Collection dirigée par Samantha Besson et Nicolas Levrat

## Immigration to the EU

Challenging the Normative Foundations of the EU Immigration Regime

Johan Rochel





## **Table of Contents**

TABLE OF CONTENTS	
PART ONE: INTRODUCTION	
I. IMMIGRATION AS A LEGAL AND PHILOSOPHICAL CHALLENGE	
II. MAIN OBJECTIVE OF THE INVESTIGATION	21
A. Scope of the investigation	22 73
1. Legal immigration to the EU	43 20
2. Exclusion of asylum	
B. Methodology	20
C. The three-fold contribution of the investigation	
1. Rethinking the role of political theory in a legal investigation.	
<ol> <li>Applying the "immigration ethics" debate to the EU</li> </ol>	
<ol> <li>Developing a republican account on immigration</li> </ol>	
III. STRUCTURE OF THE INVESTIGATION	
PART TWO: METHODOLOGY	
I. OUTLINE OF THE METHODOLOGICAL APPROACH	
A. Providing guidance in reforming legal institutions	
B. On legal institutions	37
1. Definition	38
a. General definition of institution	38
b. Legal institution: the relevance of unity	40
c. Legal institution: content	
d. Legal institution: interweaving	
2. Interest in legal institutions	
C. On providing guidance	
1. Definition	
a. Two sub-objectives	
b. A prescriptive approach	
2. A practice-oriented approach: for whom?	
II. THE NORMATIVE REFLEXIVE DIALOGUE	
A. On the relevance of institutions	
B. Towards institutional moral reasoning	
<ol> <li>Definition of the normative reflexive dialogue</li> </ol>	49
<ol><li>Is the law a "nature morte"?</li></ol>	
III. FRAMING THE OBJECT OF INVESTIGATION	
A. Clarifying jurisprudential assumptions	
1. A positivist position	
a. The core of a positivist position	
b. Two misunderstandings about positivism	
2. Normative positivism: a sketch	
a. A thesis about positivism?	
b. Substantial and methodological core	
B. Elaborating a normative model for the legal institution	
1. Interpretation: between conservation and creativity	
2. Elaboration of a normative model	
3. Methodological concerns regarding a normative model	
a. Plurality of different models	
b. Methodological neutrality	
c. Compatibility with normative positivism	
IV. PRESCRIBING NORMATIVE GUIDELINES	
A. On justification	

	1.	Definition	68
	2.	Providing justification	69
	3.	Justification and legitimacy	70
1	B.	On the place and use of moral considerations	. 72
	1.		72
	2.		. 75
		a. Refining Sen's approach	77
		b. Focus on values	. 78
	3.		. 81
	5.	a. The "ideal guidance" problem	. 82
		b. Delineating acceptable reforms	. 84
		c. A lack of critical normative force?	. 85
v.	р	LUEPRINT OF THE INVESTIGATION	. 86
PAR		THREE: LEGAL IMMIGRATION TO THE EU	
I.	S	TRUCTURE OF THE INVESTIGATION	. 91
	Α.	Structural linkage	. 92
	В.	Relevance for the present investigation	. 94
	D. С.	Intermediary conclusions	96
		ITERNAL FREE MOVEMENT REGIME	07
II.		General outline	07
	А.	General outline	. 97
]	В.	The right to free movement of Union citizens and their family members	. 98
	1.	Overview	100
		a. Legal basis	100
		b. Scope	100
		c. Art 21 TFEU and the status of Union citizen	101
	2.	Rights granted to a moving citizen and their family members	103
		a. Prohibition of discrimination	104
		i. Scope of application	105
		ii. Purely internal situations and the Zambrano's doctrine	106
		b. Rights to social benefits	108
		i. A gradual integration scheme	109
		ii. The CJEU's approach: modulating between legitimate demands	111
		iii. The deepening of free movement in the EU	112
		c. Family reunification	113
	3.	Restrictions	115
	4.		
(	С.	Internal free movement for third-country nationals	
	1.		
	2.		118
		a. TCNs without long-term resident status	118
		b. TCNs with long-term resident status	119
	3.		121
		a. Discrimination on the basis of nationality	122
		b. Freedom to move by analogy?	124
	4.		
]	D.	The Union as a free movement area? 1	
	1.		127
		a. Challenges of the Union citizens' free movement regime	128
		b. Challenges for the TCNs' free movement regime	129
	2.	Relevance for the issue of first access to the Union	130
III.		IMMIGRATION TO THE UNION	133
1	A.	Introductory remarks	133
	1.	Structure	133
	2.	Overview	134
J	B.	Competences on legal immigration	137
	1.	General overview: the regime of EU competences	

a. The types of competences	138
b. The allocation of competences	
c. The exercise of competences	139
2. Competences on legal immigration	
a. An EU competence for a common immigration policy	140
i. A general competence in historical perspective	141
ii. Remaining tensions	
b. Ал. 79 (5) TFEU	143
c. The relevance of the Single Permit Directive	144
d. External competences on labour immigration	147
3. Intermediary conclusions: EU competences on legal immigration	149
C. On the relevance of fundamental and human rights in first access to the Union	151
1. Overview: the EU fundamental and human rights regime	
a. Fundamental rights as general principles of law	152
b. The Charter	155
c. Accession to the ECHR	157
d. Human rights obligations flowing from international law	
e. Intermediary conclusions	
2. Relevance for immigration to the EU	164
a. Two distinct situations and their link to jurisdiction	
b. Family reunification and fundamental rights	
c. Labour immigration and fundamental rights	
3. Intermediary conclusions	170
D. Labour immigration to the EU	
1. Political background of the labour immigration regime	
a. Two political failures	
b. A sectoral demand-driven approach	
c. The Global Approach to Migration and Mobility	173
i. The approach in general	
ii. The relevance for labour immigration	
2. The regime of labour immigration	
a. The Blue Card Directive	
i. Structure of the Directive	
ii. Rights granted to Blue Card holders	
iii. Assessment of the Directive	
b. The EU Single Permit Directive	
i. A horizontal instrument.	
ii. Assessment of the Directive	
c. Further Directives related to labour immigration	
i. Students Directive	
ii. Researchers Directive	
iii. Directive on seasonal employment	
iiii. Directive on intra-corporate transfers	
3. GATS Mode 4	
<ol> <li>GATS Mode 4</li></ol>	
a. Bilateral agreements: the example of Turkey	
b. New "mobility partnership"	
<ol> <li>Concluding remarks on accessing the EU for labour purposes</li> </ol>	
E. Immigration based upon family reunification	
1. Introductory remarks	
2. Right to family reunification on the basis of the ECHR	
a. Separation and reunification	
b. First entry: positive obligation of the state	
i. The key principles	
ii. Between strict and lenient readings	
c. Family and individual responsibility	
i. Different conceptions of the family	
ii. Different conceptions of the link between immigration and family life	201

d. Intermediary conclusions	202
3. Family reunification and other international Conventions	203
a. Family reunification in the UN Covenant on civil and political rights	203
b. Other relevant provisions for family reunification	204
4. Family reunification and the Charter	205
a. Importance of the Charter	205
b. Current use of the Charter in family reunification cases	205
5. Family reunification and other EU law provisions	206
a. Rights of Union citizen family members	207
b. Rights of TCN family members	
i. Structure of the Family Reunification Directive	
ii. The double challenge raised by the European Parliament	
iii. Recognizing a right to family reunification	
<ol> <li>Concluding remarks on accessing the EU on the basis of family reunification</li> </ol>	
PART FOUR: THE NORMATIVE MODEL AND THE EU AS A POL	
COMMUNITY	217
I. ELABORATION OF THE NORMATIVE MODEL	
A. Systematisation of the immigration competence	
a. A framework on sovereignty	
i. Endicott's approach	
ii. An evolving and community-specific concept of sovereignty	
b. Sovereignty and immigration	
c. The EU sovereign competence on immigration	
i. Two distinct difficulties	
ii. An EU-qualified concept of sovereignty	
B. Assessment of the EU sovereign competence	
II. THE EU AS A POLITICAL COMMUNITY	232
A. Preliminary qualification of the EU	233
1. Epistemological difficulties in grasping what the EU is	233
2. The EU as a political community	
a. Is the EU condemned to be an in-between?	234
b. A positive account of the EU	235
3. Two normatively relevant subjects of the EU	237
a. The value of political communities	
i. Member States as essential parts of the European project	238
ii. The importance of political communities	
iii. An EU with the Member States	
b. The importance of citizens	
i. Two fundamental evolutions	
ii. A Union of citizens	
4. The EU as a political community	
a. Two qualitative features of the EU	
b. The double relevance of the Member States	
B. The EU between values and principles	
• •	
1. Overview	
2. The values of Art. 2 TEU	
a. The definition of "value"	
b. The functions of Art. 2 TEU	
3. "Principles" of the EU	
a. The definition of principles	
b. The functions of principles	
i. In general: general principles of EU law	257
ii. In particular: the objective of the present investigation	259

4	<ol> <li>Towards an account based upon equality and freedom</li> </ol>	
С.	Equality	261
1	. Equality as legal principle	261
	a. The general principle of equality	
	b. The general principle of non-discrimination	263
	i. Reconstruction along a negative approach	263
	ii. Comparison to the ECHR's regime	265
	c. The ambiguity of equality	
2	2. Making sense of equality	
3	<ol> <li>Intermediary conclusions</li> </ol>	
D.	Freedom	
1	. Freedom as a legal principle	
	a. Legal norms protecting freedom	
	i. The development of a fundamental rights regime: the example of the right to be heard	
	ii. Proportionality as a principle to safeguard freedom	
	b. The fundamental value of freedom	
	c. Enhancing freedom	
2		
3		
E.	Equality and freedom: on the EU's duties beyond its borders	
1		
	a. Negative duty: preventing domination	
	b. Positive duty: enhancing freedom	
	i. Sufficientarian positive duty	290
	ii. What is "sufficient"?	
	c. Intermediary conclusions	293
2		295
	a. Justifying public authority	295
	b. A three-pronged standard of justification	296
	c. A certain vision of justice for the EU	298
<b>F</b> .	General overview	299
1		300
2	. The relevance of equality and freedom	301
PART I	FIVE: THE EU SOVEREIGN COMPETENCE ON IMMIGRATION	
1. U	DVERVIEW	
	ON THE JUSTIFICATION OF THE SOVEREIGN COMPETENCE	
<b>A</b> .	Overview	307
В.	Sovereign competence on immigration as essential to self-determination	308
1		308
2		
3	Free Brancher Manual Manua	
С.	Competence on immigration as component of political self-determination	
1		
2	Final and the produced resources	
	a. The EU as intergenerational cooperative project	
	b. Production and use of goods	
-	c. A prima facie right to decide upon these goods	
3.		
	a. On the claim held by a specific community	
4.	b. On the relevance of past injustices	
4.		
	a. Structure of the challenge b. The requirement to integrate priority into a general moral framework	
	i. Background obligations ii. Scope and content of priority among members	
D.	Self-determination and immigration	
ν.	Sen-uclermination and miningration	

i.		
	a. Applying non-discrimination to the fundamental distinction	330
	b. A problem of exclusion	333
	c. Specificities of the EU	334
	d. Intermediary conclusions	335
2.	The competence to frame the EU's immigration regime	336
	a. Access to political membership and mere presence in the territory	336
	b. A weak empirical link	338
Ε.	Intermediary conclusions: justifying a sovereign competence on immigration	339
Ш.	ON THE EXERCISE OF THE SOVEREIGN COMPETENCE	
А.	Overview	
В.	Externalities of the EU immigration regime and policy	
Б. 1.		
2.		
	"Affectedness" and obligations: structure of the issue	
С.	5	
1.	a. Extraterritoriality	
	a. Extraterritoriality b. Extraterritorial effects	340
•		
2.		
D.	The importance of the general principles of law and the Charter	
1.		
	a. Scope of application	
	b. Different modalities of obligations	
	c. The relevance of international law	
2.	Contours of a doctrinal argument	
Ε.	The requirement to ensure non-discrimination	
1.	Overview	
2.	Two broad categories of tensions	
	a. Structural functioning	
	b. Similar structural distinctions: the ICERD	
3.	Access to the EU: discrimination among would-be migrants	
	a. Overview	
	b. Discrimination among would-be migrants: presumption of incompatibility	
	c. Discrimination among would-be migrants: on the respect due to individuals by a public authority	
	i. Assessing discriminatory grounds	
	ii. Equality as the requirement to treat individuals "well"	
	iii. Identity-related grounds of discrimination	
	iiii. Intermediary conclusions	
	d. Integrating contextual evolutions	
	i. Context as social, legal and political space	371
	ii. Context as internal consistency	372
	e. Accounting for language and qualification discriminations	
	i. Language as discrimination ground	
	ii. Qualification-based discrimination	
	iii. Integrating indirect discrimination	
4.	Intermediary conclusions	
	a. Overview	378
	b. A political strategy to address the sensitivity of non-discrimination in immigration	379
	i. Distinction between discrimination and exclusion	
	ii. Stronger anti-discrimination provisions	380
_	c. Further integration into a republican account of the EU	381
	The requirement to consider and take into account	382
1.	Overview	382
2.	Immigration regime: identifying detrimental effects	383
4	a. Ethical recruitment in the Blue Card Directive	384
1	b. The practice of impact assessments	385
	c. Obligation to identify: the case of environmental protection	386
	i. The principle of precaution	387

	ii. Identification of harmful effects in environmental law	388
	iii. Monitoring and reporting: the example of energy policy	
	d. Intermediary conclusions	
3.		
	a. Procedural justice	
	b. The right to be heard	
	c. The right to be heard in immigration matters	
	d. The right to be heard in legislating upon immigration policy?	
	e. Considering affected outsiders in environmental law	400
4.	Intermediary conclusions	
G.	Two republican constraints upon the EU's sovereign competence	403
1.	Overview	403
2.	Immigration and domination	403
	a. Immigration decisions as instances of domination	404
	b. Self-restraining obligations as anti-domination measures	407
	c. Intermediary conclusions	408
3.		
	a. Integrating Abizadeh's "coercion" model	410
	i. Abizadeh's democratic challenge	
	ii. Two republican lines of reply	
	b. Are arbitrary interferences always problematic?	
	i. Immigration choices as domination	
	ii. Immigration choices as unproblematic domination	
IV.	PROPORTIONALITY IN A REPUBLICAN EU IMMIGRATION REGIME	
А.	Overview	
В.	Protecting individual freedom: the importance of proportionality	
1.		
	a. The three functions of proportionality in EU law	
	b. EU and Member State interests vis-à-vis individual interests	
-	c. A three-pronged proportionality test	
. 2.	11 9 8	
	a. Inclusion of outsiders	
	b. Inclusion of interests c. Creating an institutional space for proportionality assessment	
	<ul> <li>c. Creating an institutional space for proportionality assessment</li></ul>	
	ii. Explicit proportionality assessment in the immigration regime	
	d. Criticisms	
C.	Proportionality: the requirements to evaluate and balance	
U. 1		
2		
-	a. Main hypothesis	
	b. Illustration: evaluation of interests in immigration matters	
	c. Specific challenges of an evaluation on immigration	
3		
D.	"Weight" and background conditions	
1	e e	
2		
3	. Specification of the background conditions	437
	a. The extent of the background conditions	
	i. Determining the EU's share	
	iì. Two alternatives strategies	439
	b. The fulfilment of the background conditions	440
4		
	a. Two models of conditionality	
	b. Intermediary conclusions	
E.	On the different legitimate interests	
1		
2	. Safeguarding security	444

	a. General focus: security narrowly defined	445
	<ul><li>a. General locus: security narrowly defined.</li><li>b. The figure of the "terrorist"</li></ul>	
	c. The figure of the "wave"	448
	c. The figure of the "wave" d. Intermediary conclusions	450
	d. Intermediary conclusions	450
3	Culture	
	a. Defining culture	
	b. Relevance of culture	
	c. Focus on cultural stability	
	d. Variation: social trust	
	e. Intermediary conclusions	458
4	Safeguarding economic resources	459
	a The "collanse" arguments	460
	b. The "strain" arguments	461
	i The normative dimension: the relevance of background conditions	461
	ii. The empirical dimension of the "strain" argument	463
	c. Intermediary conclusions	467
5		468
6		
		471
7.	a. Is freedom of movement a human right?	472
	<ul> <li>a. Is freedom of movement a numan right?</li> <li>i. "Human rights" as securing a minimal amount of free movement</li> </ul>	473
	1. "Human rights" as securing a minimal amount of free movement	
	ii. "Human right" as protected freedom to move	
	b. On the interest in mobility and its instrumental value	
	c. Intermediary conclusions	
8	The case of family reunification	
	a. A two-pillar approach on the value of family reunification	
	b. First pillar: the importance of the sponsor-community relation	
	i. The dilemma between home and family	481
	ii. Family reunification as "general rule"	
	iii. Focus on core family members	483
	c Second pillar: the instrumental value of mobility	484
9		485
	a. Overview	
	b. Attracting doctors from LDC and the "brain drain"	
	i. Illustration	
	ii. Brain drain and its normative challenges	
r	Intermediary conclusions	188
<b>F</b> .	-	400
1.	Overview	400
2.	Applying proportionality in a republican EU	
	a. The challenges of proportionality stricto sensu	
	b. Proportionality as dynamic movement	
3.		
4.		495
	a. Structure of the counter-arguments: on the burden of proof	
	b. Can the EU still be self-determined?	
	c. Can the EU still ensure internal non-domination?	497
	SIX: REFORMING THE EU IMMIGRATION POLICY	
I. O	N PROVIDING REFORM PROPOSALS	503
А.	Methodological remarks	503
В.	The "morality" of the process of reform	
	TRE MINIARY OF THE PROCESS OF REFORMATION TRENGTHENING THE EU REPUBLICAN CAPACITIES	
А.	Reinforcing the EU's capacity to consider interests of affected individuals	
1.		
2.		
	a. Impact assessment	
	b. Monitoring	509

.

3		
	a. "In the name of"	
	i. Two types of representatives	
	ii. Prerogatives of the representative and public dimension	
	b. Criticisms	
	i. The capacity to integrate others' interests	
	ii. Abizadeh's democratic thesis: bis repetita?	
4	Creating legal channels for immigration	
5	. International framework coordination scheme	
	a. Two principles for an international framework	
	b. A persisting tension	
6	. Intermediary conclusions	
В.	Immigration to the EU as gradual prerogatives	
1	. Overview	
2		521
-	a. Overview	
	b. The link to proportionality	
	c. Intermediary conclusions	
3	<ul> <li>Tensions with fundamental rights</li> </ul>	
5	a. Two types of criticisms	
	b. Outline of a rights-based reply	
4		
	<ul> <li>A contradiction with the rampere objectives?</li> <li>Intermediary conclusions</li> </ul>	
	FULFILLING GLOBAL DUTIES	
III.		
Α.	Overview	
В.	Fostering legal immigration	
1	. Caution in assessing empirical evidence	
2		
3	8. Remittances and sufficientarian duties	532
	a. Multiplying effects	533
	b. Exploiting the full potential of remittances	534
4	. "Brain drain" effects	
	a. Challenges linked to empirical evidence	
	b. Relevance of the empirical evidence	537
5	5. Modus of legal immigration: reinforcing circular migration	
	a. Definition and challenges linked to circular migration	
	b. A rights-based approach of circular migration	
6	5. Intermediary conclusions	
С.	Towards a rights-based GAMM	
1	. The GAMM as strategic framework	
2	2. An affirmed rights-based approach	
D.	Intermediary conclusions	
PART	SEVEN: CONCLUSION	
I. A	A LEGITIMATE SOVEREIGN COMPETENCE ON IMMIGRATION	547
Α.	Methodology: from within and for the legal institution	549
1	The sovereign competence on immigration	
- 2	2. Institution-independent values	
В.	A republican immigration theory	
	The relevance of freedom as non-domination	
	2. Immigration and global duties	
C.	The specificities and opportunities of the EU	
	The EU as an anti-domination project.	
	1.5	
	1 8	
	A consistent immigration regime	
	Leopean risks	
II. I	EUROPEAN REALISTIC UTOPIA: FOSTERING MOBILITY	

INDEX	559
BIBLIOGRAPHY AND OFFICIAL DOCUMENTS	563
DIRECTIVES, REGULATIONS AND PROPOSALS	563
COMMISSION COMMUNICATIONS AND OTHER COMMISSION DOCUMENTS	565
EUROPEAN COUNCIL AND COUNCIL OF THE EUROPEAN UNION DOCUMENTS	567
OTHER INSTITUTIONS	567
TABLE OF CASES	
BIBLIOGRAPHY	