopted under the influence of the *minderhedenbeleid,* facilitated naturalization procedures for first generation immigrants, gave to second generation the possibility to opt for Dutch citizenship at 18, and confirmed the automatic acquisition of Dutch citizenship at birth for third generation immigrants.[465] Interestingly, the new naturalization procedure for immigrants contained a precursor of the language and integration requirement: during an interview with a state official, the applicants had to demonstrate their ability to speak Dutch and their knowledge of Dutch society;[466] however, since at that time naturalization was seen as only one step in the process to achieve integration, applicants were expected to have a level of spoken Dutch sufficient for communicating with Dutch nationals, and written Dutch was not even tested.[467] In fact, thanks to these reforms, the number of people belonging to ethnic minorities that acquired Dutch citizenship through naturalization increased significantly.

Coherently with the multicultural approach, the Dutch government took the view that minority integration does not mean renouncing to one's cultural tradition and identity. That is why the government decided not only that minorities' cultural expression should not be repressed, but it should be incentivized on equal terms to that of the majority.

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[463] To be precise, naturalization policies in the Netherlands underwent a process of liberalization that started in 1953, breaking with the past. In fact, Dutch naturalization policies had assumed a restrictive character during the first War World, when the idea of citizenship as belonging to the nation-state was predominant; naturalization was granted to whoever served the Dutch nation (e.g. those who participated in the Resistance during the war) or to whoever could demonstrate an emotional tie to the Netherlands. See Ricky Van Oers, Betty De Hart and Kees Groenendijk, 'The Netherlands' in Rainer Baubock and others (eds), *Policies and Trends in 15 European States*, vol 2 (Amsterdam University Press 2006) 394.

[464] *Rijkswet op het Nederlanderschap*, replacing the 1982 Act on nationality. The Act was adopted in 1984 but entered into force on 1 January 1985.

[465] This is called "double *jus soli",* a norm first introduced in 1953, that was under review at that time. Groenendijk and Heijs, 'Immigration, Immigrants and Nationality Law in the Netherlands, 1945-98', 145.

[466] The knowledge of Dutch language and society first appeared as a requirement for naturalization in a circular of 1977 (*Hoofdafdeling Privaatrecht afdeling Nationaliteit en Burgerlijke Staat*, 10 March 1977, Staatscourant 27 April 1977, no. 81, p. 4); the circular was the first instrument to formalize the requirements for obtaining Dutch citizenship. This was an important step in the process that transformed Dutch citizenship from a state's concession into an individual right. See Van Oers, De Hart, and Groenendijk, 'The Netherlands', 398.

[467] Van Oers, *Deserving Citizenship*, 44.

Many Islamic and Hindu schools opened in the following years, along with non-Christian places of worship.[468]

With regard to minorities' political participation, the government acted on two fronts. On the one hand, it granted the right to vote in local elections to non-citizen residents. On the other, it introduced a system for minorities' consultation that relied on ethnic organizations as intermediaries. However, '[m]inority organisations needed to be supported in order to provide the government with clearly identifiable and, hopefully, representative discussion partners.'[469] To this aim, the government allocated public funds to support ethnic minority organizations and created consultative bodies where these groups and the government could discuss about integration policies.[470] These ethnic organizations proved to be very active in the political arena: they not only participated in consultations but also set up political campaigns and strategic litigation, as the second part of this chapter will show.

2.2 The Netherlands' rejection of multiculturalism

Mainstream accounts hold that the Dutch multicultural view of society began to crumble in the 1990s. Public opinion began to show some anxieties regarding immigrants' integration, propelled by the common account that 'integration of immigrants in Dutch society had failed'.[471] The multicultural approach adopted by Dutch policymakers in the 1980s was openly challenged and supplanted by an ideal of 'active citizenship':[472] immigrants should become responsible for themselves, and for finding their place in society. To be sure, this did not happen overnight, but it was the result of a slow change in language, attitudes, and public opinion, reflected in politicians' public statements.

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[468] Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth.', 341.

[469] Vink, 345.

[470] Vink, 342.

[471] Van Oers, De Hart and Groenendijk (n 427) 403.

[472] Van Oers, De Hart, and Groenendijk, 403.

Some key facts and public figures are usually mentioned in the literature to describe the change of climate of those years. These are: the bestseller book "The Multicultural Tragedy" by a Social-democrat politician who openly attacked multicultural ideals;[473] the 9/11 terrorist attack which increased islamophobia all around the Western world; the assassination of filmmaker Theo van Gogh in 2004 by the hand of an extremist Muslim who was outraged by van Gogh's movie on Islam;[474] and the rise of xenophobic politicians like Pim Fortuyn, leader of the Pim Fortuyn List, who focused his electoral campaign on the failure of integration, accusing Muslim minorities of being backward and not respecting women and gay rights.[475] He was murdered a few days before the 2002 elections, an event that probably boosted his consensus since he made a surprisingly good 'post-mortem' result.

These episodes, more or less internationally known, represent the symptoms rather than the cause of multiculturalism's decline. But then, why did Dutch public opinion and policymakers depart from their multicultural commitments? There are those who argue that, to begin with, the Netherlands has never been as multiculturalist as mainstream accounts had depicted: the term 'multiculturalism' was understood and used in its descriptive sense, and Dutch society never truly committed to the normative component of the concept.[476] A different explanation is provided by Besselink, who noted that politicians from across the whole political spectrum started seeing multiculturalism as a veil that was hiding serious economic, social, and cultural problems of Dutch society.[477] Because of a sort of 'multicultural taboo', it became impossible to openly address issues like immigrant children's bad performance in school, or Muslim women's segregation, which were concerning the Dutch population.

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[473] The book is "Het multiculturele drama", by Paul Scheffer. The author 'warned that an alienated foreign population undermines the social cohesion of Dutch society and called for a new policy based on shared language and norms.' In Li'av Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press, 2015), 103.

[474] 'Controversial Filmmaker Shot Dead', *The Independent*, 2 November 2004, http://www.independent.co.uk/news/world/europe/controversial-filmmaker-shot-dead-18345.html.

[475] Virginie Guiraudon, Karen Phalet, and Jessika Ter Wal, 'Monitoring Ethnic Minorities in the Netherlands', *International Social Science Journal* 57, no. 183 (1 March 2005): 85.

[476] Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth.', 344.

[477] Leonard F.M. Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', in *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU*, ed. Elspeth Guild, Kees Groenendijk, and Sergio Carrera (Ashgate, 2009), 242.

We do not know to what extent such social clashes between the Muslim minority and the Dutch autochthones was real or a perception made up by the same politicians and media which campaigned for a more assimilationist type of society. As Guiraudon noted: '[w]hile monitors showed an improvement of the situation of ethnic minorities, especially with respect to education and employment throughout the 1990s, this was ignored by elected politicians and the media, which increasingly spoke of the failure of the integration of minorities.'[478] The same happened with an official parliamentary report issued in 2004: although it concluded that the status of integration in Dutch society was fairly good, it was intentionally disregarded by most politicians.[479] Therefore, it is hard to assess whether multiculturalism failed, or whether politicians wanted to depict it as a failure; in any case, between the 1990s and the 2000s, the general attitude towards migration and minorities drastically changed, leading to a new cycle of political reforms.

Reforms in naturalization policies mirror the change in how integration and citizenship were commonly viewed in the 1990s. In 1992, after a decade-long discussion and campaigns (especially by Turkish ethnic organizations),[480] finally, migrants had obtained the possibility to be naturalized Dutch without renouncing their previous nationality. This led to a steady rise in the number of naturalizations that were received in two diametrically opposed ways: left-wing parties welcomed this as a sign of increased integration, while right-wing parties saw this as the evidence that citizenship risked losing its meaning. 'The idea had emerged that naturalisation had become 'too easy', and that immigrants had been treated too liberally or had even been 'pampered', without having to face any obligations.'[481] In 1997, the centre-right government opted

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[478] Guiraudon, Phalet, and Wal, 'Monitoring Ethnic Minorities in the Netherlands', 85.

[479] The report, commissioned by the Parliament this time, titled 'Building Bridges' (*Bruggen Bouwen,* TK 28689, n. 8-9, 19 January 2004). The report concluded that integration was successful for most migrants in the Netherlands, despite the many faults in the integration policies and in its application. The politicians accurately cherry-picked the information contained in the report and delivered to the public a message of failure of integration and of the necessity to introduce more stringent civic requirements for immigrants. See Besselink (n 28) 250. Also Van Oers, *Deserving Citizenship*, 52.

[480] Groenendijk and Heijs, 'Immigration, Immigrants and Nationality Law in the Netherlands, 1945-98', 159.

[481] Ricky Van Oers, Betty De Hart, and Kees Groenendijk, 'Report on The Netherlands', EUDO Citizenship Observatory (Robert Schuman Centre for Advanced Studies, 2013), 12.

again for intolerance towards dual nationality and reintroduced the condition that foreigners renounce their previous nationality in order to become Dutch. The view that citizenship was a 'reward', which would be granted only after the completion of the integration path, was gaining terrain.

The policies adopted in the beginning of the 2000s are a direct result of this mutated climate, and in fact, the logic underpinning them is very different from the *minderhedenbeleid* rationale. The old view held that the state should be responsible for integration, and naturalization was a step to further it and should be encouraged.[482] Then, in the beginning of the 2000s, the policymaker's introduced the idea that immigrants are individually responsible for their integration. The state only sets the conditions that immigrants have to fulfil in order to be considered integrated: only if successful, do they gain admittance, secure a residence permit, and acquire citizenship. In line with this view, the then Minister of Alien Affairs and Integration in the Balkenende II government, Rita Verdonk, defined the acquisition of Dutch nationality as 'the first prize'.[483]

In those years, the ideal of a multicultural society, where people holding different nationalities, identities, and beliefs could be considered equally Dutch, was crumbling. Little by little, a more assimilationist view of society was gaining terrain. We will see more in detail in the next section how this new idea of society and belonging prompted legal reforms in the field of migration law, leading to the introduction of the notorious civic integration requirements.

3. The Dutch 'New Integration Policy'

We have seen in the previous section the downward trend of Dutch multiculturalism: after a peak in the 1980s, it reached a low point in the 2000s. In these years, integration

[482] Ricky Van Oers, 'Justifying Citizenship Tests in the Netherlands and the UK', in *Illiberal Liberal States*, by Elspeth Guild, Kees Groenendijk, and Sergio Carrera (Ashgate, 2009), 123.

[483] Declaration made by the Former Minister of Alien Affairs and Integration Verdonk (VVD), reported Van Oers, De Hart, and Groenendijk, 'The Netherlands', 403. at 403.

policies gained their momentum, and heated discussions on how integration should be handled were taking place both at the national and the European level. This political climate constitutes the backdrop to the law reforms on integration that I discuss in this section; these were adopted with two main acts (2005 Act of Civic Integration from Abroad and the 2006 Civic Integration Act). Then, section four will focus on developments at the supranational level: I will examine the Dutch government's role in the negotiations for the EU Family Reunification Directive and the Directive's impact on Dutch immigration and integration policies.

The Netherlands navigated through this period of redefinition of belonging with the Balkenende II governments, which ruled from 2003 to 2007 with the support of two right-wing parties: the CDA (Cristian Democrats) and the VVD (People's Party for Freedom and Democracy). This followed the short-lived Balkenende I government, stemming from the turbulent 2002 elections which saw the rise of Pim Fortuyn's party (despite his leader's assassination) and then its quick decline because of a lack of leadership. To keep pace with the political preferences expressed by the Dutch electorate in 2002, during the 2003 electoral campaign, all political parties made a shift towards the right, promising a more restrictive model of integration.[484] This new integration model was embodied in the *inburgering* policy (literally from *burger*, citizen, "becoming citizen" policy): the idea was that an immigrant has to *inburger,* by learning Dutch culture and society, before having access to any right of residence or social support.[485]

Although all leaders during the electoral campaign had promised an *inburgering* policy, the Balkenende II government had the task of enacting it. The government started by reallocating the competences for integration policies: before they were under the minister of social policy, and now they were moved under the competence of the newly established Alien Affairs and Integration ministry, led by Rita Verdonk (VVD). In the view of some commentators, this change already implied a transformation in how

[484] Bonjour and Vink noted how, towards the end of the century, there was "a significant shift in preferences of all political parties towards the restrictive end of the policy spectrum […] particularly in the field of migration and integration policies." Bonjour and Vink, 'When Europeanization Backfires', 402.

[485] Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 243.

integration policies were conceived: from a social policy aimed at inclusion, they were now closely linked to immigration and border control.[486] Accordingly, the *inburgering* policy was enforced not through incentives but through a system of sanctions whereby people who failed civic integration tests faced high fines and could lose their permit. The next subsections further explain the two main acts which realized the *inburgering*.

3.1 The Act on Civic Integration from Abroad (Wet Inburgering Buitenland)

The flagship of the new Dutch integration policy is the 2005 Act of Civic Integration from Abroad (entered into force in March 2006). This was based on an unprecedented idea: aspirant immigrants, in order to be admitted, need to demonstrate their commitment to integration by passing an exam before arriving in The Netherlands. Not all immigrants have to take the test but only those who fulfil two conditions: they come from a country where a visa requirement exists and they wish to live in The Netherlands for a long period of time.[487] Therefore, for instance, a Japanese citizen would be exempted from taking the exam because she does not need a visa to enter the Netherlands, thanks to bilateral agreements; an Indian seasonal worker would be equally exempted because her residence would be temporary.

The exam consists of a computer test divided in two parts: one assessing the person's knowledge of Dutch society, and the second concerning her/his skills in Dutch language (level A1-minus, later raised to A1).[488] The cost of taking the exam was 350 € plus eventually the cost of the material to prepare for the test (initially 60 € then increased to 110 €) and the money for the journey to the closest Dutch embassy or consulate

[486] Besselink, 246; Kees Groenendijk, 'Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?', *European Journal of Migration and Law* 13, no. 1 (1 January 2011): 1–30.

[487] Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 246.

[488] See here the official information page of the Immigration and Naturalization Service (consulted on 18 August 2019): https://ind.nl/en/Pages/basic-civic-integration-examination-abroad.aspx

where the exam is held.[489] All these are considerable expenses, especially for people coming from the countries subjected to visa requirements, which are mainly in the so-called Global South.

The effect of *Wet Inburgering Buitenland* was rather abrupt. Immediately after its introduction, the number of applications for a residence visa in the Netherlands drastically dropped from 29 000 applications in 2004 to 14 500 in 2006.[490] This was probably a positive result in the view of the government: in fact, when they saw that most of the people taking the exam had passed it, they decided to raise the pass/fail threshold. Moreover, the civic integration test from abroad was only the first step in the *inburgering* path of the immigrant: after three years of residence in the Netherlands, she/he was expected to pass a second exam, as the next sub-section will show. Although the Netherlands was the first country to require such pre-entry test also for family members, it was promptly followed by other countries, such as Germany and France, which followed its example.[491]

3.2 The Civic Integration Act (Wet Inburgering)

While the Act of Integration from Abroad deals with people still to be admitted in the Netherlands, the Civic Integration Act was addressed to migrants already in the country. A first version of the Act had been first introduced in 1998, but it consisted in enrolling immigrants into an integration program mainly consisting of language and society courses with an optional test at the end, with no fines or sanctions in case of failure. However, after the political turmoil of the new century, and the 2002 elections, the ruling political parties considered the law not apt for its purpose anymore. In line with the new *inburgering* policy, the main novelty contained in the 2006 amendment of the Civic Integration Act was the introduction of a compulsory civic integration test, the

[489] These costs were later reduced thanks to the legal mobilization we analysed. See Regulation of the State Secretary for Security and Justice of 19 February 2016, number 736437, amending the Aliens Regulations 2000 (hundred and forty-second amendment).

[490] Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 246.

[491] Germany and France provided for the test in 2007, the UK in 2010, and Austria in 2011. Yves Pascouau, 'Measures and Rules Developed in the EU Member States Regarding Integration of Third Country Nationals - Comparative Report' (European Policy Centre, 29 April 2016), 37.

passing of which was conditional to obtaining social rights and the long-term residence permit.

By looking at who is subjected to the *inburgering* test, we can understand something about the rationale underpinning this policy. Initially, the proposal of Minister Rita Verdonk provided that all immigrants applying for long-term residence in the Netherlands had to take the test, and some Dutch citizens too. Although it may sound bizarre that a government wants to examine its own citizens' level of civic integration, probably the Dutch Minister considered some citizens less Dutch than others. In fact, the government envisioned the test only for Dutch citizens born outside of the 'European part of the Netherlands', e.g. people who naturalized Dutch and citizens who were born in the Caribbean part of the Netherlands.[492] The proposal was met with scepticism in Parliament, and the government eventually had to amend it.

The second version of the Act narrowed the group of citizens subjected to the test: only Dutch citizens who naturalized before 1993 (i.e., before the integration test became a requirement for naturalization) and who either lived on social benefits, or acquired their citizenship through their children (that is especially the case of single Muslim women), or were employed in religious office (most probably they were thinking of Imams) were subjected to the test. This badly hidden targeting of Muslim Dutch was stopped by the Raad Van State (i.e. the Dutch Council of State), with four opinions (requested in its capacity as advisor to the government) pointing out that the policy was discriminatory and violated several international treaties.[493] The Raad Van State's opinions compelled the government to definitively drop its idea to subject Dutch citizens to *inburgering* too; eventually, the test applied only to non-citizens who ask for long-term residence in the Netherlands or who are employed in religious offices.

The Civic Integration Act entered into force in January 2007. Eventually, its final version provided that all TCN migrants, also those already in the country, who are older than 16 and less than 65, have to pass a civic integration test after five years of residence

[492] Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 248.

[493] Van Oers, *Deserving Citizenship*, 55; Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 248.

(three years and a half if they had already passed the civic integration test from abroad). The test assesses migrants' civic knowledge and their language proficiency; the level of Dutch required (A2) is higher than that for the civic integration test abroad, but the cost is similar (270 €).[494] For what concerns Dutch society, the test has been criticized for featuring questions such as 'what do you do if you see two men kissing?', which seems to put Muslim applicants in a difficult position.[495] In case applicants do not take or pass the test, they face a series of sanctions that range from a fine by the municipality (which can reach a maximum of 1000 € for repeat applicants) to a cut to their social benefit or even the refusal of their long-term residence permit request.[496] The sanction depends on the migrant's individual situation and on the municipality's evaluation of his/her chances to pass the test.

4. The Family Reunification Directive: a Dutch perspective

As the first part of this chapter shows, Dutch judges have submitted more preliminary references about the Family Reunification Directive than any other EU Member State's judiciary. To understand why, we need to analyse what is the Directive's meaning in the Dutch context: what role did the Dutch government play during the negotiations for the adoption of the Directive, how was the Directive transposed in the Netherlands, and finally, what was its impact on the Dutch migration legal framework.

4.1 The negotiations

The Family Reunification Directive's purpose is 'to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully

[494] Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 248.

[495] Brandon Hartley, 'Taking the Integration Test: How Do You Deal with a Noisy Party next Door?', *Dutch News*, 22 January 2016, https://www.dutchnews.nl.

[496] See art. 31 of the *Wet Inburgering* law, and art. 21(1)k of the Vreemdelingenwet 2000 (Dutch Alien Law); also Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 248; Labayle and Pascouau, 'Study on the "Conformity Checking of the Transposition by Member States of 10 EC Directives in the Sector of Asylum and Immigration" Done for DG JLS of the European Commission End 2007', 66.

in the territory of the Member States'.[497] Its first proposal was presented by the EU Commission on 1st December 1999, and it was followed by three years of difficult negotiations in the Council, which were not helped by the fact that, at that time, the unanimity voting was still dominant in EU migration law-making.[498] The Member States finally reached a unanimous agreement within the Council in February 2003, and the Directive was adopted in September of that same year.[499]

The Netherlands was one of the most active governments during the negotiations as it wanted to make sure that the final text would 'fit Dutch policies as closely as possible'.[500] Three subsequent governments participated in the negotiations (Kok II, Balkenende I and Balkenende II), and they shared a positive attitude towards the idea of harmonizing the area of family reunification, as long as this did not interfere with their policy agenda. A particularly decisive role was played by the Balkenende I government: even if this government remained in power only for a few months, this coincided with the decisive phase of the negotiations, and its Interior Minister seized this opportunity to influence the shaping of the family reunification regime in a way to make it compatible with its planned *inburgering* tests. The Dutch government strategy consisted, first, in obtaining that the Directive set a standard of protection for TCN migrants that was not too high with respect to its national family reunification policy; second, it promoted its idea of a pre-departure integration test among other Member States (the 'Dutch model' of integration) and sponsored the introduction of specific integration clauses in the Directive, as we shall see.[501]

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[497] Art. 1 of the Family Reunification Directive.

[498] Georgia Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, Immigration and Asylum Law and Policy in Europe, v. 10 (Leiden; Boston: Martinus Nijhoff, 2006), 159; Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration, and Nationality in the EU* (M. Nijhoff, 2009), 154.

[499] Carrera, *In Search of the Perfect Citizen?*, 154.

[500] Bonjour and Vink, 'When Europeanization Backfires', 394–95.

[501] Kees Groenendijk and Tieneke Strik, 'Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors', in *Hohenheim Horizons, Festschrift Für Klaus Barwig*, ed. Stephan Beichel-Benedetti and Costanze Janda, 1st ed., 2018, 372; Bonjour and Vink, 'When Europeanization Backfires', 396.

The compromise reached between the Commission and the Council resulted in a Directive characterized by a tension between two diverging objectives: granting migrants the right to family reunification and leaving to Member States the possibility to set limits on the exercise of such right. With the aim of protecting family unity and helping TCN migrants to better integrate in the Member States,[502] the Directive provides that Member States shall admit family members of TCNs under certain circumstances.[503] This obligation on the Member States translates into an individual enforceable right of the migrant, as the CJEU had the opportunity to clarify in its first ruling on the Directive:

> Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights on the Member States since it requires them, in the cases determined by the Directive, to authorize family reunification of certain members of the sponsor's family, without being left a margin of appreciation.[504]

Interestingly, in this judgment the CJEU has set a higher standard of protection for the right to family unity than the one granted under the ECHR framework. In fact, according to the ECtHR's case law, although family life is a fundamental right (art. 8 ECHR), '[w]here immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory'.[505] Even if the ECtHR case-law offers protection against expulsion because it implies that states cannot divide families already united in their territory, the case-law is of limited use when it comes to admissions: states are not obliged to admit non-citizen family

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[502] In the preamble of the Family Reunification Directive, par. (4), states: "Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty."

[503] Art. 1 of the Directive states: "The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States."

[504] Judgment of the Court, *Parliament v. Council*, Case C-540/03, 27 June 2006, at par 60. This CJEU's first judgment on the Directive was issued in the context of an annulment action brought by the Parliament.

[505] European Court of Human Rights*, Sen v. The Netherlands,* No 31465/96 (21 December 2001).

members in order to reunite the family.[506] On the contrary, the CJEU stated that, when the sponsor and the migrants meet the Directive's requirements, Member States have a positive obligation to admit family members, with no further discretion.[507]

That said, it is important to note that the EU Family Reunification Directive does not lean too much towards the side of the migrant either. In fact, the Directive leaves to Member States some discretion in the establishment of residence and income requirements that the sponsors and the applicants need to fulfil. For instance, Member States may require the applicant to show that the sponsor has stable and regular resources, a 'normal' accommodation according to the national or regional standards, and a sickness insurance for the family (art. 7(1)).[508]

During the negotiations for the establishment of these requirements, the Netherlands played a decisive role. In fact, two of these requirements have been introduced upon proposal by the Dutch government; one is the spouse's minimum age before reunion: while most of the Member States agreed that 18 was sufficient, the Netherlands obtained that Member States can push this minimum up to 21 years old.[509] The second provision, as anticipated, regards integration: in the Dutch Parliament, the discussion on the introduction of the pre-entry integration test had already started,[510] and in view

[506] We saw in chapter III, for instance, that in the Court's view family unity can be achieved also by moving the family in the partner's country of origin. See the case of *European Court of Human Rights, Abdulaziz, Cabales and Balkandali, No. 9214/80; 9473/81; 9474/81.*

[507] The CJEU itself notes that the EU standards are higher than the ECtHR's, see para 59 and 60 of the judgment in the case C-540/03, *Parliament v. Council*, mentioned above. Groenendijk explained the difference between the ECHR and the EU standards very clearly: "The ECtHR, in its case law on Article 8 ECHR, always starts from the principle of state sovereignty in immigration matters. Article 8 sets certain limits on the exercise of that sovereignty. Generally, however, the Court in Strasbourg allows the states a certain margin of appreciation. Under the Directive, the reasoning is exactly the reverse. The Directive grants a right to family reunification in a specific Member State. Member States may, under certain circumstances (e.g. the grounds mentioned in Article 16), restrict that fundamental right. Restrictions, however, have to be interpreted restrictively." Groenendijk, 'Family Reunification as a Right under Community Law', 219.

[508] Art. 7(1) of the Family Reunification Directive.

[509] Art. 4 of the Directive.

[510] After the elections of 2002, the Balkenende I government proposed the *inburgering* reform of the integration field, and one of its proposals consisted in the introduction of the civic integration test from abroad (see section 3.1). "In December 2002, a motion by a CDA MP in favour of a pre-admission integration test for family migrants was adopted in the Second Chamber of the Dutch Parliament with the support of all major political parties. The Dutch delegation used this motion as an argument in the

of its adoption, the government supported the proposal of the Danish government by introducing in the Directive the possibility to ask family members to comply with 'integration measures' (art.7(2).[511] Initially opposed by states like France and Belgium, these were re-discussed in the following Council meetings and then were finally adopted in February 2003.[512]

Remarkably, the meaning of such 'integration measures' was unclear. The Dutch government thought of them as one of the requirements for the applicant to be admitted; therefore, they were seen as similar to the integration conditions under discussion at the national level. However, the preamble of the Directive - which reflects the 'Tampere milestones'[513] - commits to a different model of integration, one that promotes family unity as a means to enhance integration and social cohesion:

> Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.[514]

There is a conflict, then, between two models of integration. In the Dutch government's view, integration is a precondition that TCNs should fulfil to gain admittance. Instead, in the Tampere's conclusions and in the Commission's original legislative proposal, the integration of migrants is the goal, to be achieved by admitting their family members (see the picture below). These two conflicting views on integration were a source of disagreement among Member States during the negotiations, and even if the governments eventually agreed on what is today art.7(2), these divergent views gave rise to the legal mobilization that we will analyse in the next sections.[515]

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negotiations in Brussels." In Groenendijk and Strik, 'Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors', 371.

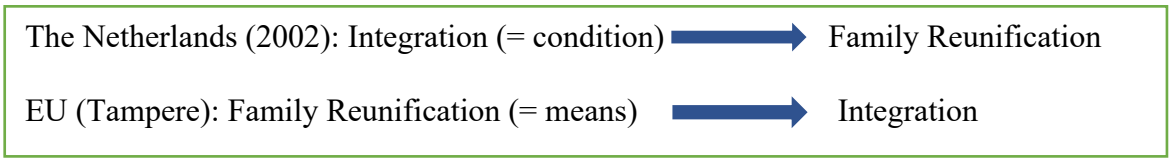
[511] See Carrera, *In Search of the Perfect Citizen?*, 170.

[512] Carrera, 170–71.

[513] Tampere European Council, Presidency Conclusions, SN 200/99, 15–16 October 1999. See also Sergio Carrera, '"Integration" as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU' (CEPS 2005) No. 219/March 2005 <https://www.ceps.eu/ceps-publications/integration-process-inclusion-migrants-case-long-term-residents-eu/>.

[514] At par. 4.

[515] Groenendijk, 'Family Reunification as a Right under Community Law', 224.



4.2 The transposition

Thanks to the Dutch government's efforts during the negotiations,[516] the transposition of the Family Reunification Directive in the Netherlands did not require major adjustments. Especially for what concerns integration, thanks to art. 7(2) of the Directive which allows Member States to introduce 'integration measures' for family members, the government could proceed with its integration reform and adopt, in 2005, the Act on Civic Integration from Abroad.[517] As explained, the condition of passing the civic integration test from abroad in order to be admitted as a family member in the Netherlands was considered as one of the 'integration measures' that the Directive allows. The government claimed that the aim of the *inburgering* policy was precisely to increase the chances that a migrant is successfully integrated into Dutch society by making sure that he/she has studied Dutch language and society before his/her arrival; this, however, at the cost that in case the migrant does not pass the test, family reunification is automatically denied.

This may give the impression that the Family Reunification Directive did not introduce clear standards for protecting migrants' rights to family reunion, or, at least, that Member States could easily avoid their application. However, as we shall see, the Directive provides for a limitation of states' discretion, and its first impact arrived five years after its adoption, thanks to the EU Commission. In its 2008 report on the implementation of the Directive, the Commission pointed out the discrepancies between the Dutch integration requirements and the Directive's integration measures:

> The objective of such measures is to facilitate the integration of family members. Their admissibility under the Directive depends on whether they

[516] Groenendijk and Strik, 'Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors', 357.

[517] Article 7(2): Member States may require third country nationals to comply with integration measures, in accordance with national law.

> serve this purpose and whether they respect the principle of proportionality. Their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (test materials, fees, venue, etc.), whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families).[518]

Between the lines, the Commission's evaluation echoed some of the same concerns expressed by migrant supporters, who also questioned the Dutch test's accessibility. In their view, the Dutch pre-entry test, because of its high fees and high pass/fail threshold, serves to discriminate and exclude migrants coming from low-income countries, rather than to integrate them.[519] Because of their scarce material resources and limited educational skills, migrants from poor countries are more likely to fail the test.

The Commission report eventually did not convince the Dutch government to amend its policy. However, by presenting doubts on its compatibility with EU law standards, the Commission raised attention to the possibility that Dutch law could be challenged through EU law remedies. In effect, a few months later, the first preliminary reference request on the Family Reunification Directive was submitted by the Raad Van State, in the case of *Chakroun*.[520] Mrs Chakroun's application for family reunification was refused because her husband, the sponsor, had a lower income than that required by Dutch law in case of couples formed after the sponsor's arrival in the Netherlands. The referring Court questioned this income requirement's legitimacy: in fact, the Directive provides only that the sponsor should have a stable and regular income, sufficient to maintain the family without social assistance.[521] The CJEU found Dutch law in conflict with the Directive because it draws a distinction based on when the family is formed,

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[518] Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification, COM(2008) 610 final, Brussels, 8.10.2008.

[519] Human Rights Watch, 'The Netherlands: Discrimination in the Name of Integration. Migrants' Rights under the Integration Abroad Act', Human Rights Watch, 13 May 2008, https://www.hrw.org/report/2008/05/13/netherlands-discrimination-name-integration/migrants-rights-under-integration.

[520] *C*ourt of Justice of the European Union*, Chakroun,* C-578/08 (4 March 2010).

[521] Art. 7(1)(c) of the Family Reunification Directive only requires that the sponsor has 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.'

that does not exist in the Directive, and it asks for an income higher to what is considered sufficient. Since the Directive 'imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States', their eventual margin of appreciation 'must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification.'[522] By setting an income higher than that prescribed by the Directive for couples formed after the sponsor's migration, Dutch law hampers the Directive's objective and is illegitimate.

The *Chakroun* case was important for it contributed to reveal the potential of the Family Reunification Directive for defending migrants' rights. We will see in the second part of this chapter how the Directive was then used as an instrument to challenge the *inburgering* policy. The next section focuses on the actors that understood the Directive's potential and who decided to mobilize it against the integration conditions. It is argued that the constraining effect that the Directive came to have in the Dutch context, rather than being a result of the CJEU's autonomous role, was the result of a legal mobilization effort undertaken by a group of civil society actors that supports migrants' rights in the Netherlands.

5. Who mobilizes EU law in the Netherlands? Actors, organizations and platforms

This section provides an overview of the main actors that use and mobilize EU migration law. Like it was for the UK, also in the Netherlands, it seems that there are two opposing factions: on the one hand, there is the government, with its ministry of justice and security and its Immigration and Naturalization Service; on the other hand, there are individuals, organizations, and private practitioners who defend the rights and the interests of the migrants. It follows below a schematic overview of the actors and organizations that we will see in action in section 7.

[522] Court of Justice of the European Union, *Chakroun, C-578/08*, ECLI:EU:C:2010:117 paragraph 43.

5.1 On the government's side

Immigratie-en Naturalisatiedienst (IND). When it comes to immigration, the most important public authority in the Netherlands is the IND: Immigration and Naturalization Service. It is under the ministry of Justice and Security, and it is in charge of assessing all individual applications for admission, residence, and naturalization on the basis of Dutch law. Its decisions can be challenged by the applicants first, via an administrative procedure, and then, judicially. In court, the IND relies either on private lawyers, based in The Hague (*landsadvocaten*), or on their own legal staff.

Journaal Vreeemdelingenrecht: This is the second most important Dutch migration law journal. It was born to keep the IND staff informed of recent changes in immigration law; therefore, for a long time, it has represented mainly the view of the government and the IND (while the *Asiel & Migrantenrecht* represents more the point of view of migrants and private practitioners, as we shall see below). However, it seems that recently the *Journaal Vreeemdelingenrecht* became more independent, also thanks to a change in its board, and today, it is no more aligned with the government.[523]

5.2 Pro-immigrant Organizations

Inspraak Orgaan Turken (IOT).[524] This is the main organization representing the interest of the Turkish minority in the Netherlands; despite being a small organization, it counts on the support of a large fighting community.[525] The IOT was created in the 1980s, during the multiculturalist years, prompted by a Dutch minority policy that provided incentives for migrants' participation in society. As one of the eight ethnic groups taking part in the 'National Minorities Consultation', it was involved in regular talks with the government (at least three times a year) and was publicly funded.[526] Since

[523] Interview with Groenendijk, 20 February 2018, Nijmegen.

[524] https://www.iot.nl/

[525] The organization has a "klein bureau en grote achterban" (small desk and a large support). See C. A. Groenendijk, M. Rondhuis, and M. H. A. Strik, 'Klagen Bij de Europese Commissie. Effecten van Tien Jaar Juridische Belangenbehartiging Door Het Inspraakorgaan Turken in Nederland', *Asiel & Migrantenrecht* 6, no. 6 (2015): 27.

[526] Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth.', 341–42. This policy was introduced in 1997 with the 1997 Law on the Consultation of Minority Policy (Wet Overleg Minderhedenbeleid).

its creation, the IOT has been very active in defending the interests of Turks in the Netherlands by using a range of techniques like campaigns, lobbying, and litigation strategies.[527] Since it defends primarily the rights of the Turkish minority, the IOT, in its legal mobilization, made large use of the EU-Turkey Association Agreements and its stand-still clause, a tool that proved crucial to preserve the Turks' rights from gradually more restrictive migration and integration policies. [528] However, the IOT was also ready to rely on the Family Reunification and the Long-Term Residence Directives in cases where their mobilization was useful also for defending Turkish migrants' rights, as we shall see. Among the most important mobilizations in which the IOT took part are: that against the loss of social security benefits in case migrants return to Turkey (2000-2014), the campaign against the increase in residence permit fees (2002-2014), and the mobilization against the civic integration tests (2006-2011) that will be addressed in this chapter. [529] In 2013, the government decided to amend its consultation policy with minorities and withdrew its financial support to ethnic minority groups, IOT included. Therefore, since 2014, the IOT became a membership-based association, funded by its own members and conducting smaller-scale activities.

Vluchtelingen Werk Nederland (Dutch Refugees Council). This is an organization founded more than thirty years ago in support of refugees and asylum seekers.[530] The organization is independent from the government, even if it is publicly subsidized, and it counts on the work of some professionals and a lot of volunteers. They have local offices spread across the whole Dutch territory, whereby they provide legal and social

[527] Groenendijk and Heijs, 'Immigration, Immigrants and Nationality Law in the Netherlands, 1945-98', 159.

[528] Agreement Establishing an Association between the European Economic Community and Turkey, signed in Ankara, 12 September 1963, OJ L 361/29, 13.12.77. For the legal status of Turkish nationals, the Additional Protocol to the Agreement, signed on 23 November 1970, is especially important, OJ L 293, 29.12.1972, p. 3–56. http://data.europa.eu/eli/prot/1972/2760/oj

[529] A description of the IOT's complaints before the EU Commission is provided by Groenendijk, Rondhuis, and Strik, 'Klagen Bij de Europese Commissie. Effecten van Tien Jaar Juridische Belangenbehartiging Door Het Inspraakorgaan Turken in Nederland'. Other accounts of IOT legal mobilization can be found in Alexander Hoogenboom, 'Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)', *European Law Review* 35, no. 5 (7 August 2014): 707–19; Narin Tezcan-Idriz, 'Dutch Courts Safeguarding Rights under the EEC-Turkey Association Law. Case Note on District Court Rotterdam Judgments of 12 August 2010, and District Court Roermond Judgment of 15 October 2010', *European Journal of Migration and Law* 13, no. 2 (1 January 2011): 219–39; Hoevenaars, 'A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice', 178.

[530] https://www.vluchtelingenwerk.nl/over-vluchtelingenwerk

support to refugees and asylum seekers. The Dutch Refugee Councils is also interested and involved in strategic litigation: in 2012, a member of their staff, Sadhia Rafi, created the *Commissie Strategisch Procederen* (Strategic Litigation Committee), where she was joined by four academics and four lawyers.[531] The Committee aims especially at supporting preliminary references to the CJEU, even if, so far, none of their cases has been referred; they also give free legal advice to lawyers whose cases found a way to Luxembourg.

5.3 Migration academics

In the Netherlands, Academia is traditionally very engaged in political debates, campaigns, and litigation, especially in the migration field. A leading example is Kees Groenendijk who is one of the leading experts on EU migration and asylum law, and has been involved in dozens of strategic litigation cases by giving advice to either the immigration lawyers or the organizations supporting migrants, like the IOT.[532] Groenendijk is but one of the Dutch academics involved in strategic litigation; another eminent example is the migration lawyers from Vrije Universiteit Amsterdam, like Thomas Spijkerboer who was involved in litigation for gay rights before the CJEU, or Marcelle Reneman who is in charge of the Migration Legal Clinic (see later). Academics contribute to legal mobilization also by providing and spreading knowledge on EU law; for instance, after the adoption of the Family Reunification and the Long-Term Resident Directives, Gronenedijk and his colleague Elspeth Guild set up courses and seminars on the new EU laws for the Dutch Judges' Academy, because 'if they don't know the directive, they're not going to take it seriously'.[533]

VU Migration Law Clinic. This is a law clinic based at the Vrij University (Amsterdam), where students under the supervision of migration law professors work together on cases pending before the CJEU. The clinic has a law blog where they

[531] Interview with Sadhia Rafi, 14 December 2017, Amsterdam. See also the article at: https://www.advocatenblad.nl/2014/02/27/strategisch-procederen/

[532] See his own article on strategic litigation for Turks' rights. Groenendijk, Rondhuis, and Strik, 'Klagen Bij de Europese Commissie. Effecten van Tien Jaar Juridische Belangenbehartiging Door Het Inspraakorgaan Turken in Nederland'.

[533] Interview with Professor Kees Groenendjik, 20 February 2018, Nijmegen.

publish their legal analyses online so that it can be read by lawyers, academics, and hopefully, judges.[534] Sometimes, the students work directly with the lawyers of the cases, conducting legal research or further investigation for the litigation before the CJEU. The Clinic had a first proof of its impact during the hearing in the case of *A&S*:[535] for the first time, during the oral hearings, the CJEU asked the lawyer some question on the VU Migration Law Clinic's opinion that was attached to the lawyer's submission. This shows not only that the CJEU judges have read the submission but also that they found the document relevant for the case. Given the inadmissibility of amicus curiae briefs before the CJEU, this is a relevant step further for public interest groups' access to the CJEU.

5.4 Migration lawyers

Like the UK, also the Netherlands presents a very committed migration bar that sides with migrants and is willing to challenge the government. One of the most important organizations of migration lawyers is the *Werkgroep Rechtsbijstand in Vreemdelingenzaken* (Legal Aid Working Group on Immigration - WRV). The group was funded in the 1970s by 'young and left-wing lawyers' who became interested in the issue of refugees when the first asylum seekers arrived in the Netherlands.[536] At that time, the WRV was composed of around twenty committed members who successfully engaged in political lobbying of Parliament in order to improve the situation of migrants and asylum seekers. Today, the WRV is part of a bigger membership association of migration lawyers (*Stichting Migratierecht*), with 500 members, among them, practitioners, legal advisers, researchers, and other experts.[537] Its main mission is to make migration law and decisions available to legal practitioners, to train them, and provide legal assistance. They publish of one of the two Dutch migration legal journals: *Asiel & Migrantenrecht*.

[534] https://migrationlawclinic.org/

[535] Court of Justice of the European Union, *A and S*, C-550/16 (12 April 2018).

[536] Quirijn Visscher, 'De Politieke Wortels van de WRV', *Migrantenrecht* 9/10 (2009): 260.

[537] https://www.stichtingmigratierecht.nl/over-ons

6. How does the national procedure influence mobilization? Notes on the specificities of the Netherlands judicial system

Because the preliminary reference procedure starts in the context of national proceedings, it is important to understand how the Dutch procedural rules impact on legal mobilization before the CJEU: do they hinder or facilitate it? This issue is connected with the existence and functioning of judicial review in the Netherlands since this is the most common procedure used in migration cases (subsection 6.1). In the second subsection, I will analyse Dutch judges' propensity to submit a reference to the CJEU (subsection 6.2).

6.1 Migrants' access to judicial review in the Netherlands

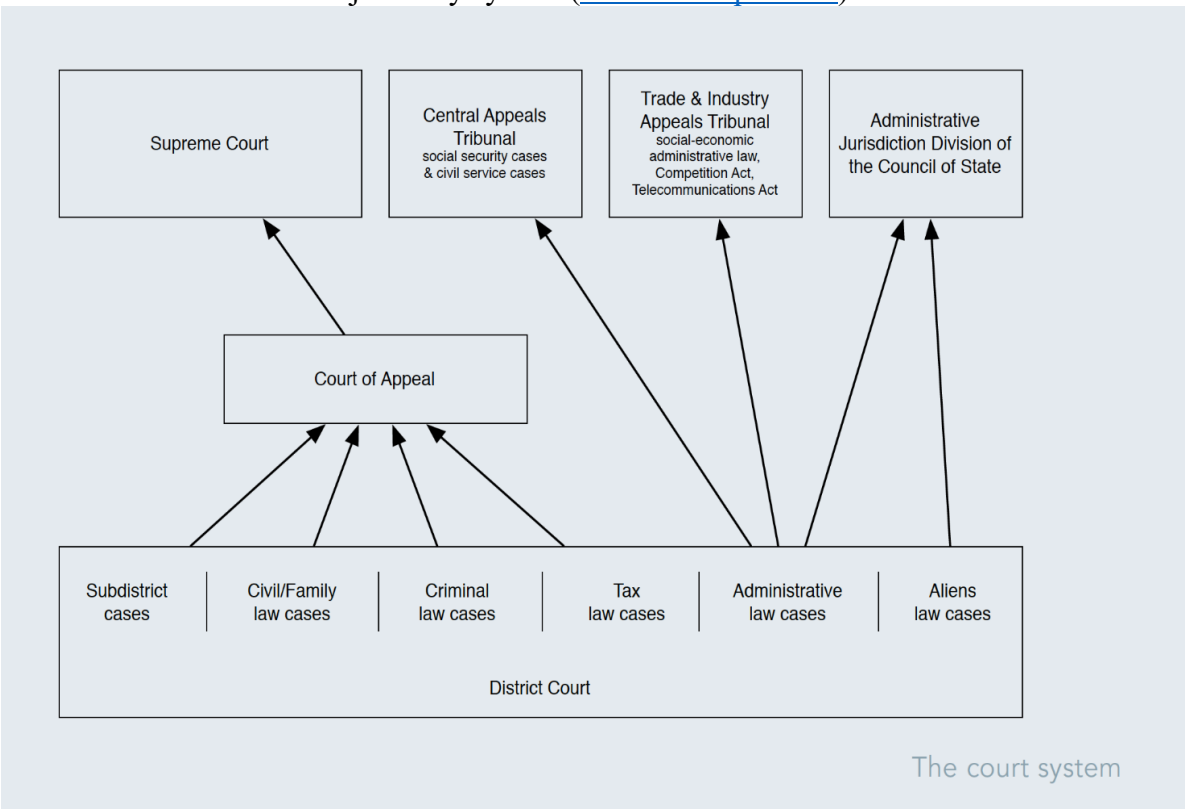
Most migration cases involve challenging the validity of an administrative decision by a public authority. The cases analysed in this chapter are no exception since they involve the appeal against decisions by the IND that deny family reunification. In the Netherlands, regardless of the content of the administrative act in question, a person should first appeal against the act via administrative procedure, and only subsequently ask for a judicial review on the ground that the act is contrary to national, EU, or international norms. Although the Dutch Constitution prohibits judicial review of legislation,[538] a litigant might still challenge the legitimacy of Dutch law *vis à vis* EU or international standards; in fact, if these norms are directly applicable (they are self-executing international norms or EU norms having direct effect), they enjoy primacy over national laws, and Dutch judges must enforce them.

The judicial review proceedings consist of a first stage before the District court (first-instance court) which has chambers specialized in immigration, composed of one or three judges. If the District court's decision is appealed, this leads to a second stage before the Raad Van State (Council of State), the highest administrative court (see Table 2).[539]

[538] Art. 120 of the Dutch Constitution explicitly forbids judges from reviewing the legitimacy of laws.

[539] This is the case especially for judicial review proceedings against an IND's decision, but not all the appeals filed by migrants are dealt by the immigration and asylum chambers and by the Raad Van State. Sometimes, if the issue raised by the immigrant relates to other fields like labour law, social security, or

Table 2: "The Judiciary System in the Netherlands", p. 12, available on the official website of the Netherlands judiciary system (www.rechtspraak.nl)



Although migrants have the right to ask for judicial review, the lack of means might dissuade them from starting a case, given the high cost of court fees and legal representation. To counteract this, the Dutch constitution establishes a system of legal aid[540] that covers the cost of legal representation, which is required in the judicial stage of the review. Instead, in the course of the administrative part of the proceedings, migrants are often assisted by the Dutch Refugee Council, thanks to volunteers and paralegal staff present in their local offices. For what concerns the court fee, people below a certain level of income can ask for a fee reduction. In sum, migrants' access to judicial review in the Netherlands is fairly supported.

fundamental rights, the case can fall under the competence of the Centrale Raad van Beroep (Central Appeals Tribunal) and the Hoge Raad (Supreme Court).

[540] Art. 17 and 18 of the Dutch Constitution.

6.2 Dutch judges and the preliminary reference mechanism: Is the 'Gentlemen's agreement' myth or reality?

As mentioned before, the Netherlands is one of the EU Member States that refers the most. Interestingly, most of its preliminary references come from its last instance courts: the Dutch Supreme Courts (*Hoge Raad*) and the Dutch Council of State (*Raad van State*).[541] This has attracted scholarly attention, and Dutch academics advanced different hypotheses about why this is the case and looked critically at this practice.[542] Groenendijk wrote an influential piece on the issue, saying that between the District courts and the Raad Van State there exists a 'Gentlemen's agreement': lower courts would abstain from referring, leaving to the highest court the choice on whether to refer or not. Despite the lack of official documents proving the existence of such a 'Gentlemen's agreement', other authors started referring to it and questioned its legitimacy.[543] Indeed, the issue is rather important: such an agreement would make it more difficult to reach the CJEU for an individual litigant since he/she would have to wait until the proceedings gets to the last stage; moreover, art. 267 TFEU establishes that any court or tribunal may ask for a preliminary ruling to the CJEU, and the Dutch practice can entail a violation of this provision.

Of a different view, was a judge from the Raad Van State, who told me that the 'Gentlemen's Agreement' is more a myth than reality.[544] In the judge's opinion, District courts 'have lots of cases, they have a tough job, very often they are sitting alone'; therefore, they simply have less incentive and resources to make a preliminary reference. Another practical barrier to lower judges' references is the fact that before the entry into force of the Lisbon Treaty, they did not have the power to submit

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[541] According to Krommerdijk, only 32% of Dutch referrals come from lower courts. Jasper Krommendijk, 'De Lagere Rechter Aan Banden. Is Er Nog Ruimte Voor de Lagere Rechter Om Te Verwijzen Naar Het HvJ?', *Sociaal-Economische Wetgeving*, no. 5 (May 2018): 183–96.

[542] Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration'.

[543] Krommendijk, 'De Lagere Rechter Aan Banden. Is Er Nog Ruimte Voor de Lagere Rechter Om Te Verwijzen Naar Het HvJ?'; Jasper Krommendijk, 'The Highest Dutch Courts and the Preliminary Ruling Procedure: Critically Obedient Interlocutors of the Court of Justice', *European Law Journal* 0, no. 0 (20 June 2019).

[544] Interview with Raad Van State Judge, 22 February 2018, The Hague.

references on matters related to the AFSJ, and therefore neither on migration. Data confirm that this was an important barrier: after the Lisbon Treaty entered into force, there was a rise in the number of requests for preliminary rulings by lower courts, and this is still a current trend.

Through my interviews,[545] I discovered the existence of a new practice among Dutch judges: before submitting a preliminary reference, District court judges circulate via email the text of the questions they want to ask among their colleagues of other District courts and of the Raad Van State, requiring comments and feedback. This was originally an informal practice, but recently the Utrecht District Court issued an official order asking for advice from its colleagues before making the reference.[546] Even if this practice could eventually increase the quality of preliminary reference requests, it can also expose judges to criticisms and pressure by other colleagues and especially by the higher court. For instance, according to Alter's competition-between-courts theory,[547] this practice might represent a problem for lower judges that want to bypass the Raad Van State's judicial interpretation.

Another important aspect concerning the functioning of the preliminary reference procedure in the Dutch system regards the so-called 'European turn' of the Raad Van State. Apparently, until 2008, there was a diffuse malcontent towards the Raad Van State's way of interpreting EU migration law.[548] Similar concerns were raised also internally by the Raad Van State's advisory division,[549] which warned their judicial

[545] Interview with Raad Van State Judge, 22 February 2018, The Hague. Interview with Groenendijk, 20 February 2018, Nijmegen.

[546] This was in the national proceedings that gave rise to the preliminary ruling in *Court of Justice of the European Union, Vethanayagam and Others, C-680/17 (29 July 2019).*

[547] Alter, 'The European Court's Political Power', 467.

[548] Groenendijk, during his farewell lecture held in April 2008, showed some interviews he conducted with Dutch immigration judges who complained about the fact that the Raad Van State was interpreting EU law as it was Dutch law, without giving it an independent meaning.

[549] Raad Van State has two divisions having two different roles: one is the advisor of the Government on legislation, and the second is the judicial division, i.e. the last-instance administrative court. Since it works very close to the government, the Raad Van State has been accused in the past of not being completely independent from the government; however, the two careers for the judicial staff and for the advisors to the government are kept separate.

colleagues of the possibility of losing the jurisdiction on immigration law.[550] In response to these criticisms, the Raad Van State took a 'European turn': acknowledging the growing importance of EU law, they decided to strengthen the Raad Van State's expertise in the field by selecting judges with an EU law background (e.g. Mortelmans, former EU law professor at Utrecht University, and former Dutch agents before the CJEU).[551] As part of this new trend, the Raad Van State started referring more cases to the CJEU and initiated new internal practices aimed at improving the quality of Dutch referrals to the CJEU.[552] This renewed attention to EU law and to the preliminary mechanism creates a fertile terrain for legal mobilization before the CJEU.

7. The legal mobilization before the CJEU on the civic integration test

The previous sections have outlined the legal and political background of the preliminary references on the civic integration test and the Family Reunification Directive. This section will describe the background of two legal mobilization cases (*Imran* and *K and A*), which show that academics, organizations, and lawyers played an important role in the litigation. I have decided to focus on these two cases in particular because they pioneered a new way to challenge the *inburgering* policy, and their example was later followed by other preliminary references (see next section). Importantly, the legal mobilization was not limited to the CJEU: cases against the two *inburgering* laws were brought (and ended) before national courts,[553] and the Dutch Refugee Council and the IOT filed complaints to the Commission to prompt an infringement procedure;[554] these examples of legal mobilizations go beyond the scope

[550] Interview with Kees Groenendijk, 20 February 2018, Nijmegen.

[551] Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', 138.

[552] Interview with Raad Van State Judge, 22 February 2018, The Hague. For instance, an internal commission was established in the Raad Van State, where the state counsellor that are experts in EU law sit. When other counsellors want to submit a reference, they should first consult with this commission.

[553] Tezcan-Idriz, 'Dutch Courts Safeguarding Rights under the EEC-Turkey Association Law. Case Note on District Court Rotterdam Judgments of 12 August 2010, and District Court Roermond Judgment of 15 October 2010'.

[554] Groenendijk and Strik, 'Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors', 377.

of my dissertation but are necessarily intertwined with the preliminary references analysed, and I will discuss them in the conclusion of this chapter.

7.1 Imran

The *Imran* case shows how, sometimes, you can make an impact just by asking for a preliminary reference. In fact, the case was dropped before the CJEU could issue a judgement on it; nevertheless, it had relevant impact on the integration policy and the legal mobilization strategies of two Member States: the Netherlands and Germany.[555]

The idea of this preliminary reference emerged during a lecture on family reunification that Professor Groenendijk gave to the Dutch Refugee Council's (hereinafter, DRC) staff. Somebody raised the fact that refugees and migrants in the Netherlands do not enjoy a right to family reunification in practice because of the Act on Civic Integration from Abroad. The test was too expensive, both in terms of registration fee and preparation material; moreover, this preparation material was not available in all languages and therefore many people could not understand it. Especially migrants from the poorest countries were in a very difficult situation: they often have to undertake very long journeys (even to other countries) to reach the closest Dutch consulate or embassy where they can take the test, and they have scarce material and educational resources, which make their chances to pass the test lower. Professor Groenendijk, having listened to these complaints, told the DRC staff that they could use EU law more proactively and that they should try to challenge the Act before the CJEU: if they found a good case, he could help them in bringing the litigation to Luxembourg.[556] The DRC took this suggestion seriously, and a few months later, they got back to Professor Groenendijk with a potentially very strong test-case: *Imran*.

The *Imran* case started in spring 2009, when the DRC's local office in Vianen (a small city close to Utrecht) decided to assist Mr Safi in filing his family reunification request. Mr Safi is an Afghan citizen, residing in the Netherlands since 2000; after a long time apart, he wanted to reunite with his wife, Mrs Bibi Mohammad Imran, and their eight children, who in the meantime were living in Pakistan. It took several years to Mr Safi

[555] Court of Justice of the European Union, *Imran, C-155/11 PPU*, ECLI:EU:C:2011:387.

[556] Interviews with Kees Groenendijk, on 8 August 2016 and 20 February 2018, both in Nijmegen.

to meet all the conditions required by EU and Dutch law for filing a family reunification request: he had to obtain a regular status (he got a residence permit via regularization[557]), a sufficient income (he was carrying out three jobs at the same time), and an appropriate house to accommodate his big family. However, the Act of Civic Integration from Abroad imposed a further condition: the family members should pass the civic integration test. Unfortunately for the Safi family, Mrs Imran, who travelled all the way to Delhi with their eight children to take the test, eventually did not pass the test, and her visa application was consequently rejected. Ironically, the children obtained the visa instead, and joined their father immediately, on 5 August 2009.

Three features make the *Imran* case a compelling example of how the civic integration test was an obstacle to the right to family reunification: 1) The failure to pass the civic integration test was the only reason why Mrs Imran could not reunite with her husband; 2) Dutch authorities applied the civic integration requirement in a very restrictive manner: they did not grant Mrs Imran the medical exemption she asked for, and they did not take into account the fact that she could not access the material to prepare for the test (as it was not available in her language); 3) Mrs Imran's visa rejection had a terrible impact on the well-being of the whole family. In fact, the eight sons had been catapulted into a new foreign state, far away from their mother, having to live with a father that they barely knew (they lived apart for the last nine years) and who was extremely busy with his three jobs, which he needed to carry on to have the sufficient income necessary to complete his wife's reunification process.[558] In sum, the Imran family was in a difficult and absurd situation that was completely ignored by Dutch authorities, which based their decision only on Mrs Imran's failure to pass the test.

With the help of the DRC, Mrs Imran filed an administrative complaint against the visa rejection from Afghanistan, and when this was also refused, they decided to appeal in court. To represent Mrs Imran in the proceedings, the DRC contacted Gerben Dijkman, an immigration lawyer based in Utrecht with whom they often collaborate. The DRC put Dijkman and Groenendijk in contact; the professor offered his assistance with the

[557] Mr Safi entered the Netherlands as an asylum seeker. Despite his asylum application being rejected, he obtained another residence permit thanks to a regularization.

[558] These circumstances are in part described in the facts of the case, in part they were told to me by the lawyer: Interview with Gerben Dijkman, 13 December 2017, Utrecht.

case, and the lawyer enthusiastically accepted. Interestingly, when I asked Dijkman whether *Imran* was a test case, he answered that officially it was not, but that probably Professor Groenendijk was waiting for a 'good case to test his arguments', and that *Imran* was indeed a good one, 'too good, in the end'.[559]

Since the very beginning, the goal was to bring the *Imran* case before the CJEU. During the proceedings before the Zwolle-Lelystad District Court, the first-instance court, Professor Groenendijk drafted an advisory opinion for the lawyer, where among other things, he argued that art.7(2) of the Family Reunification Directive has been incorrectly transposed into Dutch legislation:

> The provision only permits the person concerned to participate in integration measures. The word "integration conditions" in that provision is a manifest translation error. The other language versions refer to "integration measures" (integration measures, mésures d'integration, Integrationsmassnahmen).[560]

Moreover, the Dutch law-maker did not transpose art. 5 of the Directive, stating that Member States must duly take into account the best interest of the child when examining applications for family reunification. Finally, Groenendijk argued that the requirement to pass the civic integration test from abroad is contrary to the principle of proportionality: the test imposes high costs and sacrifices on the applicant, but there is no evidence that, once the test is passed, the chances of integration have increased.[561] In sum, the Dutch integration policy hinders the *effet utile* of the Directive, that is to promote family reunification, and not to make it more difficult.

Dijkman, for his part, had to convince the Zwolle District Court to make a reference. This was not an easy task because, as explained in the previous section, at that time,

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[559] Interview with Gerben Dijkman, 13 December 2017, Utrecht.

[560] Letter from Professor Groenendijk to Dijkman, 28 July 2010. The letter was subsequently published on Migratie Web: Note of Kees Groenendijk, appeals procedure AWB 10/9716, (interim) judgment VK Zwolle (jerk) ve11000797, of 28 July 2010 (published on *Migratie Web*). Here is the original text in Dutch: "Art. 7(2) van richtlijn 2003/86 is onjuist omgezet in de Nederlandse wetgeving. De bepaling laat alleen toe te eisen dat de betrokkene deelneemt aan inburgeringsmaatregelen. Het word "inburgeringsvoorwaarden" in die bepaling is een kennelijke vertaalfout. In de andere taalversies is sprake van "inburgeringsmaatregelen" (integration measures, mésures d'integration, Integrationsmassnahmen)."

[561] Note of Kees Groenendijk, appeals procedure AWB 10/9716, (interim) judgment VK Zwolle (jerk) ve11000797, of 28 July 2010 (published on *Migratie Web*).

only the last instance courts were submitting preliminary references.[562] Therefore, he elaborated an original strategy:

> I thought, I can do two things: I can copy-paste Professor Groenendijk's argument in my own pleading for a referral, and then the judges would think: 'Ok, this is what Mr Dijkman thinks, shall we take him seriously?' Or, I can just say explicitly: 'here is a letter for you from Professor Groenendijk'. Officially it shouldn't matter for the court who puts down the argument, but in practice it does matter. Groenendijk is recognised as an authority, even in Europe, on this specific Directive.[563]

Eventually, the lawyer's technique was successful: he submitted Groenendijk's letter as a separate document in the proceedings, and the District Court decided to submit a request for a preliminary reference to the Court of Justice, asking that it be dealt with under the urgent procedure.[564] The Zwolle-Lelystad District Court was the first Dutch lower court to ask for a preliminary reference in the AFSJ area; it might be appropriate to say that, be it a myth or reality, the 'Gentlemen's agreement' was definitively breached.

The reference in *Imran* represented a hard test for the Act on the Civic Integration from Abroad, at least in the view of Groenendijk, the DRC, and Dijkman. But, apparently, the lawyers representing the IND underestimated its potential impact. It was only when the case was referred to Luxembourg, and communicated to the Dutch government's agents, that these realized the important challenge that *Imran* represented. In the words of a Dutch government agent at that time, 'this was not the kind of cases where you want to have this law tested'.[565] The agent immediately informed the Foreign Affairs Minister about the likely negative outcome of *Imran*, who in turn called for an urgent meeting with the IND representatives and the Minister of the Interior. During the meeting, the Dutch agent suggested to offer Mrs Imran a residence permit, in order to end the proceedings and avoid the CJEU's ruling; after some hesitancy, the Minister of

[562] See what was said in the previous section on the Dutch lower courts' restraint from referring.

[563] Interview with Gerben Dijkman, 13 December 2017, Utrecht.

[564] Pursuant to Article 104b of the Rules of Procedure of the Court of Justice.

[565] Interview with former Dutch agent, 22 February 2018, The Hague.

Interior issued a special permit for Mrs Imran and sent a letter to the CJEU to inform it that the case was solved. On 30 May 2011, the Zwolle-Lelystad District Court also communicated to the CJEU the changed situation, confirming that Mrs Imran eventually obtained a temporary permit but asking for the continuance of the case since its interpretation was still relevant to decide on the award of damages; despite this, the CJEU issued an order of no need to adjudicate.[566] The *Imran* case came therefore to a premature end, and the Dutch government avoided a likely debacle in Luxembourg.

7.2 The impact of the EU Commission's opinion in Imran

At first glance, *Imran* was an individual victory and a collective defeat: the Safi family was finally reunited in the Netherlands, but the Dutch government managed to prevent that its Act on Civic Integration from Abroad was tested in Luxembourg. However, before the case was abruptly ended, the EU Commission had already submitted its written observations, and these fully confirmed Groenendijk and Dijkman's arguments. What turned *Imran* into an impactful case, interestingly, was the divulgation of the Commission's written observations. Below I will explain the Commission's argument and how it was effectively used by migrant supporters.

The Commission made a textual and teleological interpretation of the Directive. 'First of all, it is not a question of conditions as referred to in Article 7(1) of which proof must be provided, but of 'integration measures' that Member States may require the family member to comply with.'[567] To further support its claim, the Commission made reference to the various language versions of the Directive (as Groenendijk did) and gave a functional interpretation of the Directive. The Commission stated that the goal of the Directive is to promote family reunification because this will enable migrants' successful integration. Therefore, the integration measures that the Member States may adopt should not constitute a limit to family reunification: 'On the contrary, the

[566] Court of Justice of the European Union, Order in the Case of *Bibi Mohammad Imran v Minister van Buitenlandse Zaken*, Case C-155/11 PPU, 10 June 2011.

[567] See Commission Observations, *Imran*, C-155/11, Sj.g(2011)540657, Brussel, 4 May 2011, at par. 21, translation by the author.

integration measure must contribute to a successful family reunification. […] It is therefore a positive measure and not an exclusion ground or an access condition.'[568]

Under the CJEU rules, the Commission's observations are not public, and are to be shared only among the parties in the case. However, after the disappointing premature closure of the *Imran* case, Dijkman, Groenendijk, and the DRC made their utmost to spread the Commission's document as much as possible, even beyond national borders. The text was published on online platforms (such as *Migratierecht.net)*, making it available for migration lawyers to use. Groenendijk, who had worked with migration lawyers and experts in Germany, forwarded the Commission's observations also to them. The observations, originally available only in Dutch, were translated into German and spread on German online resources for immigration lawyers.

Soon, the case of *Imran* manifested its impact in Germany, where an integration test similar to that of the Netherlands had been introduced.[569] German immigration lawyers were referring to the Commission Observations in national proceedings, attaching the document to the file of the proceedings as an argument to challenge the validity of the German integration test. Moreover, the Commission Observations were used to convince German courts to make a reference to the CJEU. After a first attempt where the German government stopped the referral by granting a permit to the litigant,[570] finally a case reached the CJEU. This was the case of *Dogan* (C-138/13),[571] a case of a Turkish national whose application for family reunification was dismissed because she failed the pre-entry integration test; although the referring Court asked whether the integration test was compatible with both the Turkey Association Agreement and the Family Reunification Directive, the CJEU declared the integration test in violation of

[568] Ibidem at par 29. Also in par. 31: "Member States have the possibility to impose integration measures. However, they must be proportionate and must not function as a mechanism to impede the purpose of the directive, which is to promote family reunification. They cannot therefore lead to a refusal of family reunification." To support this argument, the Commission cited extensively the CJEU's judgements in the cases of *Parliament v. Council* (C- 540/03) and *Chakroun* (C-578/08), and relevant human rights norms contained in the Nice Charter and the ECHR that protect family life and the best interest of the child.

[569] Pascouau, 'Measures and Rules Developed in the EU Member States Regarding Integration of Third Country Nationals - Comparative Report', 37.

[570] Court of Justice of the European Union, *Ayalti*, C-513/12 (25 March 2013).

[571] Court of Justice of the European Union, *Dogan, C-138/13*, ECLI:EU:C:2014:2066.

the standstill clause of the former instrument and did not answer to the question about the Directive.[572]

The impact of *Imran* was strong, also within the Netherlands. Immigration lawyers were aware of the EU Commission Observations and started using them before Dutch courts to challenge the validity of family reunification denials based solely on the failure to pass the civic integration test. The Dutch government became aware of this situation: the IND changed the way in which the Act on Civil Integration from Abroad was applied, granting more exemptions based on the health or the personal circumstances of the applicant (the so-called hardship clause, introduced in 2011 but still rarely used).[573] In sum, the law was still very restrictive and represented a big obstacle for family reunification.

7.3 K and A

After having been very close to a victory in *Imran*, Dijkman, the DRC, and Groenendijk were even more determined to obtain a preliminary ruling on the Act on Civil Integration from Abroad. The Commission Observations demonstrated that their arguments were correct, but to make the Family Reunification Directive uniformly enforced, they needed a CJEU's judgment.

This time, Dijkman and the DRC did not wait for the perfect case. *K* was the case of a woman that failed the integration test abroad for not very compelling reasons (she asked for an exemption on medical grounds and declared to be illiterate, but during a hearing, there emerged some documents that proved her wrong).[574] However, the team could rely on the Commission Observations in the case of *Imran*, and on a new ally: the VU Migration Law Clinic. Dijkman, Groenendijk, the DRC, and the researchers from the clinic met regularly in Dijkman's office in Utrecht to discuss the best strategy for the case. While the lawyer and the professor focused on the EU law arguments of incompatibility with the Directive, the Migration Law Clinic conducted research on

[572] Court of Justice of the European Union, ECLI:EU:C:2014:2066 paragraph 40.

[573] Article 3.71 paragraph 2 of the Immigration Law, Vb 2000, entered into force since April 2001.

[574] Interview with Gerben Dijkman, 13 December 2017, Utrecht.

how the civic integration test abroad was applied in practice by the IND, gathering statistics and information on practical difficulties that applicants encounter during the process of taking the integration test.[575]

The case of *K* received a first positive ruling already in the first stage of the proceedings before the District Court of The Hague. The EU Commission Observations proved decisive, as Dijkman told me: 'I sent the documents from the previous referral in *Imran*, the Commission's opinion, and I basically said 'Well, this is how you should do it''.[576] The District Court could not ignore the Commission's statement, and had two alternatives: either upholding the Commission's view, or challenging it and asking for a new interpretation to the CJEU. It went for the first: it declared that the Directive precludes a member state from denying family reunification exclusively on the ground that the applicant did not pass the integration test.[577]

The District court decision in *K* constituted a very bad precedent for the IND. Considering this situation, for them it was better to have the case referred to the CJEU because it would have given them the chance to advocate for a different interpretation of the Directive. Therefore, the IND lawyers filed an appeal before the Raad Van State and asked the court to issue a request for preliminary reference. Although both parties showed their support for the request for a preliminary ruling, the Raad Van State decided to wait for another case to refer, and hence it merged *K* with *A*. This is a regular practice for the Raad Van State: they always try to submit to the CJEU more than a case at a time to avoid an *Imran*-like situation; after having invested so much time on a case,

[575] Migration Law Clinic, 'De Wet Inburgering in Het Buitenland in EU-Rechtelijk Perspectief', July 2014, https://migrationlawclinic.files.wordpress.com/2014/08/expert-opinion-de-wet-inburgering-in-het-buitenland-in-eu-rechtelijk-perspectief.pdf.

[576] Interview with Gerben Dijkman, 13 December 2017, Utrecht.

[577] We can see the reference to the Commission Observations also in the *K and A* judgment, par. 40: "The Rechtbank 's-Gravenhage considered it to be decisive in that regard that, in its written observations in the proceedings of the case giving rise to the order in Mohammad Imran (C-155/11 PPU, EU:C:2011:387) which were included in K's file before the Rechtbank 's-Gravenhage, the Commission took the view that Article 7(2) of the Directive 2003/86 precludes a Member State from refusing the spouse of a third country national living lawfully in that Member State entry and residence exclusively on the ground that that spouse has not, outside the European Union, passed the civic integration examination provided for in the legislation of that Member State."

they do not want that the case is subsequently dropped because the government grants the permit.[578]

On 9 July 2015, three years after the failed reference in the *Imran* case, finally the CJEU pronounced itself on the compatibility of the pre-departure civic integration test with the Family Reunification Directive. First, the CJEU confirmed its interpretation in *Chakroun*: the Directive imposes specific obligations on Member States which must authorize the entry of the sponsor's family member, provided that all conditions are met.[579] However, among these conditions, laid down in Chapter IV of the Directive, there are also the integration measures of art. 7(2): Member States can subject the entry of the family member to compliance with certain integration measures because this would not *per se* undermine the Directive's aims.

At the outset, the CJEU seems to leave more discretion to Member States, in comparison with what was observed by the Commission in *Imran*. However, the Court then added some caveats. It stated that 'since the authorisation of family reunification is the general rule', the integration measures should be interpreted strictly: being an integration requirement, they must be proportionate and achieve their objective, that is to facilitate family members' integration, and they 'must not go beyond what is necessary to attain them.'[580] Moreover, the Court noted that the way in which the integration measures have been applied in Dutch law and in the referred cases is problematic because they are able to systematically prevent family reunification, the promotion of which is the main aim of the Directive. In fact, the applicants' individual circumstances were not taken into account in order to decide whether to dispense them from taking the test or not;[581] also, the preparation and registration fees required for taking the integration test are so high that they are capable of making family reunification impossible or excessively difficult.[582]

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[578] Interview with Raad Van State Judge, 22 February 2018, The Hague.

[579] Court of Justice of the European Union, *K and A, C-153/14*, ECLI:EU:C:2015:453 paragraphs 45–49.

[580] Judgment in *K and A,* par. 50-51.

[581] Judgment in *K and A,* par. 63.

[582] Judgment in *K and A,* par. 64-70.

The *K and A* judgment resulted in a compromise solution between the position of migrant supporters and the government. In principle, Member States can require family members to comply with integration measures prior to their admission; however, the way in which these requirements have been designed in Dutch law is such that they might render the exercise of the right to family reunification impossible or excessively difficult, and therefore they are contrary to the Directive. Even if it was a compromise decision, *K and A* represented an important victory for migrant supporters because it imposed a limit on states' discretion on the basis of the consideration of migrants' rights. The next section will show the judgment's impact on how the integration test is applied in the Netherlands and on how the issue of migrants' integration is dealt with in EU law.

8. The legal mobilization's impact on Dutch integration policy and on the EU conception of integration

In the cases of *Imran* and *K and A,* migrant supporters, by overcoming lower courts' reticence and government's obstruction, managed to mobilize the Family Reunification Directive before the CJEU to challenge the legitimacy of the *inburgering* policy. This is what some scholars have called the Directive's 'backfire'.[583] Thanks to the described mobilization, the CJEU had the opportunity to issue its interpretation on the meaning of 'integration measures' (art. 7(2) of the Directive). This new judicial interpretation had practical implications on three different levels: a) on how TCN's integration is conceived in general in the EU; b) on Dutch integration law and IND's practice; c) on practitioners' understanding of the Directive. Below I will explain these three outcomes, with the anticipation that in the perspective of migrant supporters, the mobilization has yielded positive and negative outcomes.

8.1 Mobilization's impact on the concept of integration

[583] Bonjour and Vink, 'When Europeanization Backfires'.

We saw that the Dutch policy on immigration experienced a significant shift in the beginning of the 2000s (section 3). While before, the law-maker was actively promoting integration through policies of social inclusion and equality, it then decided to conceive of integration as a condition for obtaining territorial admission, social inclusion, and an equal status. This new integration policy, centring on the *inburgering* concept, was the target of the legal mobilization that culminated in the cases of *Imran* and *K and A*.

Interestingly, the *Centrale Raad Van Beroep* (Central Appeals Tribunal*)*, a few months before the reference in *K and A*, had referred another case, *P and S,* [584] which also questioned the legitimacy of the civic integration test vis à vis EU law. However, *P and S* focused on the *Wet Inburgering* Act, the Dutch law that imposes a test on the TCN who already resides regularly in the Netherlands, and who wants to acquire or to maintain a long-term residence status.[585] The reference was submitted *ex officio* by the judges, without the litigants asking for it. However, Professor Groenendijk helped the lawyer in the case, Jeremy Bierbach, to formulate his submissions, and the arguments put forward were in line with those of *K and A*;[586] they challenged the legitimacy of the civic integration test because it was deemed in conflict with long-term resident migrants' rights, in particular with their right to be treated equally to Dutch citizens.[587] Eventually, *P and S* and *K and A* were decided almost at the same time by the Second Chamber of the CJEU, which reached a similar conclusion.

As noted, these cases bear an importance that transcends the Dutch borders and concerns the whole EU polity. In fact, *K and A* and *P and S* 'obliged the Court, as hard

[584] Court of Justice of the European Union, *P and S, C-579/13*, ECLI:EU:C:2015:369. The question was referred on November 2013, while *K and A* was referred in April 2014.

[585] See section 3.2, this is the test introduced for migrants who had already been admitted in the Netherlands. The government introduced the test as a condition to acquire long-term residence status, as permitted by art. 5(2) of the Long-Term Residence Directive: "Member States may require third-country nationals to comply with integration conditions, in accordance with national law." However, when the *Wet Inburgering* Act was introduced in 2007, the government decided to impose the test also on migrants that already had long-term residence status, who in case of failure, would pay a high fee. This was the case of the applicants in *P and S.*

[586] Interview with Jeremy Bierbach, 14 December 2014, Amsterdam. Interview with Kees Groenendijk, 20 February 2018, Nijmegen.

[587] Art. 11 of the Long-Term Residence Directive 2003/109.

cases, to define its standpoint on integration'.[588] By asking for a definition of integration 'measures' and 'conditions', migrant supporters were posing more fundamental questions, such as: What is the EU model of integration? Is this compatible with the Dutch assimilationist turn?

The CJEU's rulings fell short of the expectations that migrant supporters had. The Court's Second Chamber, responsible for both the decisions in *K and A* and *P and S*, reversed the way in which integration was previously understood in the framework of EU migration policy. Until then, because of the statements in the Tampere Conclusions,[589] recalled by the preambles and wording of the Family Reunification and Long-Term Resident Directives,[590] a consistent group of migration scholars had interpreted the EU approach to integration as based on incremental rights, quasi-equality between migrants and citizens, and active policies of social inclusion.[591] This scholarship would see the EU much closer to a multicultural ideal of society, with a 'right focus stand-point'. On the opposite side, another part of the scholarship was arguing that integration in the EU was characterized by a 'cultural outlook', which emphasized the importance of migrants' assimilation to the culture of the majority.[592] Arguably, these two rulings locate the EU more along this second strand.

The CJEU's take on integration is difficult to predict, also because it is not fully in line with the position that the majority of Member States expressed during the Family Reunification Directive's negotiations. In fact, the Dutch delegation had openly advocated for including the possibility to require integration conditions in the text of

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[588] Daniel Thym, 'Towards a Contextual Conception of Social Integration in Eu Immigration Law. Comments on P & S and K & A', *European Journal of Migration and Law* 18, no. 1 (15 March 2016): 106.

[589] Moritz Jesse, 'Integration Measures, Integration Exams, and Immigration Control: P and S and K and A', *Common Market Law Review* 53, no. 4 (1 July 2016): 1080.

[590] Scholars argued that the choice of the word 'measures' instead of 'conditions' could not be random. The difference between the two words exists also in the Long-Term Residence Directive 2003/109. See Sarah Ganty, 'Les Tests d'intégration Civique Sous Le Contrôle de La Cour de Justice de l'Union Européenne: Un Exercice d'équilibriste Périlleux Entre Marge d'appréciation Des États Membres et Protection Des Ressortissants de Pays Tiers', *Journal Européen Des Droits de l'homme*, 2016, 51.

[591] Mark Bell, 'Civic Citizenship and Migrant Integration', *European Public Law* 13, no. 2 (1 May 2007): 329.

[592] Thym, 'Towards a Contextual Conception of Social Integration in Eu Immigration Law. Comments on P & S and K & A', 90.

the Family Reunification Directive, but this was met with scepticism by other Member States, which eventually agreed on the milder 'measures'. Arguably, the decision in *K and A* redefined the Family Reunification Directive in a way that was not initially foreseen by the Commission and the Council, and it validated the Dutch model of integration.[593] The CJEU confirmed its reasoning in its subsequent case-law, stating the legitimacy of Dutch integration conditions, also in other instances, such as *C and A* and *K*, as we will see later (section 8.3).[594]

8.2 Mobilization impact on Dutch integration law

On a more positive note, the *K and A* ruling confirmed the CJEU's rigorous commitment with respect of the right to family reunification. The Court confirmed the findings of *Commission v. Parliament* and *Chakroun*: family reunification is an individual right conferred by the EU upon TCN migrants residing legally, and Member States are bound to respect it, with limited margin of appreciation. This means that Member States have limited discretion, also in the implementation of integration conditions: these cannot make the exercise of the right to family reunification impossible or too difficult. Given how strict the Dutch norms on the civic integration test were, the CJEU decision entailed relevant amendments.

First, in light of *K and A*, the government adopted legal change to the Act implementing the Alien Law (*Vreemdelingencirculaire* 2000).[595] Immigration authorities cannot reject a family reunification application anymore solely because the applicant failed the exam; the IND must consider the applicant's individual circumstances and apply the conditions required by national law in a way that respects the proportionality

[593] For another critical view on how the CJEU's judicial law-making trumps the political view of the law-maker to impose a different model of (economic) integration, see Martin Höpner and Armin Schäfer, 'A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe', *West European Politics* 33, no. 2 (1 March 2010): 344–68.

[594] Court of Justice of the European Union, *C and A, C-257/17*, ECLI:EU:C:2018:876; Court of Justice of the European Union, *K, C-484/17*, ECLI:EU:C:2018:878.

[595] Art. B.1/4.7 Vreemdelingencirculaire 2000 (B). Available at the link: https://wetten.overheid.nl/BWBR0012289/2016-01-01?VergelijkMet=BWBR0012289%3Fg%3D2015-07-01

principle.[596] More concretely, the IND must consider whether the applicant should be granted an exemption from taking the civic integration test because of his/her particular situation, such as the presence of minor children, specific health conditions, or the unsafe situation of the third-country.[597] Another newly introduced exemption from taking the test applies in case the preparation material is not available in the language of the applicant. If, nevertheless, the IND decides to refuse the reunification request, the migrant can ask for a judicial review of the decision, whereby judges must also make sure that the applicant did not qualify for one of the exemptions listed. This guarantees a judicial scrutiny over the IND's decision.

Another positive impact that *K and A* had on migrants' situation regards the fees they are required to pay.[598] The Dutch government reduced substantially the fees (from 350 € to 150 €) and the cost of the preparation material (from 110 € to 60 €) for taking the integration test.[599] Overall, even if the civic integration test from abroad still applies, its conditions substantially improved.

8.3 Mobilization's impact on how the Directive is perceived

Lastly, the cases of *Imran* and *K and A* had an impact on how migration practitioners think of the Family Reunification Directive. Thanks to these first preliminary references, 'lawyers and judges became acquainted with European Migration Law and its implications, and national courts started submitting requests for a preliminary ruling from the Court of Justice.'[600] These judgments unveiled the potential of the Directive

[596] Ganty, 'Les Tests d'intégration Civique Sous Le Contrôle de La Cour de Justice de l'Union Européenne: Un Exercice d'équilibriste Périlleux Entre Marge d'appréciation Des États Membres et Protection Des Ressortissants de Pays Tiers', 39.

[597] Ibidem: "The IND does not reject the application for a provisional residence permit because of the integration requirement if there are special individual circumstances that lead to the foreign national being unable to pass the civic integration examination successfully. This can be a single circumstance or a combination of different circumstances" (translation by the author).

[598] Jesse, 'Integration Measures, Integration Exams, and Immigration Control', 1083 and 1085.

[599] Regulation of the State Secretary for Security and Justice of 19 February 2016, number 736437, amending the Aliens Regulations 2000 (hundred and forty-second amendment).

[600] Groenendijk and Strik, 'Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors', 364.

as an instrument to protect family reunification from unlawful barriers set up by the government.

As a consequence, new preliminary references on the Family Reunification Directive arose. Some of them where promoted by civil society actors (like the case of *A and S*, supported by the VU legal clinic), but others have been referred under the initiative of national judges alone, without the parties asking for it (like *C and A*, as results from the text of the reference).[601] Surely, these references show that judges and practitioners are now more acquainted with the Directive and its implications, and are ready to rely on the preliminary reference mechanism to enforce it; however, if we take a more pessimistic view, we can also read the preliminary reference mechanism as a symptom of the reluctance of the IND to fully subscribe to the higher standards set by the Directive.

For instance, the cases of *C and A* and *K* regard the situation of TCN spouses who, after more than five years of residence as family members, asked for an autonomous residence permit;[602] however, they could not pass the civic integration test required by Dutch law, and the IND withdrew their permits.[603] The CJEU restated that a decision to withdraw a permit of a family member cannot be based on the sole fact that the TCN did not pass the test, but other circumstances should be taken into account, 'such as the age, level of education, economic situation or health', which can exempt him/her from

[601] See Court of Justice of the European Union, Judgment in the case of *A and S*, C-550/16, ECLI:EU:C:2018:248. And Court of Justice of the European Union, Judgment in the case of *C and A*, C-257/2017, of 7 November 2018, ECLI:EU:C:2018:876. This is the case of two TCNs that are spouses of Dutch citizens, who see their permanent residence permits denied because they do not pass the integration test. The national court decision is: Raad Van State, Order for Reference in the case of C and A, 201600860/1 / V2 and 201604637/1 / V2, May 10, 2017, available at https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekstuitspraak.html?id=91156&summary_only=&q=C+and+A.

[602] This is expressly provided by the Family Reunification Directive, at art. 15: "1. Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor.[..] 4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law."

[603] Court of Justice of the European Union, *K, C-484/17*, ECLI:EU:C:2018:878; Court of Justice of the European Union, *C and A, C-257/17*, ECLI:EU:C:2018:876.

passing the test.[604] Arguably, these conclusions were already in the *K and A* judgment and, in my view, are paradigmatic of the fact that the IND still applies a restrictive approach to these rights' enforcement. In fact, if preliminary references are still needed, it might mean, although the meaning of the Directive has been clarified, that the IND keeps interpreting it in a way that is not fully consistent with the CJEU's judgments.

9. Conclusion

This chapter has situated the Family Reunification Directive in the context of the Dutch integration policy, shedding light on its enforcement and transformation by civil society actors. Importantly, the chapter shows how the adoption of the Directive alone was not sufficient to change Dutch policy: the Directive was transposed by the government already in 2004 but without major impact on the national legal framework or on the practice of the IND. Instead, the CJEU's judgments were crucial for clarifying the content of the Directive and the implications of the right to family reunification enshrined therein. This chapter shows how these important rulings were the outcome of a legal mobilization conducted by migrant supporters who foresaw the Directive's potential.

As mentioned before, the cases of *Imran* and *K and A* were only a part of a broader litigation strategy set up to mobilize EU law against the Dutch integration policy. In fact, migrant supporters mobilized the Directive also via other venues. For instance, the DRC filed two complaints before the Commission, denouncing as incorrect the Dutch transposition of the Directive.[605] The IOT, the organization of Turkish migrants in the Netherlands, organized a strategic litigation before Dutch national courts, which obtained the exclusion of Turkish migrants from the obligation of taking the civic integration test, thanks to the application of the standstill clause of the Ankara

[604] Court of Justice of the European Union, *C and A, C-257/17*, ECLI:EU:C:2018:876 paragraph 63; Court of Justice of the European Union, *K, C-484/17*, ECLI:EU:C:2018:878 paragraph 23.

[605] Groenendijk and Strik, 'Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors', 378.

Agreement.[606] The IOT also contested the high fees required in order to obtain a permit, controversy that started within the framework of the Long-Term Residence Directive but which eventually concerned also the Family Reunification Directive.[607]

Even if we saw that national courts' judgments can bear important results in the mobilization, only a CJEU's ruling can impact on the Family Reunification Directive's interpretation in the whole EU. As we have seen, such judicial interpretation had a catalysing effect, and other preliminary requests followed on the application of the Directive in other fields: for people with subsidiary protection, for minors, for family members of national citizens, etc. These new cases, on the one hand, reveal the potential that an indeterminate instrument such as the Directive bears, which can be used to expand migrants' rights in different fields. On the other hand, as we have seen, some of these cases also show how reluctant the IND was and still is to fully protect and respect migrants' rights to family reunification as interpreted by the CJEU.

This chapter, by looking at the CJEU case-law through the legal mobilization lens, argues that the conditions that have made the Family Reunification Directive backfire in the Netherlands are to be found in its socio-political context and in the work of migrant supporters. First, the academics that analysed the text of the Directive and understood its potential were crucial for the trigger of the mobilization; also crucial was the fact that these academics were in contact with migrant supporter organizations, which decided to believe in the legal mobilization project. Finally, the availability of lawyers that believed in the migrants' cause and decided to invest their time and work in the legal mobilization effort was important. These civil society actors played a crucial

[606] See the judgments of the District Court Rotterdam of 12 August 2010, and District Court Roermond Judgment of 15 October 2010, described in the article of Tezcan-Idriz (n 74).

[607] See the Raad Van State's judgment on 9 October 2012, ECLI:NL:RVS 2012:BY0145, JV 2012/470: "Although the scope of application of Directives 2003/86 and 2003/109 is not the same, both Directives apply to third-country nationals, both aim to promote the integration of third-country nationals in Member States and both require Member States to introduce a system in which third-country nationals are entitled to a residence permit if they meet a number of procedural and material requirements. In addition, both directives have in common the fact that they do not contain provisions on fees and therefore leave discretion to the Member States in this respect. In view of these similarities between the Directives, it must be assumed that the considerations of the CJEU as presented in 1.4 are applicable mutatis mutandis in the context of Directive 2003/86."

role in mobilizing the Directive, and they did so under the sole incentive of supporting the migrants' cause. In the word of Professor Groenendijk: 'I never got a penny for what I did. Just cute paintings from Mrs Imran's children'.[608] These socio-political factors should be taken into account when trying to understand the roots and the direction that Europeanization takes. In fact, even the most autonomous Court, without migrant supporters mobilizing EU law, would remain silent.

[608] Interview with Kees Groenendijk, 20 February 2018, Nijmegen.

Chapter V. Legal Mobilization: Conditions and Impact

The three case studies of Italy, the UK, and the Netherlands provide useful insights to further our knowledge on the use of the preliminary reference mechanism as a tool to advance migrants' rights. The empirical analysis shows how, in all the three cases selected, networks of migrant supporters have mobilized EU law before the CJEU to challenge restrictive national laws and practices, and to influence the development of EU migration law. With the aim of gaining theoretical insights, the present chapter makes a step further. By drawing on the findings of the three case-studies, and on the differences and similarities that emerged, it identifies the conditions under which a legal mobilization before the CJEU arises. These conditions will be described in sections three (the grievances), four (the legal opportunity structure), and five (the resources); then, I will partially test them in section six. These sections deal with the last question I posed at the beginning of my research: after having answered the who, how, and why of the mobilization, this chapter answers the question 'when does the mobilization for migrants' rights before the CJEU occur?' Finally, the last section of the chapter engages in a reflection on the impact of the mobilization. It is argued that, although migrant supporters can be important in determining the CJEU's agenda, they have nonetheless a limited influence on the outcome of the litigation; however, if we take a plural approach to assess the litigation impact (e.g. we look beyond the single ruling), then we can see how legal mobilization does produce important effects for society: it prompts further litigation, influences political debates, and shapes the executive's action.

1. The mobilization of EU migration law

This dissertation started with three basic questions concerning legal mobilization for migrants' rights before the CJEU: first and foremost, does such a mobilization even exist? If yes, who carries it out, how, and why? The first three chapters have dealt with these questions, and this last chapter builds on their findings to understand a further piece of the puzzle: under which conditions does a legal mobilization before the CJEU emerge?

The table below summarizes the main findings of the three empirical chapters. The left column lists the questions that guided my analysis, while the following columns toward the right report the answers for each country, and the last column on the right states whether the findings in the three countries coincide (there is 'convergence') or differ ('variation'). The table is useful to give a sense of the inductive attitude that characterizes my approach to the phenomenon. This approach has the advantage of showing the complexities and grey areas characterizing the reality of the mobilization. However, it has also the limit of shedding only partial light on the conditions under which legal mobilization occurs. In fact, even where the three case-studies show convergence, this does not mean that that factor is necessary for the mobilization emergence. Despite these limitations, I believe that the inductive approach is the best suited to identify possible conditions, which should then be tested with a more deductive design.

	ITALY	THE UK	THE NETHERLANDS	FINDINGS
Why EU law was mobilized?	Crimmigration	Curtail of family migration	Civic integration test from abroad	Convergence: To challenge a restrictive national policy
Political opportunities?	No	No	No	Convergence: Closed political opportunities
Why EU Law?	Higher protection to right to liberty	Higher protection to family reunion	Higher protection to family reunion	Convergence: it was potentially more protective
Why the Court of Justice?	Directive was non-transposed	Citizenship Directive was mis-applied	Directive was mis-transposed	Convergence: enforcement problem
Did migrants lead the legal mobilization?	No	No	No	Convergence: Limited role of migrants
Who led the legal mobilization?	Network of judges + Network of migration lawyers	Migration NGOs + Eurolawyers	Independent academics + Migration NGOs	Convergence: Law-focused groups
Who proposed to refer?	Mostly criminal judges	Migration Lawyers	Migration Lawyers with academics' support	Variation
Who authored the prel. ref. request?	National judges with the support of legal experts	Lawyers write the first draft and the judge writes the question	National judges	Variation
Procedural barriers to access the CJEU?	Giudici di Pace limited ability to refer.	Weak judicial review culture	"Gentlemen Agreement"	Convergence: different procedural constraints
Procedural facilitations to access the CJEU?	Legal aid + Criminal judges' competence	Legal aid + Third-party interventions	Legal aid + "EU turn" of the Raad Van State.	Convergence: Different procedural incentives
Government's attempts to contain justice?	Communication on how to avoid judicial review	Cut to legal aid and to advisory centres + Order to lower courts not to refer	Cut to funding for minority groups + Government drops weak cases	Convergence: Governments tried to contain justice

Once the converging findings are identified, we need to analyse them further to understand whether they might in fact be considered conditions for the emergence of the mobilization. Relying on the literature on legal mobilization and social movements, I decided to structure my analysis as follows: first, I will analyse who are the collective actors that led the mobilization and what individual and collective grievances induced them to mount a litigation strategy; then, I will focus on the Legal Opportunity Structure (LOS) characterizing the national and EU level where the actors operated; and finally, I will look at the resources used by the groups involved in the legal mobilization. The concepts of LOS and mobilization's resources are drawn from the social movement literature, while LOS (the legal equivalent of the political opportunity structure) refers to conditions external to the movement and pertaining to the political environment; the resources of the mobilization are internal in the sense that they are qualities or assets that belong to the group.[609] The following analysis points out what I consider the conditions for the emergence of a legal mobilization before the CJEU: the overlap between collective and individual grievances, an open EU legal opportunity structure, and the presence of collective actors providing EU law expertise,.

2. Who mobilizes the law? Focus on the actors

One of the main outcomes of my case-study investigation is the uncovering and mapping of the collective actors behind the mobilization of EU migration law. The empirical chapters offer new insights into who uses EU law on behalf of disadvantaged groups such as migrants and who is able to master the complicated EU law preliminary reference mechanism to put it at the service of social justice goals.

[609] Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics*, Revised and updated third edition. (Cambridge University Press, 2011), chap. 1. See what was said in the introduction of this thesis.

Socio-legal and legal mobilization scholars focused at length on the importance of those actors, referred to at that time as translators,[610] compliance constituency,[611] support structure,[612] strategy entrepreneurs,[613] collective actors,[614] etc. Felstiner, Abel and Sarat explain the importance of - what they call - 'reference groups' in this way: 'The movement from law to politics, and the accompanying expansion of the scope of disputing, are prompted and guided by the reaction of a wide social network to individual instances of injustice. Absent the support of such a network, no such movement is likely to occur.'[615]

According to my definition of legal mobilization, proceedings can be considered to be part of a legal mobilization only if they aim to achieve a political goal and feature the presence of collective actors. Therefore, the presence of collective actors is not surprising, but is a necessary element of the mobilization; however, in the cases studied, collective actors were not only there, they played a protagonist role, while litigants most of the time faded in the background. This section first examines and compares the collective actors detected in the three legal mobilizations analysed (subsection 1), and then, it advances some reflection on their relationship with the litigants, e.g. the migrants.

2.1 Judges, lawyers and academics: Mapping the actors and comparing their role in the legal mobilization

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[610] Sally Engle Merry, *Human Rights and Gender Violence Translating International Law into Local Justice* (The University of Chicago Press, 2006), 193 ss. She defined translators as: "The translators were people who helped the members of one layer reframe their grievances in the language of others" And then, "Local women's groups translated the grievances into a rights language that the legislature and political leaders could hear. They taught rural women how to frame their inheritance problems in the language of rights and to talk to reporters this way. This example shows the importance of translators, people who navigate between more or less separate social worlds, helping each group to understand the perspectives of others."

[611] Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014), 19.

[612] Epp, *The Rights Revolution*, 3.

[613] Vanhala, 'Is Legal Mobilization for the Birds?', 18.

[614] Muir et al., 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights'.

[615] Felstiner, Abel, and Sarat, 'The Emergence and Transformation of Disputes', 644.

The case-studies show that the three countries are rather heterogeneous in terms of the actors involved and the role they played. In Italy, the legal mobilization featured the participation of several groups and individuals, but two clearly stand out as the leading ones: the association of migration lawyers (ASGI) and a judges' association (*Magistratura Democratica*). In the UK, the mobilization took the form of a chain of separate proceedings brought to the CJEU thanks to the initiative and the support of different actors: legal advisory centres, NGOs (legal charities), and migration practitioners (solicitors and barristers) specialized in EU law. Finally, in the Netherlands, the mobilization was led by a key alliance between migrants' support organizations (the Dutch Refugee Council and the IOT – the Turkish representative group) and legal academics, who were the mind behind the European litigation strategy.

By comparing the three cases, we learn therefore that multiple actors (judges, lawyers, academics) can take the lead of a legal mobilization before the CJEU. In Italy, the active involvement of the association of judges was key to obtain a 'mass referral' to the CJEU. Instead in the UK, where the legal culture 'values minimal judicial interference into politics',[616] the existence of a politicized association of judges would be unthinkable; instead, the task of convincing judges to refer was up to British lawyers, using all their rhetorical ability. In the Netherlands, relying on academic experts' advice, the lawyers could overcome the traditional reluctance to refer to district courts and opened a 'new dialogue' between lower courts and the CJEU. These examples also make it clear that legal mobilization is embedded in the national legal culture and procedure, and these influence the form that the mobilization takes.

Besides these differences, the actors of the three mobilizations share important commonalities. First, most of the actors are migrant supporters but not migrants; in this respect, the mobilizations studied are examples of 'altruistic mobilization', where the 'beneficiary of the political goal differs from the constituency group that makes it.'[617]

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[616] Sabrina Tesoka, 'Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality', Working Paper (MPIfG Discussion Paper, 1999), 10, https://www.econstor.eu/handle/10419/43287.

[617] Paul Statham, 'Political Opportunities for Altruism? The Role of State Policies in Influencing Claims-Making by British Antiracist and Pro-Migrant Movements', in *Political Altruism? Solidarity Movements in International Perspective*, by Giugni and Passy (Rowman & Littlefield, 2001), 135.

Second, most of the actors are members of the legal profession or, at least, organizations with a predominantly legal focus.

Israël created a typology of organizations that use the law, distinguishing them firstly, on the basis of 'whether they mainly use legal tools, and secondly, on whether they mainly address the legal profession or act as an advocacy group on behalf of a social cause';[618] most of the organisations that we saw in action would fall in Israël's first category, i.e. they are 'built directly on a legal frame that shapes the way in which a social problem is raised and addressed politically' (see Table).[619] In other words, they see the world through a legal lens and the law is their main tool for political change. This distinguishes them from the other two types of organizations identified by Israël: those mainly concerned with social issues that use the law only occasionally,[620] and organizations that have an exclusively legal focus but address only issues related to the legal profession (e.g. a practitioners' trade union). Israël's typology has the limitation of applying only to organizations, and it therefore excludes actors that participate in the mobilization as individuals; for instance, this is the case of academics or lawyers who provide their work and expertise, which are arguably key resources in a mobilization. Therefore, even if it is fine adopting a social movements' focus, we have to make sure that we do not overlook these individual yet important actors.

[618] Israël's point of departure was McCann's question "What the law means for social movement?". Liora Israël, 'Rights on the Left? Social Movements, Law and Lawyers after 1968 in France', in *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi- Level European System*, by Dia Anagnostou, Onati International Series in Law and Society (Oxford and Portland Oregon: Hart Publishing, 2014), 94.

[619] Israël, 94.

[620] The IOT – the Turkish representative group in the Netherlands – would fall instead into this second category as their work regards any social issue related to the wellbeing and integration of the Turkish community in the Netherlands, and occasionally they use the law to defend their constituency's rights, relying on external lawyers.

Table: Support groups involved in the mobilization categorized on the basis of Israël's typology

	I BUILT ON A LEGAL FRAME	II OCCASIONALLY USE THE LAW	III EXCLUSIVE FOCUS ON THE LAW PROFESSION
(IT) ASGI	X		
(IT) Magistratura Democratica	X		
(UK) Law Centres	X		
(UK) JCWI	X		
(UK) Public Law Project	X		
(UK) AIRE Centre	X		
(UK) ILPA			X
(NL) IOT		X	
(NL) Dutch Council for Refugees		X	
(NL) Migration Law Clinic	X		
(NL) WRV	X		

The important role of lawyers is widely acknowledged in the socio-legal literature: 'Of all of the agents of dispute transformation lawyers are probably the most important. This is, in part, the result of the lawyer's central role as gatekeeper to legal institutions.'[621] In fact, in the three case studies, lawyers were either the leading actors

[621] Felstiner, Abel, and Sarat, 'The Emergence and Transformation of Disputes', 645.

that organized the legal strategy (Italy and the UK) or an essential ally (the Netherlands). But, to be the 'gatekeeper' to the CJEU, a lawyer needs to have special skills to master EU migration law and the complicated preliminary reference procedure. In fact, another important feature that the three mobilizations share is the key role played by EU law expertise. Whether it is provided by academics (as in the cases of the Netherlands and Italy) or specialized practitioners (as in the case of the UK), expertise in EU law is an essential resource in the framework of a procedure which is still little known to national judges and lawyers, and that appears to them rather foreign and unfamiliar.[622]

The central role of EU law experts is gaining increasing scholarly attention, and there are now several works that show the importance and influence of 'Eurolawyers' on the development of the CJEU jurisprudence.[623] The seminal works of Vauchez and the book edited by him and De Witte have the merit of having uncovered the existence of a specific 'European legal field', which, far from being easily accessible, is rather exclusive and requires aspirant members to have specific social and professional credentials.[624] This research shows how Eurolawyers can be crucial allies in the mobilization: they suggest the potential of EU law to movements, and they know how to reach the CJEU.

However, this thesis also shows how not all Eurolawyers are the same. The accounts of Vauchez and Pavone describe them as very much aligned with the European integration and free market goals, concerned to advance the European project as well as their own careers.[625] This 'legal entrepreneur' portrait does not fit the Eurolawyers that mobilize

[622] Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', 103.

[623] Tommaso Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa', *Law & Society Review* 53, no. 2 (20 December 2018): 33; Fernanda Nicola and Bill Davies, *EU Law Stories* (Cambridge University Press, 2017), chaps 2 and 20.

[624] Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity'. "[T]he production and interpretation of European law takes place in a complex set of established institutions and reputable groups, specialised breeding grounds and cursus honorum, shared understandings and conventional wisdoms, that define specific 'European ways of law'." Vauchez and de Witte, *Lawyering Europe*, 12.

[625] See the Euro-lawyers descriptions by the two authors in Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity', 18; Pavone, 'From Marx to Market', 14. To be sure, Vauchez does not argue that all Eurolawyers are the same, but he shows how it was the

for migrants so well. These are mostly concerned with defending human rights and increasing government's accountability, and to these ends, they are ready to use either the CJEU or the ECHR, depending on which court is best suited for their political goal. In this sense, they have more in common with the classic human rights lawyers, and they are probably a good example of the new 'pole of legal practice' which has 'transformed Brussels into the financial capital of European human rights activism'.[626]

2.2 Mobilizing migrants' rights without migrants?

The case studies tell the story of three mobilizations, taking place in three different EU countries with the aim of improving migrants' rights - all three featuring a remarkable absence of migrants. Of course, being the litigants, migrants' personal stories and circumstances were at the centre of the litigation; but migrants do not feature as promoters of the mobilization and, most importantly, they do not necessarily share the collective and political goals that the legal mobilization pursues. In fact, there are even situations, as in the Italian case study, where the litigants were prosecuted *in absentia,* and they never met the lawyers and civil society actors that fought for their rights.[627]

According to Ambrosini, migrants' low engagement in legal mobilization is an 'Italian peculiarity':

> [T]he defence of immigrants' rights is mounted essentially by actors from Italian civil society. Immigrant associations are still fragile and under-equipped for these battles. The absence of the right to vote compromises access to public resources, and the comparatively recent settlement of the foreign population weakens engagement and the development of professional skills, for example in the legal field.[628]

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same theory of integration through law that contributed to giving an a identity and a mission to an otherwise diversified group: "Thereby, re-framing the role of the ECJ in Europeanisation processes also meant lawyers re-framing their own role within EC polity. While building a legal theory of Europe, the otherwise segmented and often antagonistic ensemble of Euro-implicated lawyers was therefore constituting itself as a specific EC elite."

[626] Vauchez and de Witte, *Lawyering Europe*, 11.

[627] This is the case of *Sagor* C-430/11, see Italian chapter.

[628] Maurizio Ambrosini, 'Fighting Discrimination and Exclusion: Civil Society and Immigration Policies in Italy', *Migration Letters* 10, no. 3 (5 September 2013): 321.

Ambrosini explains migrants' low engagement in rights litigation with their associations' under-equipment and their general lack of professional skills, which are due to the fact that immigration to Italy is a relatively recent phenomenon. Indeed, in the Netherlands and in the UK, where migration is an older phenomenon, we saw that ethnic minorities organizations were more engaged. The most eminent examples are the JCWI, which was originally created by a coalition of different ethnic minorities, and the IOT, an organization representing the Turkish minority in the Netherlands. The JCWI and the IOT are probably the organizations that most resemble the model of 'translators' conceptualized in Merry's account: 'people who helped the members of one layer reframe their grievances in the language of others'.[629] These organizations work as intermediaries between the world of justice and the everyday reality of (in this case) migrants. The role of such 'translators' is crucial since it makes the mobilization known and meaningful for the very people that it wants to benefit.

However, the legal mobilizations observed in this thesis, also in the UK and the Netherlands contexts, seem rather weak when it comes to legal consciousness and grassroot participation. This was also noted in Hoevenaars's study that involved interviewing the litigants in the proceedings, which looked more closely at individual litigants' point of view in the litigation before the CJEU. He noted:

> The technical nature of the proceedings, with little to no role for the individual litigant, left some with the feeling of being a spectator to their own dispute. Relatedly, only rarely did litigants, whether they had travelled to Luxembourg or not, have a good understanding of the reason for, and function of referral of their case to the ECJ for a preliminary ruling.[630]

In effect, in none of the cases analysed, have migrants started a political mobilization in which legal action was embedded, nor do they seem to have invoked their EU rights consciously; rather they were told by their lawyers of the advantages they could achieve by 'using' EU law. This is not necessarily due to the fact that migrants are in a

[629] Merry, *Human Rights and Gender Violence Translating International Law into Local Justice*, 194.

[630] Hoevenaars, 'A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice', 274.

disadvantaged position in our societies, as we saw the same dynamic also in cases where the litigants were rather wealthy and resourceful.[631] Rather, this seems due to the fact that the preliminary reference mechanism is a rather sophisticated and technical tool, very important in the 'elite world' of Euro lawyers and legal academics but without much connection with the everyday lives of migrants and their legal consciousness.

3 Why mobilizing the law? The overlap between collective and individual grievances

When legal mobilization started, migrants in Italy, the Netherlands, and the UK, for very different historical and contingent reasons, were facing a rather hostile political environment. The majorities in power adopted reforms that negatively impacted on their situation and public discourses were pervaded with anti-migration stances. This affected migrants at two different levels, as individuals and as a targeted minority, and constitutes the grievance for the legal mobilization.

Legal mobilization scholars warn us that the reasons why individuals and collective groups engage in litigation might differ, and this can give rise to tensions.[632] Indeed, the three case studies show that such tensions exist, and it is worth exploring them here. Therefore, the first sub-section outlines the individual dimension of grievance, the second the collective one, and the third the tensions between the two. Note that the grievances behind the mobilization and the choice to rely specifically on a litigation strategy are two connected but still different aspects of the issue under analysis. Indeed, the same grievance can give rise to different forms of mobilizations and, among these, one can be a legal mobilization. Therefore, in this section, we are trying to answer two connected questions: "Why mobilizing" (e.g. the political grievance) and "Why mobilizing the law" (i.e. the strategy chosen).

[631] See the case of *Zhu and Chen* in the UK chapter.

[632] Sterett, 'Caring about Individual Cases: Immigration Lawyering in Britain', 312; Thomas M. Hilbink, 'You Know the Type: Categories of Cause Lawyering', *Law & Social Inquiry* 29, no. 3 (1 July 2004): 684.

3.1 The individual grievances: the attack on rights

The three empirical chapters start with a description of the political context when the legal mobilizations started. In Italy, in the early 2000s, the Berlusconi II government introduced norms criminalizing and harshly punishing undocumented migrants. In the UK, in the 1980s, the Thatcher government started a 'war on foreign husbands' that aimed at curtailing the number of family reunifications, which was continued by subsequent governments. In the Netherlands, between the 1990s and 2000s, successive governments gradually departed from the former multicultural approach and embraced a more assimilationist view of society, introducing a mandatory civic integration test for prospective migrants. The extent to which these governments' attitudes entailed a proper political shift with respect to the past varies in the three cases,[633] but without any doubt, their reforms had concrete impact on the lives of TCNs, who relied on litigation to defend their rights.

If we look at the proceedings from the migrants' point of view, they would appear as the natural response to an attack on their individual rights. The migration legal reforms of Italy, the UK, and the Netherlands entailed a restriction of the rights of migrants that individuals tried to challenge by invoking law and courts. The facts of the cases brought before the CJEU would confirm this: litigation always started as a reaction to an executive act that denies a request, orders a deportation, or sanctions the individual. For instance, *El Dridi* started as an appeal against a criminal conviction and detention, the case of *McCarthy* was an attempt to stop the deportation of a family member, and *Imran* tried to overturn a visa rejection. It seems correct to say then, that not only courts are reactive institutions, but also migrants' initiatives to mobilize the law may start as defensive acts vis à vis what was perceived as an unjust attack on their rights by public authorities.[634] This attack on individual rights represents the individual grievance that set the migrants in motion: these persons in distress asked for help to collective actors:

[633] Especially the UK arguably never experienced a majority in the government that showed support towards migrants, see chapter III.

[634] On the idea of "reactivity" in legal disputes, see Felstiner, Abel, and Sarat, 'The Emergence and Transformation of Disputes', 638.

'Mrs Akrich walked into the Law centre asking for help because her husband was about to be deported.'[635] Then, collective actors granted them support and elaborated a litigation strategy; we shall see in the next subsection what has motivated them.

	Italy	**The UK**	**The Netherlands**
Reform implemented	Criminalization of undocumented TCN	Curtail of family migration	Introduction of the civic integration test abroad
Individual grievance (Right under attack)	Long criminal imprisonment (right to liberty)	Deportation and family disruption (right to reside and to family unity)	Denied entry and family disruption (Right to entry and to family unity)

3.2 The collective grievance: protecting minorities in a politically closed environment

If it is easy to understand why an individual would use litigation once his/her rights are undermined, it is more complex to understand why groups decide to support his/her legal claim. This is all the more, given that most of the migrants' rights supporters are not migrants themselves and do not have a migration background; on the contrary, they generally belong to the majoritarian/autochthonous group and, therefore, they are not directly affected by the immigration policies. The reason why they decide to mobilize resides instead in their political beliefs: 'With cause lawyering, the issue is not someone's ability to pay, nor is the primary motivator found in doing one's job with the utmost professional skill. Instead, belief in a cause and a desire to advance that cause are the forces that drive cause lawyering actions.'[636]

Even if, obviously, all actors are different, it seems fair to say that they all share a common belief in the fact that the immigration system is unfair because it relegates

[635] Interview with Don Flynn, 14 December 2016, London.

[636] Hilbink, 'You Know the Type', 659.

non-citizens in a disadvantaged and powerless position vis à vis the state.[637] Migrants' supporters want to remedy such imbalance and contribute to making society more just. As said by one of my interviewees:

> For many of us, it was a political commitment. We believe that a "right-based approach to immigration" was the best way to deal with immigration law. Immigration policies didn't acknowledge that, but they felt that they can dispose of migrants, that they are subject to the discretion of the state, that rights can be taken away from them because this is under politicians' power.[638]

If this political conviction answers to the question of "why mobilizing?", it leaves unanswered the question of "why mobilizing the *law*?" (see *supra*). The litigation strategy was not the only one available, and surely not the easiest. Lobbying, protests, campaigns were among the other options that movements could use to challenge a heinous migration policy. Moreover, legal mobilization is not a 'cheap' option: it requires material and non-material resources, and it is generally a rather long process, the outcome of which is difficult to predict. In the words of the director of a legal charity (NGO) in London:

> The charity sector is a relatively small sector, with limited capacity. Litigation is one of the more risky and intimidating actions a charity can do.[639]

Given these clear limits, why do groups engage in litigation? This is a central question in studies on legal mobilization, and many scholars have answered with the political-disadvantage theory:[640] when traditional avenues to political change are obstructed,

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[637] This view, expressed in different terms, can be found in all the mission statements of the organizations studied. See JWCI website, for instance: "We believe in a fair and just immigration system" at https://www.jcwi.org.uk; or the Dutch Refugee Council mission statement: "The Dutch Council for Refugees promotes the interests of refugees and asylum seekers in the Netherlands, from the moment they arrive to integration into Dutch society. Our vision: refugees must find more legal and social security and the Netherlands must contribute more to solving major refugee crises." At https://www.vluchtelingenwerk.nl/over-ons/missie-en-visie.

[638] Interview with Don Flynn, 14 December 2016, London.

[639] Quotation from the speech by Joe Tomlinson, Research Director of Public Law Project, at the event "The Impact of Brexit on Administrative Justice in the UK", held at the Bonavero Institute for Human Rights, Oxford University, on 29 January 2019.

[640] Vanhala, 'Legal Mobilization', 7.

groups turn to litigation.[641] A similar dynamic was observed by Hilson in the specific context of European supranational mobilizations; in his view, in the cases examined, the lack of political opportunities, at the national or supranational level, influenced the adoption of litigation as a strategy.[642]

The three case studies considered in this dissertation only partially confirm the political-disadvantage argument. It is true that litigation as a collective strategy was used in contexts where there was a lack of political opportunities (see what we said in the previous subsection). But can we say that these closed opportunities were the main reason why civil society actors turned to courts? The empirical research suggests that most of the migrant supporters were not confronted with the choice of whether to adopt a political strategy or a legal one: because of their professional background or the specific legal focus of their organization, if they faced an injustice, they were naturally inclined to reflect on *how the law could be used to remedy it*. In other words, because of the nature of their organization, and of their profession, the law is their preferred (and often only) political strategy.

For this reason, I argue that the choice to rely on a litigation strategy does not lie in the close political opportunity, but it depends on 1) the individual grievance; 2) the type of collective actors involved. In fact, when a TCN faces a negative administrative or judicial decision, he/she turns to lawyers or to organizations with a legal focus to ask for help. Some of these organizations do not only try to solve the individual's problem but mount a litigation strategy that can challenge the entire policy. That is why most of the migrant supporters we saw in action in the three case-studies are embedded in legal frames; the law is their main lens to understand society and their main tool to influence politics (see what was said in section two).

The law occupies a central role in migrants' lives and, as a consequence, also in pro-migrant activism. Legal service is often offered by associations supporting migrants, to help them with their papers and to deal with public authorities; this is something

[641] Vanhala, 'Is Legal Mobilization for the Birds?'; Harlow and Rawlings, *Pressure Through Law*, 48; Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 458.

[642] Hilson, 'New Social Movements', 250.

distinctive of the migration field, which does not happen in other fields such as animal welfare or the environment. I think that this might also be the reason why Vanhala, in her study on environmental NGOs, reached a conclusion different from mine. She analysed whether 'the existence of in-house lawyers or relationships with pro bono legal counsel may help to explain a group's propensity to litigate or may influence the meaning frames of a group and increase the likelihood of a group framing problems through a legal lens'.[643] Vanhala's finding were negative: the groups' relationship with lawyers did not seem to have any impact on their propensity to use litigation. However, the actors analysed in my research are not in relation with pro-bono lawyers as they often *are* the pro bono lawyers; they do not have 'in-house' lawyers because they are law firms themselves. To once again use Israël's typology, all the organizations in Vanhala's study would fall in group two (i.e. they are concerned with a social issue and occasionally use the law), while most of the organizations studied in my work fall in group one.[644]

The special role of rights litigation in the migration field has been recognised also in relation to migration governance. In the 1990s, Cornelius, Martin, and Hollifield defined what became known as the 'liberal dilemma': 'Individual rights-based policies help immigrants not only to get in (e.g., as asylum claimants) but to stay in labor-importing countries'; and 'effective control of immigration requires a rollback of civil and human rights for noncitizens.'[645] For this reason, migrants' rights represent an important constraint for the executive power and a crucial tool to undermine state's ability to enforce its policies. This also explains why litigation occupies a special place in migration policies: courts became important arenas where to contest state policies in the name of migrants' rights.

We can conclude that, although it is true that in the three countries the political opportunities for challenging migration policies were rather low or non-existent, this

[643] Vanhala, 'Is Legal Mobilization for the Birds?', 19.

[644] The JCWI, even if it is very engaged in campaigns and political lobbying, was also born within a legal frame: its first action was during the East-Asia African crisis when it sent lawyers to the airport to help people who were about to be pushed back to Africa. Moreover, the majority of its staff are lawyers, which confirms that they heavily use the law, and trying to change the law is their target.

[645] Cornelius, Martin, and Hollifield, *Controlling Immigration: A Global Perspective*, 9–10.

does not seem the main reason why groups decided to rely on litigation. The state's restrictive policy entailed a migrant's rights violation; this, in turn, led the migrant to ask for help to legal advisory centres/associations with a legal focus, who in turn initiated a litigation strategy. This is the reason why, contrary to other fields of politics, the collective actors that mobilized EU law for migrants' rights are legal professionals or have a legal focus, and their background necessarily has an influence on their strategy choice. Moreover, rights and courts have been historically important to limit the executive's powers in the migration field, so even in contexts where other political strategies would be viable, litigation remains a key channel for contestation.

3.3 The individual and the collective dimensions in tension

The proceedings studied in this research are, at the same time, a means to defend one's rights and to achieve political change. This duality is not exceptional for the legal mobilization field, as efficaciously expressed by Hilbink, using the US movement against race segregation as an example:

> Whose interests did the NAACP represent in the Brown litigation? Oliver Brown's? All African Americans'? In one argument before the Supreme Court, NAACP counsel Robert Carter told the court that he represented not any one client, but instead the "entire Negro community". In cause lawyering aimed at vindicating or advancing a broad principle, the individual client fades into the background.[646]

In such a situation, where two goals are pursued at the same time, some tension may arise. The case of *McCarthy*, described in the UK chapter, provides a good example. [647] Shirley McCarthy tried everything to stop the deportation of her husband, reaching the point that after yet another negative sentence, the only chance left for her was to seek a reference to the CJEU and obtain an expansive interpretation of free movement

[646] Hilbink, 'You Know the Type', 680.

[647] Court of Justice of the European Union, *McCarthy, C-434/09*, ECLI:EU:C:2011:277.

rights.[648] The clients' best interest was at the centre of the lawyers' decision to seek for a reference, and not strategic considerations regarding the advancement of EU free movement law or the reform of the Home Office practice. In the words of the Barrister:

> We run the EU law argument because it was the best argument we could run for the client. We didn't run it because we thought that it would probably win. We didn't have anything else. In fact, when she came to me, that was the only thing she was arguing. She only had EU law.

The McCarthy couple was probably not the perfect case to pick in order to push for an expansive interpretation of EU law. Eventually, as the UK chapter shows, the CJEU decided the case in a way that was detrimental both for the litigants (who lost the case) and for migrants in general in the UK (who had to face a new more restrictive interpretation of their rights). As noted also by Harlow and Rawling, this is the risk of adopting a 'reactive stance' rather than a proactive one: instead of picking cases, some organizations respond to migrants' requests for help, without these being necessarily the most promising cases to use for political means.[649]

Also, there are cases where a preliminary reference is the best strategy for the advancement of the collective cause, but it is a suboptimal solution for the individual party. In fact, arguably, the preferred solution for a client would be to win his/her case *without* submitting a reference. 'The client does not like the procedure before the CJEU, because it is too long.'[650] Indeed, the average length of a preliminary reference proceeding is 18 months, which consists in a considerable delay of the national proceedings.

Tensions may arise also when collective and individual grievances do not perfectly coincide. The Italian case study provides an example: the main collective target of the mobilization in *Sagor* was the norm criminalizing the status of irregular migrants.[651]

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[648] Shirley MacCarthy is a dual Irish-British national, and even if she never lived outside the UK, where she was born, she tried to invoke her free movement rights to oppose her husband's (a TCN) deportation. See the UK chapter and, in particular, the interview with the barrister representing her.

[649] Harlow and Rawlings, *Pressure Through Law*, 489.

[650] Interview with Lawyer Dijkman, 13 December 2017, Utrecht.

[651] Court of Justice of the European Union, *Md Sagor, C-430/11*, ECLI:EU:C:2012:777.

This provision was particularly heinous in the eyes of criminal judges and prosecutors since they were the ones who were supposed to apply a rather severe criminal sanction to people who arguably did not cause any harm (this was seen as conflicting with the principle of *nullum crimen sine iniuria*). However, and interestingly, in respect to individual migrants' situations, whether the irregular status was punished with an administrative or a criminal sanction did not make much difference; tellingly, Mr Sagor was sentenced *in absentia* since the best strategy for an irregular migrant caught by the police is to run away to avoid deportation (which is the worst punishment of all). Because of its almost exclusive symbolic value, the clandestinity crime was defined as a useless norm. And yet, legal practitioners and judges considered this norm unacceptable and mobilized against it.

These are only some examples of the tensions that might arise in legal mobilization for migrants' rights. These tensions represent an important challenge for the actors of the mobilization and especially for the lawyers who have special obligations and responsibilities towards the litigant; they might have to choose between pursuing the best interest for the litigant and the best interest for the cause, facing difficult dilemmas.

4 The EU Legal Opportunity Structure

The concept of legal opportunity structure (LOS) draws on the social movement scholarship's concept of political opportunity structure (POS). This is based on the idea that the political environment affects social movement's expectations for collective action's success by providing incentives or disincentives for action.[652] Since we still lack an agreed upon definition of LOS, legal mobilization scholars have used it to indicate a number of different dimensions that might affect opportunities for mobilization.[653] However, if we want to stick to the original POS's definition, we

[652] Tarrow, *Power in Movement*, 163. The example used by Tarrow is that of workers' movements: "Other things being equal, workers are more likely to go on strike in boom times than in depression. The logic of the connection is clear: Prosperity increases employers' need for labor, just as tight labor markets reduce the competition for jobs. As workers learn this, they demand higher wages, shorter hours, or better working conditions." *Ibidem*, at page 162.

[653] This is observed also by Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK', 527.

should consider only the factors external to the social movements as part of LOS; in fact, internal factors should be treated as mobilization's resources, which will be analysed in the next section.[654] Even if external, the LOS is not independent from social movements: in fact, scholars have highlighted how the opportunities are relevant not because they are 'objective' but as far as they are 'perceived' as such by social movements.[655] Moreover, although the name structure suggests something static, the LOS are dynamic and can be influenced by social movements' action.[656]

Finally, often overlooked in the literature is how the law matters for the configuration of LOS. For what concerns this study specifically, the question is whether and how the preliminary reference procedure affects the LOS of migrants' rights supporters. The case studies show that the preliminary reference procedure conditions the movements' action in two important ways. The first condition regards the legal stock: to bring a case before the CJEU, EU law must be relevant and applicable to the situation at stake. Second, migrant supporters need to gain access to two legal orders, the national and the supranational one, each having its specific access rules; the main implication of this is the gatekeeping role of national judges: even if full access to justice is granted at the national level, if national courts are reference-adverse or unable to refer, access to the CJEU is irremediably obstructed. Following these considerations, I have structured my analysis of the EU LOS in the following way: first, I will examine when EU law becomes relevant for the movement's cause and what are the implications of adopting an EU law framing; second, I will look at the specific role of the national judge in determining access to the CJEU.

4.1 The comparative advantage of EU law

We have seen that, in the three case-studies, migrants relied on courts to demand protection from restrictive immigration rules or from the executive's discretionary

[654] Hilson, 'New Social Movements', 270.

[655] Tarrow, *Power in Movement*, 163.

[656] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK', 528; Andersen, *Out of the Closets and into the Courts*, 7; Tarrow, *Power in Movement*, 29. In the words of Tarrow, "people engage in contentious politics when patterns of political opportunities and constraints change, and then by strategically employing a repertoire of collective action, creating new opportunities, which are used by others in widening cycles of contention".

action. But why did they decide to rely specifically on EU law? As well known, art. 267 of the TFEU states that the preliminary reference procedure may (or shall, in case of last instance courts) be activated by any national court that has a doubt concerning the validity or the interpretation of EU law. However, the empirical research shows a rather different dynamic: in the legal mobilization cases analysed, the idea of asking for a reference did not emerge because a national judge was faced with a difficult interpretative issue; it emerged because migrant supporters understood that a certain interpretation of EU law could offer a higher protection to migrants' rights with respect to national law, in a context where other national remedies proved to be of limited use.

EU law and the CJEU can open new windows of opportunities for migrant supporters. In the Italian case, migrant support networks (ASGI and MD) tried to challenge the laws criminalizing undocumented migrants since their entry into force in early 2000. Their first strategy was to uphold the unconstitutionality of the laws before the Italian Constitutional Court; however, this found the laws only partially unconstitutional, leaving the bulk of the norms in force. Some years later, when the Return Directive was adopted, migrant supporters understood that this new law bore some potential for challenging the Italian legislation. In social movement's language, the networks perceived that there was a change in the opportunity structure (in the legal stock) and decided to invest in that new possibility for contestation.

In the UK, the denial of the right to family unity and to family reunification remained constant over the last three decades. The UK does not have a constitution or a Constitutional Court, therefore migrant supporters tried to challenge British laws invoking the ECHR in national proceedings and before the ECtHR, with little results (after the introduction of the Human Rights Act, British courts acquired the power to review legislative acts under human rights standards, but they cannot strike them down because they are unconstitutional; instead, they can only issue a 'declaration'). The advent of free movement rights and EU citizenship norms represented a turning point: these norms recognise more rights to Union Citizens' TCN family members than UK law; moreover, thanks to the principle of supremacy of EU law, they prevail over more restrictive or conflicting national laws. These characteristics meant that EU law opened up new possibilities to achieve family reunification and to challenge the legitimacy of British laws.

Finally, in the Netherlands, when the *inburgering* policies were introduced, they were immediately subjected to a preliminary scrutiny by the Raad van State, which issued an opinion stating their partial unlawfulness. The problem was how to strike down the remaining part. Under the Dutch Constitution, national judges cannot engage in judicial review of national legislation, but they can review it under international law standards, which enjoy primacy over national law. This means that, if migrant supporters want to challenge the legitimacy of a national law, it is quite obvious for them to look for a ground of illegitimacy under international or EU law standards. Again, migrants' rights supporters understood that the EU Family Reunification Directive had a good potential to challenge a national law and practice.

The reframing of an issue under EU law terms does not come without a cost. In fact, the decision to invoke an EU norm may bring important constraints to the movement's strategy. Migrant supporters 'must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law.'[657] As the case of the UK shows, in order to be able to use EU law, migrant supporters had to frame their claims, not in terms of the right to family unity (what was in fact demanded) but in terms of 'free movement law'; to obtain a preliminary reference, they argued that the TCN's right to reside was instrumental to the Union citizen's liberty to move and reside in the Union. Even more paradoxical was the situation in Italy: instead of directly contesting the illegitimacy of the restriction of migrant liberties, the lawyers argued that a long prison sentence would cause a delay in the return procedure, thus compromising the speed of repatriation of the irregular migrant (i.e. the objective of the Return Directive).

In light of this, two necessary conditions must materialize for migrant supporters deciding to mobilize EU migration law before the CJEU:

a) National laws and national remedies prove inadequate to protect migrants' rights;
b) An EU law provision is deemed to offer a higher protection to migrants than national law;

[657] Andersen, *Out of the Closets and into the Courts*, 12.

As stated in social movements scholarship: 'If citizens perceive opportunities that lower the cost for collective action, reveal allies, show vulnerability of authority, then they engage in contentious politics.'[658] These opportunities are relevant as far as they are perceived as such by the migrant supporters. In fact, it is not necessary that EU law *effectively* offers a higher protection than national standards: it is sufficient that migrant supporters think that this is the case. In this sense, also EU law's indeterminacy helps increasing perceived opportunities for action. First, the preliminary question is based on a doubt of EU law interpretation; second, if there is room for different interpretation, it means that migrant supporters can use that uncertainty to stir the interpretation in their favour. As noted, legal ambiguities may produce 'niche-openings' that can be transformed into opportunities for contestation:[659] migrant supporters might turn the grey areas of an EU Directive into opportunities for a migrant-friendly interpretation. And, of course, the opposite is true also for the executive. As a UK Barrister told me:

> The UK [government] is always looking for narrow interpretations about something's meaning, rather than liberal interpretation. If you apply the [Citizenship] Directive liberally you do not worry so much about these very small points and you focus more on the broad purposes of free movement, that is how the CJEU says you should interpret it. The common law approach is concerned with how far the statute stretches, does it extend to this use or that particular scenario? […] All of that leads to treating the [Citizenship] Directive not so much as a liberal rule to promote free movement, but as a strict rule of immigration control. The whole emphasis is different.[660]

4.2 Access to court: National judges' ability and propensity to refer

As mentioned, an implication of the use of the preliminary reference procedure is that the litigant needs to gain access to two legal systems, each having different standing

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[658] Tarrow, *Power in Movement*, 33.

[659] Walter J. Nicholls, 'From Political Opportunities to Niche-Openings: The Dilemmas of Mobilizing for Immigrant Rights in Inhospitable Environments', *Theory and Society* 43, no. 1 (1 January 2014): 24.Nicholls, 'From Political Opportunities to Niche-Openings'.

[660] Interview with Barrister Adrian Berry, 23 November 2016, London.

rules. To have a question referred, first, migrants and their supporters need to secure access to a national court, and then, they need to convince the national judge to refer a question to the CJEU. In the three case studies examined, access to justice at the national level was not an obstacle. This was granted as an individual right and supported by state funding to a relevant extent. In particular, we saw that immigrants in the three countries could count on legal aid, which importantly lowers the cost of litigation. The UK and the Netherlands, in fact, are two remarkable examples of countries where a rather generous system of legal aid was already in place since the 1970s.[661] This financial support is particularly important in the migration field, where litigants often have limited financial resources, and in countries such as the UK, where the proceedings' costs are very high.[662] To be sure, the fact that access to legal aid was not an issue in my case studies, should not lead to the conclusion that this is always the case: other studies have reported migrants and asylum seekers' difficulties in accessing legal aid, and also in my study I found that recent reforms to legal aid are likely to have a major impact on access to justice in the future.[663]

The access to the EU Court, instead, is more complex as it requires a national judge that is willing and able to refer. Scholars of legal mobilization, by making a 'standpoint shift' in their analysis of litigation, have shed light on the role of litigants in mobilizing the law and participating in the law making.[664] But if we look at the preliminary reference procedure, we realize that judges can have a proactive role too, since they can refer on their own motion and act as gatekeepers for the CJEU. This raises a central question: how does the preliminary reference procedure, by providing for new powers in the hands of national judges, change judges' roles in the mobilization?

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[661] Legal aid provides for a limited amount of money that is sufficient to pay the minimum rate for a lawyer. In most cases, this would be a limitation because it would mean that the best lawyers would not be affordable. But we have seen that in these mobilization cases, lawyers were committed to the cause and often provided their service for free or at a lower rate.

[662] Notably, the UK government has recently introduced a reform that importantly cut legal aid in the migration field. This is an example of how movements' opponents can change LOS in a way that negatively impacts on movements' opportunities.

[663] ECRE, 'Survey on Legal Aid for Asylum Seekers in Europe', October 2010, https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Legal-Aid-for-Asylum-Seekers-in-Europe_October-2010.pdf. In the UK, the 2012 LASPO reform will likely affect access to legal aid for migrants, see section 7 of the UK chapter.

[664] Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK'.

If legal mobilization scholars minimize the active role of national judges, EU law scholars maximize their role in the EU legal system. Very influential are the judicial empowerment theories, centred on the idea that, thanks to the combined role of the preliminary reference procedure and the principles of direct effect and supremacy, Member States' courts came to occupy a central position in the EU constitutional order.[665] In particular, national judges have the crucial task of overseeing the correct application of EU law at the national level, they set aside any national provision in conflict with EU law, and they provide the CJEU with preliminary references which proved to be central engines in its integrationist process.[666] For these reasons, to describe national courts' positions, the metaphor of the shield and the sword became widely used:

> It is certainly the case that judicial discretion to make or withhold references concentrates power in the hands of national judges, considerably expanding their menu of options in each case. One of these options is to utilise a preliminary reference as a sword with which to prod reluctant governments to alter their policies. […] In other cases, however, national judges may have significant political incentives to avoid ECJ judicial review. Acknowledging that both of these situations might arise would reorient the model and suggests that empowerment derives more from the option to refer than from the referral itself- from the 'heady stuff of enjoying a choice between the sword and the shield.[667]

The empirical research does not confirm this idea of powerful national judges that master the references according to their preferences, but neither does it find that the judges were purely reactive to parties' demands. In fact, convincing national judges to

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[665] See chapter I of this dissertation for a more complete review of this rich literature. Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, First published new in paperback 2002. (Oxford University Press, 2002); Bruno de Witte et al., *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar Publishing, 2016); Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler, eds., *The European Courts and National Courts: Doctrine and Jurisprudence* (Oxford : Evanston, Ill: Hart Publishing, 1998); specifically on the role of national judges in the migration field see Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration'.

[666] Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice', *International Organization* 52, no. 01 (1998): 62.

[667] Golub, 'The Politics of Judicial Discretion', 379.

refer was often the trickiest part of the legal mobilization strategy, exactly because of the huge discretion that they enjoy. In the words of one of the lawyers that I have interviewed: 'You need to have the good case, at the good time, with the good judge.'[668] Said in these terms, this seems a matter of luck. But the case studies, by providing insights from three different countries, show how the characteristics of the national environment (e.g. legal culture, procedural law, or the general attitude towards judicial review) can importantly affect migrant supporters chances to encounter a 'good judge' that is willing and able to refer.[669] This sheds light on how the domestic opportunity structure interacts and affects the EU LOS.

In the Italian case, structural factors, unrelated to the movement's activity, have increased judges' propensity to refer. In fact, the government's criminalization of undocumented migrants led to an unexpected side-effect: a huge amount of cases previously dealt with by administrative authorities were brought under the competence of criminal tribunals, which were virtually drowning in cases. Being already overloaded with regular casework, judges were rather unhappy with the use of criminal justice for migration control purposes. This contributed to make them more willing to challenge the criminalizing norms via preliminary reference.

In the UK and the Netherlands, structural factors were instead operating in the opposite direction, making judges less prone to refer. The UK is one of the countries with the lowest reference rate, and after the case of *Zhu and Chen*, the President of the Tribunal invited lower immigration judges to avoid making references. In the Netherlands, because of the so-called 'Gentlemen's agreement', only the last-instance courts would refer, so that references at the earlier stage of the proceedings are almost impossible. However, we have seen in the case of *Imran* how the collective actors managed to convince the district court to make a reference, virtually breaking such agreement.[670] At the moment, the situation in the Netherlands is gradually changing, and while the

[668] Interview with Lawyer Dijkman, 13 December 2017, Utrecht.

[669] Since this section is concerned with LOS, here I address only the judge-related factors which are external to the movements. In the next section, on mobilization resources, I will deal with the situation where judges are allies or even part of the mobilization.

[670] Court of Justice of the European Union, *Imran, C-155/11 PPU*, ECLI:EU:C:2011:387.

highest courts still make most of the reference requests, lower courts have started referring as well.

The Netherlands case also shows how movements' opponents are able to affect LOS. In migration litigation, the counterparty is always the government, which enjoys important advantages: in certain cases it can avoid the reference by simply reversing its previous decision and settling the dispute; what has been called an 'anticipatory measure'.[671] This is what eventually happened in the *Imran* case cited above and in other similar cases that emerged in Germany.[672] This government strategy is not an *unicum* of the migration field, yet it has been noted that Member States use it to avoid the referral of 'weak' cases.[673]

To make a reference, a judges' ability to refer is also crucial. In particular, their knowledge of EU law and procedure, and their experience with the preliminary reference procedure, can be central to explain variation in reference rates. Different studies on the preliminary reference mechanism have confirmed this,[674] and again, Dutch case study has showed how the 'EU turn' at the Raad Van State led to an important increase in the number of cases submitted to the CJEU. Since the EU turn largely consisted in expanding the number of EU law experts among the Raad Van State judges, we can see the strong relation between expertise and ability to refer.

5 The mobilization's resources: the presence of collective actors providing EU law expertise

The capacity to mobilize the law crucially depends on the resources of the individual. Therefore, when some political scientists argued that the European legal system has

[671] Moritz Baumgärtel, 'Part of the Game', in *The Changing Practices of International Law*, ed. T. Aalberts and T. Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2018), 115.

[672] See chapter IV.

[673] Broberg and Fenger, 'Variations in Member States' Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation?', 497.

[674] Mayoral, Nowak, and Jaremba, 'Creating EU Law Judges'; Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration'.

'shifted the domestic balance of powers'[675] and has 'created increased opportunities for participation through law enforcement, rights claiming, and expanded protection',[676] it seemed right to note that such 'empowerment' depends on whether people and groups on the ground have the means to use these new participatory tools.[677] The impact of a court's decisions varies according to its recipients too: 'Where courts exert influence through communication, the results will be powerfully influenced by the information-processing capacities of the recipients - and by the disparities in their capacities.'[678] In sum, resources are key for mobilizing the law and for making the mobilization's result meaningful.

Against this backdrop, it seems that resources can be even more crucial in the context of migration proceedings, characterized by a huge disparity between the two parties in the case: the state and the TCN. Different from the LOS, mobilization's resources are internal to the movement, and in the migration field, they are mostly provided by migrant supporters. In fact, collective actors can 'support, represent or replace action' by individuals who lack the necessary resources to take action.[679] In light of the case studies, I shall argue that migrant supporters' principal role is to rebalance the structural asymmetry of the proceedings by providing material resources, technical knowledge, and creative litigation strategies.

The empirical chapters have shed light on the specific resources provided by migrant supporters. Legal experts played a protagonist role: they were the first to understand that supranational litigation could be used to challenge a particular provision in the national migration; they trained judges, built alliances with NGOs and academics, and spread their arguments through academic articles and conferences. This helped to create the conditions for the emergence of not only one, but several, preliminary references, because it made judges, academics, and practitioners more aware of the opportunities

[675] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 453.

[676] Rachel A. Cichowski, 'Courts, Rights, and Democratic Participation', *Comparative Political Studies* 39, no. 1 (2 January 2006): 56.

[677] Börzel, 'Participation Through Law Enforcement. The Case of the European Union'.

[678] Galanter, 'Justice in Many Rooms', 15.

[679] Dawson, Muir, and Claes, 'A Tool-Box for Legal and Political Mobilisation in European Equality Law', 120.

that EU law offered to defend migrants' rights. As one interviewee noted: 'if judges don't know the law, if they don't know the directives, they're not going to take it seriously'.[680] Advertising the mobilization results is also a key strategy after the mobilization, to transform a single judicial victory into a more stable political change ('follow-through'[681]).

Mobilizing EU law knowledge is particularly crucial in the context of a procedure like the preliminary reference, which is mastered by a very small group of people. Luckily, the experts involved in the case studies share the cause behind the mobilization, so they often provided their legal advice for free; as Professor Groenendijk told me: 'I never got a penny for what I did. But I have got very nice paintings from the children in the *Imran* case. So cute!'[682] Reputation and career can also be incentives for making experts willing to collaborate in a mobilization. This seems the case in the UK, where by providing legal advice in important test cases, young barristers can make their name known.[683]

Probably the Italian case presents the most unexpected ally of the mobilization: the national judge. The idea of national judges being active participants in a mobilization is particularly striking from a legal mobilization point of view. In fact, legal mobilization scholars generally describe courts as reactive institutions, defenders of the status quo, with an interest in preserving the current distribution of power in society.[684] As a consequence, the role of judges has been somehow overshadowed, and they tend to be either ignored or criticized. However, migration offers a particularly good terrain to study the role of judges. Courts are recipients of very conflicting expectations: they are 'caught in the middle' between two powerful constituencies, namely rights restricting governments on the one hand, and migrant rights advocates on the other

[680] Interview with Professor Groenendijk, 20 February 2018, Nijmegen.

[681] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 623.

[682] Interview with Professor Groenendijk, 20 February 2018, Nijmegen.

[683] Interview with Barrister Simon Cox,18 November 2016, London. However, it is also true that these barristers, by deciding not to work for the government but only for the immigrants, pay a cost: representing the government gives a very good chance for a barrister to advance in their career. See Interview with Don Flynn, 14 December 2016, London.

[684] Susan M. Sterett, "Legal Mobilization and Juridification: Migration as a Central Case," *Law & Policy* 38, no. 4 (October 1, 2016): 275.

one.'[685] The Italian case shows that judges can play a proactive role in this context and promote the mobilization before the CJEU: the cases of *El Dridi* and *Sagor* were largely possible thanks to the help of the judges' association.

To conclude, we can say that the most important resource in the legal mobilizations analysed, is the supporting groups themselves. By providing key resources, above all EU law technical expertise, they partially remedied the existing asymmetry between the parties in the proceedings, empowering migrants and their supporters.

6 Under which conditions does a legal mobilization before the CJEU emerge?

The previous sections detailed the grievances, the structure of opportunities, and the resources of the three legal mobilizations analysed. With no doubt, these factors have been crucial for the emergence of legal mobilizations in the three cases studied; but can we say that these are necessary and sufficient conditions for having a mobilization before the CJEU? In other words, if one of these conditions was missing, would the legal mobilizations have emerged? And shall we observe a supranational legal mobilization in every instance where all the mentioned conditions are met?

The case studies alone do not allow for the identification of necessary and sufficient conditions because they provide information only on 'positive cases' of mobilization, i.e. they do not consider cases where groups have failed to mobilize the law.[686] Also, to prove that a condition is necessary, we would need to show that, without that condition, the mobilization would not have occurred; for instance, if we want to know whether the role of legal experts is a necessary condition, we would need to know what would have happened if such legal experts had not provided support. For obvious reasons, this is

[685] Moritz Baumgärtel, 'Caught in the Middle: Europe's Regional Courts and the Dilemma(s) of Migrant Rights', Paper presented at the Annual Meeting of the Law and Society Association (LSA) (New Orleans, 3 June 2016), 51.

[686] This is what Börzel calls 'bias on the dependent variable'. Börzel, 'Participation Through Law Enforcement. The Case of the European Union', 129.

impossible to know; in fact, such counterfactual tests are very difficult to make in qualitative research.

However, throughout the research process, I got to know several other cases of (attempted) legal mobilization for migrants. By learning more about these cases, I realized that some of them provide relevant insights on whether the factors I identified amount to necessary and sufficient conditions, increasing the confidence that I have in the findings reported before. This section outlines two of these cases of non-mobilization before the CJEU, with the aim of shedding more light on the conditions under which a legal mobilization before the CJEU emerges.

6.1 The UK and the 'Calais Case': avoiding the reference

The case analysed here shows how, sometimes, mobilizing the CJEU is not the best strategy for migrants. In this case, civil society groups decided to mobilize the law, but instead of invoking the application of an EU norm, they decided to demand its non-application by invoking human rights standards instead. Moreover, since these groups knew that the CJEU case law would go against their interpretation, they avoided the activation of the preliminary reference procedure.

It is not a mystery that the Dublin Regulation is not working as it should, as this provision has been at the centre of Member States' disputes since the so-called migration crisis of 2015.[687] One of the symbols of the Dublin system's dysfunctions was the 'Calais Jungle'. This was an informal encampment in the North of France where several thousands of migrants found temporary homes (6000 at the time of the

[687] Regulation 604/2013, OJ L 180, 29.6.2013, p. 31–59. The Regulation prescribes the criteria for determining the state responsible for the examination of an asylum claim and, consequentially, where the asylum seeker will end up residing. 'Mutual trust' and 'Member State of first-entry' are the two principles underpinning the Dublin system: under the assumption that all EU Member States offer adequate standards of reception, the state in charge of examining the asylum request is the first where the third-country national arrives. These are the main rules, but also other criteria apply; for instance, unaccompanied minors should be under the competence of the state where a family member is legally present; also, any Member State might decide to 'take charge' of an asylum request 'on humanitarian grounds based in particular on family or cultural considerations'. See art. 8 and 17 of the Dublin Regulation.

case) while seeking to enter the UK in order to reunite with their relatives.[688] Some of the Jungle inhabitants were in the camp waiting for an occasion to enter the UK illegally by crossing the English channel; others wanted to register their asylum claim in France, to then request a transfer to the UK in virtue of the fact that they had relatives there (the Dublin Regulation provides for this possibility under specific conditions).[689] However, due to the extraordinary number of asylum requests received in 2015, the filing of these asylum applications in France was taking several months, during which these people were stuck in the Jungle, living in 'appalling and highly dangerous living conditions'.[690]

Amidst this precarious situation, a group of NGOs decided that a litigation strategy could bring people to the UK more swiftly than the Dublin procedure. The NGOs teamed up with UK-based lawyers (e.g. the Islington Law Centre) who would litigate the case on behalf of the Jungle's inhabitants. For their first test case, they carefully picked four migrants whose vulnerability was indisputable: three unaccompanied children and a fourth adult suffering from mental health problems, all from Syria with siblings in the UK already enjoying refugee status. The four asylum seekers filed an application for leave to enter the UK, grounding their request solely on human rights grounds. Unsurprisingly, the Home Office rejected their application: under the Dublin Regulation, the applicants should have first applied for asylum in France, the first Member State of arrival, which in turn decides the country responsible for examining their request.[691]

At this point, the legal team in the UK appealed the Home Office's denial by filing a judicial review application before the Upper Tribunal (case *ZAT and Others*[692]). Their chances of victory, however, were low. As the Home Office's lawyer stated, the

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[688] The Calais camp was cleared up by the police in fall 2016. To have a general idea on why people in Calais wanted to get to the UK, see https://www.freemovement.org.uk/why-do-the-migrants-in-calais-want-to-come-to-the-uk/

[689] This would be a take charge request made by French authorities towards the UK.

[690] *Upper Tribunal Immigration and Asylum Chamber, ZAT and Others, JR/15401/2015 -JR/15405/2015 (Upper Tribunal Immigration and Asylum Chamber 21 January 2016).*

[691] Art. 20 of the Dublin Regulation which establishes that the process of determining the responsible Member State begins as soon as an application for international protection is first lodged with one of the Member States; see Upper Tribunal Immigration and Asylum Chamber, paragraph 27.

[692] Upper Tribunal Immigration and Asylum Chamber, *ZAT and Others*.

applicants' presence in France was 'unlawful'; they had not even filed an asylum claim in France and their application to enter the UK had no legal ground (it was not a Dublin transfer and neither a request for family reunion). The lawyer cited the CJEU's case law, clearly on his side: 'The only way in which the applicant for asylum can call into question the ['first country of arrival criterion'] is by pleading systemic deficiencies in the asylum procedure'.[693] Since there was no evidence of a 'generalized breakdown' of the French system, the applicants could not call for any exemption from the rule.

Probably this 'unorthodox'[694] claim to enter the UK made by (not yet registered) asylum seekers in Calais would have been quickly dismissed by any other judge except the one who actually decided the case. The President of the Upper Tribunal at that time was not only particularly sensitive to asylum seekers' humanitarian claims, but he also demonstrated an above average interest in human rights. He engaged in a balance between the public interest at stake, namely the maintenance of immigration control and the application of the Dublin Regulation, and the right to family life of the applicants.[695] Although the CJEU case law was very clear on the issue, the President concluded that 'the Dublin Regulation exists, and operates alongside, the ECHR and, in the United Kingdom, the Human Rights Act 1998', and the UK's refusal to admit the four applicants 'would interfere disproportionately with the right to respect to family life under Article 8 ECHR'.[696] Following this, he pronounced an unprecedented Order whereby he required the Secretary of State to admit the four applicants, with no delay.[697] The Dublin Regulation was outflanked.

The case of *ZAT and Others* presents almost all the conditions for the emergence of legal mobilization before the CJEU. These are: collective actors providing EU law expertise (a network of French-British NGOs and lawyers); an overlap between individual and collective grievances (the desperate conditions in "the Jungle" and the

[693] This is the CJEU decision in the case of *Abdullahi*, C-394/12, cited in Upper Tribunal Immigration and Asylum Chamber, paragraph 45.

[694] Upper Tribunal Immigration and Asylum Chamber, paragraph 48.

[695] Paragraph 54 of the decision.

[696] Upper Tribunal Immigration and Asylum Chamber, *ZAT and Others* paragraph 58.

[697] See Order attached to the *ZAT and Others* decision.

flaws in the Dublin system); an open EU LOS, both in terms of access to justice (the right to judicial review was financially supported by legal aid)[698] and of national judge's capacity to refer to the CJEU (the same President of the Upper Tribunal made references in other cases).[699]

Only two sub-conditions are missing: the EU law comparative advantage and the national judge's willingness to refer. In fact, in the case at stake, EU law offered less protection to the migrants than human rights norms as interpreted by British courts.[700] Making a reference would have entailed a risk for the applicants since the CJEU already stated that even if a Member State breaches an individual human right, this will not 'affect the obligations of the other Member States to comply with the provisions of [the Dublin Regulation]'. Only the proof of 'systemic deficiencies' in a country's asylum system would rebut the mutual trust presumption. [701] Since both the lawyers and the Upper Tribunal's President did not agree with such an interpretation, preferring a more human-right oriented balance, they did not use the preliminary reference mechanism.[702]

This case also confirms how national judges can be important allies in the mobilization. The Upper Tribunal President was a particularly good encounter for the mobilization actors: *ZAT and Others* was followed by other cases, all brought by the same legal team

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[698] Paragraph 22 of the decision specifies that the applicants benefit from public funding.

[699] The cases are: Court of Justice of the European Union, *CS, C-304/14*, ECLI:EU:C:2016:674; Court of Justice of the European Union, *Banger, C-89/17*, ECLI:EU:C:2018:570.

[700] The case of *ZAT and Others* follows, and develops further, the UK Supreme Court judgment in *EM (Eritrea) v Secretary of State for the Home Department*, [2012] EWCA Civ 1336, where it stated: "The Court of Appeal's conclusion that only systemic deficiencies in the listed country's asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in *Soering v United Kingdom* [1989] 11 EHRR 439. The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR".

[701] The Court stated that it would not be compatible with the aims of the Common European Asylum System to admit that "any infringement of fundamental right" or of the norms regulating asylum in the EU would be sufficient to affect the obligations of the other Member States to comply with the Dublin Regulation. See Court of Justice of the European Union, N.S. and M.S., C-411/10 and C-493/10 (3 March 2011) paragraphs 82 ss.

[702] The President of the Upper Tribunal's view regarding the case law of the CJEU emerges from his interview (12 January, 2017, London) and from the paper he wrote "The Article 8 ECHR/Dublin Regulation Interface", paragraphs 26 ss., that he presented during the "Strasbourg Tripartite Seminar: Court of Justice of the European Union, European Court of Human Rights, International Association of Refugee Law Judges", held on 25 November 2016.

and decided by the same judge who tried to open the UK doors to asylum seekers victims of human rights abuses elsewhere in Europe.[703] The Upper Tribunal's attitude confirms Golub's theory: by not referring, the national judge avoided compliance with the CJEU's precedent and shielded the national case law.

6.2 Italian Giudici di Pace and judicial capacity to refer

The second non-mobilization case needs less introduction since it is part of the Italian case study. The Italian case is characterized by the fact that national judges referred *en masse* to the CJEU to challenge the criminalization of migrants, with one important exception. *Giudici di Pace*, the lowest Italian court, despite being competent to rule on the 'clandestinity crime' and on several other Italian norms openly in conflict with the Return Directive, did not efficaciously mobilize the CJEU. To be more specific, three Giudici di Pace made a reference, but these were declared inadmissible by the CJEU. How can we explain this lack of mobilization?

I have asked this question to the judge that submitted the preliminary reference request in *Sagor,* [704] a criminal judge member of the *Magistratura Democratica* group, who answered in this way:

> [The Giudici di Pace] were recruited from professionally not very well-prepared people. They had a very different approach to their duties: they were paid a fixed rate for each decision delivered. Therefore, they had no interest in delaying the proceedings because it was more convenient for them to deliver the sentence.[705]

The above answer can be interpreted as a lack of national judges' ability to refer (see section 4.2) for reasons of time and lack of experience. The data on the references submitted to the CJEU during the mobilization seem to confirm this. Particularly telling

[703] See also Upper Tribunal Immigration and Asylum Chamber, R (on the application of SA & AA) v Secretary of State for the Home Department (Upper Tribunal Immigration and Asylum Chamber 12 October 2016); Upper Tribunal Immigration and Asylum Chamber, AM, R (on the application of) v Secretary of State for the Home Department (Upper Tribunal Immigration and Asylum Chamber 28 March 2017).

[704] Court of Justice of the European Union, *Md Sagor, C-430/11*, ECLI:EU:C:2012:777.

[705] Interview with the Tribunale di Rovigo judge, 26 March 2016, Venezia.

is the case of one judge who submitted seven questions, all in one month, one after the other, of which at least three did not provide any description of the facts and were declared manifestly inadmissible.[706] He was probably determined to challenge the clandestinity crime before the CJEU, but determination sometimes is not enough.

As showed in the Italian chapter, eventually the clandestinity crime was referred to the CJEU by a criminal judge; therefore, the low engagement of the Giudici di Pace in the mobilization was not problematic. However, there were other provisions of Italian immigration law that were in conflict with the Return Directive but which have never been referred probably because they fell under the exclusive jurisdiction of the Giudici di Pace. This was confirmed also in an interview with one of the main lawyers in the mobilization:

> Many aspects of administrative law were clearly in contradiction with the Return Directive. Even just the fact that a period for voluntary departure was not granted.[707] But the Giudici di Pace did not have sufficient technical expertise to deal with European rules. I found myself giving courses to Giudici di Pace that were completely lost when confronted with the idea of having to set aside a national law because it is in conflict with an EU provision. "Setting aside a state law" is a difficult concept to accept.[708]

The lack of expertise in EU law obviously is not a matter that concerns only Giudici di Pace. However, the limited length of their appointment means that generally they are less experienced than ordinary judges who remain in office their entire life.[709]

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[706] This is the case of the Giudice di Pace di Revere. The other questions he referred were dismissed because the CJEU issued its judgment in *Sagor* in the meantime. Giudice di Pace di Revere, *Zhu and others*, C-51/12, 11 January 2012; Giudice di Pace di Revere, *Ion Beregovoi*, C-52/12, 12 January 2012; Giudice di Pace di Revere, *Hai Feng Sun*, C-53/12, 12 January 2012; Giudice di Pace di Revere, *Liung Hong Yang*, C-54/12, 19 January 2012; Giudice di Pace di Revere, *Ahmed Ettaghi*, C-73/12, 26 January 2012; Giudice di Pace di Revere, *Majali,* C-75/12, 26 January 2012; Giudice di Pace di Revere, *Tam*, C-74/12, 13 February 2012.

[707] The Return Directive requires Member States to grant irregular migrants a period for voluntary departure of at least seven days; public authorities can proceed with the removal only if the obligation to return within that period is not complied with. Art. 7 of the Return Directive 2008/115.

[708] Interview with Luca Masera, 26 January 2016, Brescia.

[709] They can serve as Giudici di Pace for four years, renewable once. See details on the *Consiglio Superiore della Magistratura* website: https://www.csm.it/web/csm-internet/magistratura/onoraria/funzioni-onorarie

Moreover, for what specifically concerns the capacity to refer, it is also crucial to highlight what the *Sagor* judge told me:

> I would not have dared to make the preliminary reference without Chiara [Favilli]'s support. In my everyday work I used to deal with cases of stolen bicycles, do you understand? Without Chiara's help, perhaps I would have made the reference by myself, because I had the conviction, but it would not have been the same.

Chiara Favilli is the ASGI member and Professor of EU Law that helped the judge to draft the reference. We understand from this interview the complex dimension of the legal mobilization conditions: on the one hand, structural factors, such as the length of judges' appointment, can affect their capacity to refer; on the other hand, a support network can importantly help national judges and fill some of their gaps in knowledge or expertise.

Drawing some conclusions from the UK Calais case and the Italian Giudici di Pace examples, we can affirm that, to have a legal mobilization before the CJEU, resources are not enough. The EU (perceived) comparative advantage and the judges' ability and propensity to refer are necessary conditions for the mobilization. This limited empirical analysis is of course not sufficient to affirm whether the conditions we examined in the first section of the chapter are necessary and sufficient. Further cases need to be studied to test under which conditions we have or do not have mobilization before the CJEU.

7 EU law from below? The influence of civil society actors in the construction of the EU legal status of TCN

While the first part of this chapter explores the conditions under which a legal mobilization before the CJEU emerges, this last section looks at whether these cases had any impact on the CJEU's case law. Acknowledging that there are different views in the scholarship on how to assess legal mobilization's impact,[710] I adopt a middle

[710] Michael McCann, 'Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...)', *Law & Social Inquiry* 21, no. 2 (1996): 457–82; Scott Cummings, 'Rethinking the Foundational Critiques of Lawyers in Social Movements', *Fordham Law Review*, no. 85 (2017): 1987; For a closer perspective on litigation before the ECHR and the CJEU for migrants rights, see Baumgärtel's book categorization of three different types of decision's impact: law development, case specific, and strategic. Moritz Baumgärtel, *Demanding Rights. Europe's Supranational Courts and the*

ground position: migrant supporters definitively do have an influence on which cases reach the Court, but their influence decreases during the phase of litigation before the CJEU. Their contribution to the migrants' cause, however, is not a small one. By being at the heart of the 'enforcement gap', and by taking the side of minorities, they are defending the rule of law and democratic values, reducing the discretion of the executive and, therefore, increasing its accountability.

7.1 Legal mobilization as judicial agenda setter

One of the starting questions of this dissertation is: to what extent are the preliminary reference requests in the migration field a result of civil society's participation? As socio-legal scholars remind us, litigants decide the courts' agenda.[711] 'Courts are reactive; they do not acquire cases of their own motion, but only upon the initiative of one of the disputants.'[712] This considered, can we say that, to a certain extent, migrant supporters set the CJEU's agenda?

In classical EU law scholarship, the role of the individual litigant has been widely recognised as crucial to ensure the enforcement of EU law, given the limited executive powers of the European supranational order. Thanks to the principles of direct effect and supremacy, individuals can demand any national court to enforce and give precedence to an EU law provision, forcing Member States to comply; this dynamic has been described as 'decentralized enforcement' of EU law.[713] Legal mobilization scholars have noted how civil society actors play a role in such enforcement, and they coined the expression 'participation through law enforcement'.[714] This research follows their lead and shows how migrant supporters, by providing crucial resources such as legal advice, promoting litigation, carefully picking cases, and spreading knowledge,

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Dilemma of Migrant Vulnerability (Cambridge: Cambridge University Press, 2019), 8, https://doi.org/10.1017/9781108677837.

[711] Zemans, 'Legal Mobilization'.

[712] Marc Galanter, 'The Radiating Effects of Courts', in *Empirical Theories about Courts*, ed. Keith O. Boyum and Lynn Mather (New York: Longman Inc., 1983), 122.

[713] Pollack, *The Engines of European Integration Delegation, Agency, and Agenda Setting in the EU*, 164.

[714] Cichowski, 'Courts, Rights, and Democratic Participation'; Börzel, 'Participation Through Law Enforcement. The Case of the European Union'.

managed to influence the emergence of specific preliminary references and partially determined the CJEU's subject matter.

However, the term 'enforcement' conveys the idea of something neutral and almost mechanical, while this research also shows that proceedings can be highly contentious processes. Migrant supporters' initiatives are driven by domestic politics, and the TCN status itself is a politically contested terrain, where there is no agreement on how and what should be enforced. During proceedings, the government and the migrant supporters engaged in a 'struggle for interpretative authority'[715]: 'In each instance, one side attempted to redefine an existing (or potential) legal condition as unjust, while the other side sought to prevent such a redefinition from occurring'.[716] To give an example, the cases of *Imran* and *K&A* revolved around the definition of what 'integration measures' means in the context of the Family Reunification Directive.[717] Behind what seems a dispute over terminology, there is a clash between two models of integration, a multicultural model and an assimilationist one. During this struggle over the meaning of migration law, the legal status of the migrant is constructed and reconstructed. Far from being merely about enforcement, the preliminary reference procedure is often a contentious process consisting in challenging the public authority's power over TCN, and in re-discussing the place of migrants in our society.

7.2 Legal mobilization as agent of change

Although the three chapters shed light on the fact that, in many instances, migrant supporters have managed to prompt a reference, this does not automatically mean that they have influenced the final CJEU's decision. Quite the opposite, the cases show how, after the reference is transmitted to the CJEU, migrant supporters lose their control: in Luxembourg, new actors take the floor (the Advocate General, the EU Commission, and the intervening Member States) and feed into the process new and sometimes

[715] This expression is borrowed from Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (University of Toronto Press, 1994), 126.

[716] Andersen, *Out of the Closets and into the Courts*, 210.

[717] Court of Justice of the European Union, *Imran, C-155/11 PPU*, ECLI:EU:C:2011:387; Court of Justice of the European Union, *K and A, C-153/14*, ECLI:EU:C:2015:453.

unexpected considerations. It has been noted that Member States tend to intervene in cases with potentially high political costs at stake;[718] this is especially relevant for the migration field, given that Member States' interventions are almost always in favour of the government and against the migrant's side. Baumgärtel called this a 'peer mobilization', alias 'the collective intervention of a multitude of contracting states before European courts […] in order to demarcate a domaine réservé and to stress the high political stakes of a case.'[719] In the CJEU context, migrants and their supporters can find themselves easily outnumbered and overwhelmed by many resourceful repeat players.

An example from the cases I analysed is provided by the case of *Akrich* (UK Chapter). Here, the Advocate General in his Opinion raised a new issue, never mentioned during national proceedings and neither during the CJEU's hearing: the problem of bogus marriage. Despite being fully irrelevant for the case (the genuineness of the couple's marriage had never been questioned), the CJEU picked it up in its judgment, saying that marriages of convenience would entail an abuse of free movement law,[720] thereby giving resonance and legitimacy to the issue. Even if the case concluded positively for the Akrich couple, it had a broader negative impact on EU free movement law. In sum, we can conclude that even if it is true that by mobilizing the CJEU migrant supporters make the law, they do not make it just as they please.[721]

However, the impact of litigation and legal mobilization is far more ubiquitous than a single judgment's outcome. As Galanter argued: 'courts not only resolve disputes, they prevent them, mobilize them, displace them, and transform them. Thus, the effects of a court (or any other forum) cannot be equated with the dispositions of the cases that come before it.'[722] Even if the litigation rarely met the expectations of the civil society actors that started the case, to evaluate its impact we need to take into account multiple

[718] Cichowski, *The European Court and Civil Society*, 88.

[719] Baumgärtel, 'Part of the Game', 120.

[720] Court of Justice of the European Union, *Akrich, C-109/01*, ECLI:EU:C:2003:491 paragraph 57.

[721] I have paraphrased this expression from Felstiner, Abel, and Sarat, 'The Emergence and Transformation of Disputes', 633.

[722] Galanter, 'The Radiating Effects of Courts', 124.

dimensions that go beyond the ruling or its impact on national law.[723] Below, drawing on the insights I gained in the case studies, I advance three dimensions.

The mobilization of the CJEU may have the effect of mobilizing other disputes. We saw this clearly in the case of the *Surinder Singh*'s judgment and its progeny. By legitimizing the Singh couple's attempt to stretch the boundaries of their free movement rights, the CJEU has encouraged other Union citizens in the same situation to do the same. In addition to this, civil society actors learned about this case, informed migrants of their newly acquired rights, and mobilized the CJEU again to try to further expand the scope of Union citizenship (i.e., trying to encompass non-mobile Irish-UK citizens). The Italian and the Netherlands chapters provide similar examples, even if maybe on a smaller scale; the decision in *El Dridi* had an important role in the emergence of its sister reference, *Sagor*, and *Celaj*. Cases such as *Chakroun* and *K and A* revealed the potential of the Family Reunification Directive to practitioners and judges, prompting other preliminary references.

Second, the CJEU judgments may serve as a sounding board for migrant supporters. Through references, they gain visibility and important chances to disseminate their claims and ideas, both in the national and supranational context. In this sense, the CJEU and its preliminary reference procedure offer a platform for the 'iterative interactions' between civil society and the government, which is crucial in experimentalist government theories too.[724] Communication is also crucial for the 'follow-through' phase of litigation. We saw this in *Sagor*: the judgment of the CJEU dismissed migrant supporters' thesis; nevertheless, they used the visibility gained to spread their message and have an impact on subsequent parliamentary debates and law reform.

Finally, by 'Europeanizing' their grievances, migrant supporters gain a new tool to scrutinize the executive. Even if the CJEU might not eventually embrace their

[723] Baumgärtel, *Demanding Rights. Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, chap. 5. The author analysed the impact of selected ECtHR and CJEU's judgments in the field of migrants' rights, concluding that the rulings rarely meet the expectations of the civil society actors that start the case. His analysis was based on a three-dimensional view of effectiveness: law development, case specific, and strategic effectiveness (page 7).

[724] Gráinne de Búrca, 'Human Rights Experimentalism', *American Journal of International Law* 111, no. 2 (April 2017): 278.

arguments, the possibility of bringing governments before the EU Court has an important effect on governments' behaviour. This has been called the 'perception of the threat of litigation';[725] that is, the influence on behaviour that just the possibility of being liable in court exerts. As Galanter noted: 'Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls. It affects us primarily through communication of symbols by providing threats, promises, models, persuasion, legitimacy, stigma, and so on.'[726]

But how do we know that governments perceive such a threat? Some examples can be drawn by looking at how the governments acted before and after a preliminary ruling. In the UK, after the ruling of *Zhu and Chen,* the UK Tribunal issued a communication ordering all first-instance courts not to refer to the CJEU because it feared further 'negative' rulings. In the Netherlands, not only did the government grant a permit to Mrs Imran to drop the case, but immediately thereafter, knowing that another reference was likely to come, it adjusted the immigration authority's practice so as to make it more in line with what the EU Directive provided. In Italy, the police chief, after having realized that the non-transposition of the Directive could prompt a preliminary reference to the CJEU, issued a communication to all the police stations, ordering them to act so as to minimize the chances of judicial review. These government actions did not entail any formal change to the law in the books; however, they relevantly changed the executive's practice, showing the important effects that a litigation threat can have.

8 Conclusion

This chapter draws on the findings of the empirical chapters to make a comparison between the three case studies and to gain some insights on the phenomenon of legal mobilization before the CJEU for migrants' rights. In the first part of this chapter, I identified three factors that contributed to the emergence of the legal mobilizations. These are: 1) the presence of an active network of migrants' rights supporters that provides EU law expertise; 2) the existence and partial overlap of individual and

[725] Epp, 'Implementing the Rights Revolution', 47.

[726] Galanter, 'The Radiating Effects of Courts', 127.

collective grievances; 3) an EU LOS that features: EU law perceived comparative advantage, access to national courts, and access to the CJEU (national courts' ability and propensity to refer). Regarding the issue of why movements choose a litigation strategy, I have argued against the mainstream political-disadvantage theory; I believe that migrant supporters rely on litigation because of a combination of the particular individual grievance at stake (migrants' right-deprivation) with the type of organizations involved (law-focused). Given these two, litigation was the natural strategy to use.

I acknowledge that we need further research to understand whether the factors identified amount to sufficient and necessary conditions for the emergence of legal mobilization before the CJEU. For now, I provided two examples of non-mobilization cases that provide further evidence of how some of these factors might be necessary for a mobilization. Finally, the chapter concludes by redirecting the attention at the CJEU, asking what is the impact of such legal mobilization on the judicial law-making; can we say that the preliminary reference is a tool for participation for migrant supporters? The answer is yes and no. Migrant supporters clearly can influence which cases reach the Court; however, their impact on how the CJEU will then decide these cases is less evident. Notably, one could argue that this is, in a way, desirable: it also means that the CJEU is impartial and independent from migrant supporters' influence, and that will eventually decide freely on the issue (although we have also noted the disproportionate presence of Member States in the proceedings). Moreover, if we look at the effect of the 'perception of the threat of litigation', we realize that just by mobilizing the law, migrant supporters can make a difference, making the executive more accountable and responsive to its EU law obligations.

Chapter VI. Conclusions

In the last twenty years, EU competence in the migration and asylum field experienced a rapid expansion and a change in character and governance. At the beginning, the field was dominated by an intergovernmental approach, which led scholars to be rather critical towards it: allegedly, Europeanization led to an expansion of Member States governments' discretion. However, in the year 2000, the EU migration and asylum policy underwent an important reorganization: the Commission and the Parliament assumed a more important role in its law-making, and the CJEU was granted full jurisdiction on it. This thesis shows that especially the preliminary references to the CJEU represented a new opportunity for migrant supporters, who could use it to contest national policies and, incidentally, participate in EU law-making. Even if, admittedly, the CJEU's judgments are often not in line with migrant supporters' expectations, the use of the mechanism has nevertheless enhanced the level of scrutiny over the Member States' executive in the form of 'perception of the threat of litigation'.

1. Who, Why and How?

This research, thanks to three in-depth case-studies (Italy, the UK, and the Netherlands) and a final comparative analysis, enriches our understanding of the micro processes and conditions of legal mobilization before the CJEU. The first part of each empirical chapter illustrates the historical and political background of the legal mobilizations, which is helpful to study how 'legal, judicial, social and political factors at the national level' shape litigation at the EU level.[727] Then, by relying on interviews, documents from the proceedings, reports, and mass media, the chapters identify the actors, strategies, and contentious dynamics of the mobilization. Thanks to this law in context analysis, we realize that the legal mobilizations were embedded in national politics and discourses: they represented the European step of a longer national struggle, where the CJEU made a brief, but sometimes crucial, appearance. In fact, the three mobilizations were national in their targets and in their political meaning, and almost incidentally, they ended up participating in the construction of EU migration law. I shall summarize below the main findings briefly.

1.1 Who

The three empirical chapters uncovered who are the groups that have mobilized EU migration law before the CJEU. Importantly, only a bottom-up research could unveil the presence of these collective actors since, from the outset, most of these proceedings feature a single litigant and do not show any sign of strategic mobilization. The mapping of the mobilization actors reveals at least three interesting findings. The first is migrants' limited role: although they benefit from the mobilization, they are not the key actors in it, and that is why we have litigation for migrants' rights but not by migrants. In many cases, they have a very thin connection with the mobilization, and in most of the cases, we do not know if they share the cause pursued by the group: we even have examples of mobilizations without the litigant knowing it.[728]

[727] Dia Anagnostou, *Rights and Courts in Pursuit of Social Change*, 21.

[728] The case of *Sagor*, described in the Italian chapter, was maybe the most emblematic because the migrant was prosecuted *in absentia*. Court of Justice of the European Union, *Md Sagor, C-430/11*, ECLI:EU:C:2012:777.

Second, most of the migrant supporter groups that organized the legal mobilizations are 'embedded in legal frames'[729]: they are lawyers or a law-focused organization. This has an impact on both how these groups pick a case (they tend to have a 'reactive attitude'[730]) and on their choice to rely on a litigation strategy. In fact, contrary to what has been noted in environmental litigation,[731] I argue that the type of organization, and especially its composition and focus, shapes how the struggle is seen and limits the repertoires of actions available: lawyers, when faced with a problem, try naturally to understand how law can help, and not whether a demonstration or a campaign would be feasible.

Third, contrary to expectations, the fact that the litigation is transnational, does not necessarily mean that we see the involvement of transnational networks of activists. In fact, all the organizations analysed but one (the AIRE Centre, which has a European reach) act mainly, if not exclusively, at the national level. To be sure, my impression is that this is something destined to change soon: the 'discovery' of European litigation strategies urges groups to look for European allies. In this sense, the asylum field is more advanced: asylum and refugee support groups started their transnational cooperation many years ago, probably prompted by the international reach of the Dublin regulation and resettlement mechanisms. We have partially seen this in the 'Calais case' described in chapter V, but also landmark strategic litigation cases like *N.S.* are examples of how these organizations collaborate transnationally for mobilizing asylum law before the CJEU.[732]

1.2 Why

The socio-political context outlined in the case studies helped us to understand where a legal mobilization comes from and why it emerged in a certain Member State and not in another. In fact, the crimmigration policies in Italy were crucial to understand the migrant supporters' group decision to mobilize the Return Directive. The same is true

[729] Israël, 'Rights on the Left? Social Movements, Law and Lawyers after 1968 in France', 94.

[730] Harlow and Rawlings, *Pressure Through Law*, 189. We saw this especially in the UK case but also to a certain extent in the others.

[731] Vanhala, 'Is Legal Mobilization for the Birds?'

[732] Court of Justice of the European Union, *N.S. and M.S., C-411/10 and C-493/10*.

about the UK's recurrent attempts to curb family migration and the Dutch turn to assimilationist integration policy. These policies represented an attack on migrants' individual rights, to which their supporters decided to respond (i.e. the individual grievance of the litigation). The national socio-political context is also useful to explain the collective grievance behind the litigation, that is, why, given an individual rights violation, non-migrant groups decided to mobilize in solidarity. The answer lies in the local political meaning of the legal mobilizations, and not in the technical definition of a specific legal concept or in its case-specific effect; the local political meaning of the litigation lies in the groups' striving to participate in the definition of the basic terms under which citizens and migrants can live together.

1.3 How

Since the EU legal mobilization starts in national proceedings, also the strategies to reach the CJEU are to be analysed in relation to the national procedure. In particular, there are the elements that the bottom-up research highlighted. First, starting an EU litigation strategy means that an EU norm should be relevant to the national political struggle and represent a (possible) advantage for migrants' rights, compared to national law. Second, national procedural law can provide possibilities and obstacles for the mobilization: legal aid, for instance, is an important help, but procedural hurdles such as the 'Gentlemen's agreement' in the Dutch context can hamper the mobilization. In fact, one of the most critical parts of mobilizing the CJEU is how to obtain the support of a national judge that must be willing and able to request a preliminary reference. This can represent an important obstacle for the mobilization, even if this research reveals how the national judge can also be an important ally (see later). Third, and this is a consequence of the previous two points, EU legal expertise bears an important role: legal experts are often those who identify the potential benefit of an EU norm, and they elaborate the legal argument to reach the Court. The preliminary reference procedure is not an easy procedure for national actors, and often, national judges are not familiar with it; that is why we have seen a high engagement of EU law experts, either among the legal team or as external allies.

2 When?

The comparative chapter engaged in an analysis of the three case studies with the view to identify common patterns and the conditions under which we have a supranational mobilization. There is a caveat though: the three conditions I have identified would need further (empirical) testing; for the moment, I provided two examples of how, lacking one of these conditions, legal mobilization for migrants' rights before the CJEU does not occur.

These conditions are:

1) Collective actors that provide EU law expertise. The presence of an active network of migrant supporters is key, especially in the migration field: as we have seen, migrants do not lead the mobilization by themselves and they often have limited resources. In fact, the availability of specific resources can be crucial for the mobilization, and in particular, technical expertise in EU law proved essential. It is important both to identify a relevant and advantageous EU norm to rely upon and to frame a preliminary question request; this resource is often provided by key allies in the mobilization, like academics and Eurolawyers.
2) A grievance that is individual and collective at the same time. The existence and partial overlap of individual and collective grievances is a precondition to establish an alliance between the movement and the migrants and, especially, to mobilize the collective actors. In fact, we can imagine that migrants face many hurdles in host societies, but not all of them mobilize supporters. This might be either because they are exclusively of individual concern or because they are not underlined by a political view. For instance, the fact that migrants are separated from their family members is perceived by migrants as a right deprivation and by supporters as an injustice. On the contrary, it would be more difficult to mobilize groups against the deportation of 'rejected' asylum seekers whose situation does not fit the Geneva Convention definition. Notably, human rights sources like the ECHR do not recognize protection for either of the situations.
3) Open EU LOS. I have defined the EU LOS as a combination of national and EU factors; these are: an EU norm that has a potential comparative advantage with respect to national law; effective access to national courts; and access to the CJEU, which boils down to national courts' ability and propensity to refer.

3 The neglected role of national judges in legal mobilization

One of the main contributions of this thesis is to shed new light on the role of national judges in the mobilization before the CJEU for migrants' rights. National judges are the gatekeepers to the CJEU, and depending on the decision they make, they may be the main obstacle for the mobilization, or the most important ally. EU legal scholars have always dedicated much attention to national judges in the preliminary reference procedure: studies on the propensity or adversity to refer abound. However, and quite strikingly, we have little works of national judges *in society.*[733] That is, how do national judges respond to different political contexts? Do ideological considerations matter in their decision to refer to the CJEU?

Interestingly, Krommerdijk, in an article on Dutch judges' attitude towards referrals in the migration field, concluded that his study 'casts doubt upon the explanatory power of theoretical accounts that portray national courts as strategic actors that primarily refer for 'political' strategic reasons.'[734] But then, in another study, he seemed to acknowledge the impact of political considerations: 'it seems safe to say that politico-strategic reasons play a more important role in sensitive administrative law fields, such as migration.'[735] However, I would argue that this ambivalence in his findings might be linked to the fact that his research is mainly based on interviews with national judges, and it is quite understandable that these would not openly acknowledge their political bias. In fact, we should consider in our investigations that judges' political considerations are a delicate issue to explore: judges may find it difficult to admit, even in an anonymized survey, that their world view had an impact on their decision because this might expose them to the criticism of being partial.[736]

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[733] An exception is Golub, who argued that UK judges' adversity to refer was influenced by the UK's Eurosceptic context. However, his lead was not followed, probably also because of some flaws in its design. Golub, 'The Politics of Judicial Discretion'.

[734] Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', 106.

[735] Krommendijk, 'The Highest Dutch Courts and the Preliminary Ruling Procedure', 20.

[736] The mask of judges' neutrality is very much at the centre of neo-functional theories: "courts in countries upholding the rule of law must perceive themselves and be perceived by others as fundamentally non-political actors. They are socialized to understand themselves as agents and servants of the law. Political considerations attach to judicial decisions and may motivate these decisions at the margin. Nevertheless, overt political arguments are illegitimate; actions must be justified with reference

Contrary to law scholars, legal mobilization scholars have rather overlooked national judges' role in mobilizations before the CJEU. Some authors have noted their role: Hilson talks of 'judicial receptivity to policy arguments', and Alter and Vargas wrote that 'the key is to find sympathetic judges'.[737] However, they did not further elaborate on the issue, and we still know little on why some judges are more or less receptive or sympathetic to a cause. More importantly, should we consider judges as part of the legal opportunity structure? Or are they potential allies?

My research started digging into the issue, and especially the Italian chapter offered very interesting insights in this respect. We have seen that judges can actively shape the mobilization, beyond being simply the sympathetic court where movements bring their claims. Judges can organize independently and create alliances with other groups to challenge a law that they think is unlawful. In Italy, a judges' association played an important role in spreading information on the reasons why national norms were contrary to EU law, and in creating opportunity for referrals (chapter II). Also, in the Calais case (chapter V), we saw how a UK judge mobilized and found creative solutions that helped migrant supporters fighting against human rights violations. These 'behavioural' factors do not exhaust judges' reasons to refer, and they need to be complemented with more 'structural' factors, like judges' ability to refer, which are also part of the equation.[738]

Arguably, even if nobody believes anymore that the judge is *la bouche de la loi*, the idea that judges take active part in a mobilization might raise the criticism that this runs against judicial impartiality, which is a critical tenet of our rule of law system. This is true, but the line that separates an opinionated judge from a partial judge can be subtle and difficult to draw, and, in my view, the problem is rather how much space to express these preferences that each legal culture leaves. One may see as undemocratic the situation where an activist judge contributes to strike down a law voted by an elected

to generalizable principles and in a particular technical discourse." Mattli and Slaughter, 'Revisiting the European Court of Justice', 196.

[737] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 475; Hilson, 'New Social Movements', 243.

[738] Broberg and Fenger, *Preliminary References to the European Court of Justice*.

majority, but this obviously does not reflect reality. In the European legal system, a single judge's decision will never have the last word over legislation and will always be reviewed by a higher and collegial court in which less space is left to judges' personal preferences. Admittedly, single judges acquired the power to trigger judicial reviews before the CJEU, but the ultimate decision on the legitimacy of the legislation remains with this last Court, and not with the national judge. Finally, one could also answer that judges who challenge the legitimacy of laws which are expressions of elected majorities are doing exactly what they are supposed to do: protecting minorities against the arbitrary power of the majorities and being one of the most important counter-majoritarian forces in our societies.

4. Conclusion

Who brings migration cases before the CJEU? Are some of these cases a result of a mobilization effort? If yes, how do migrant supporters reach the CJEU and why? These were the starting questions of this investigation, that I tackled by adopting a bottom-up and legal mobilization approach. On the basis of the empirical research, I proposed three conditions to explain when a legal mobilization before the CJEU emerges. Moreover, regarding the outcome of the mobilization, this research shows that migrant supporters use the preliminary reference mechanism to shape the judicial agenda of the CJEU, and even if they ultimately cannot control its ruling, the reference alone can importantly influence Member States' executives ('the perception of the threat of litigation').

In light of this, it might be appropriate to complete former CJEU Judge Mancini's words: he said that national courts, by referring 'sensitive questions of interpretation', are 'indirectly responsible for the boldest judgments the Court has made';[739] this research argues that migrants' rights supporters, by chasing, promoting, and prompting preliminary references to the CJEU, are partly responsible as well.

[739] Mancini, 'The Making of a Constitution for Europe', 597.

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