

## 3

### Viciously Circular

#### *Will Ageing Lock the European Union into Immigrant Exclusion?*

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#### 3.1 INTRODUCTION

The EU is currently experiencing the coincidence of two phenomena: the demise of its decade-old economic model and the looming reduction of growth due to the ageing of European populations. Since the 1950s, the Union has operated a regulatory model on migration, the whole point of which was to promote growth among an incrementally enlarged group of cooperating nation states. It combines the acceptance of the freedom of movement for nationals of cooperating parties with the power to exclude nationals from countries outside the group. To function as an engine of growth, the circle of parties has to be successively widened. With a limited scope for further EU expansion, this model is no longer sustainable according to its own logic. To be sure, I am not engaging with the question of *how* a novel successor model could or should look. Rather, I find reasons to doubt that a new and more viable model will be negotiated at all, unless we reimagine the fundamental assumptions of the European social contract. The ageing of populations will block such a policy process, according to my hypothesis, providing for a vicious circle where two separate factors amplify each other. This interrelation – the demise of a stabilizing regime concurring with an ageing population as a reform-blocking development – merits scholarly attention. My shorthand for it in the following is ‘the *blocage*’, and it will provide the theme for this chapter.

To understand the *blocage*, legal scholarship is necessary, but not sufficient. The power of the EU regulatory model derives from its legal character, and legal scholarship is good at explaining its components. Economic growth and political stability are the *teloi* that this model seeks to ensure. Law has a curious blind spot for its own overarching *teloi*, with disciplines such as political philosophy or economics partly filling that void. The particular crisis that engenders the *blocage* is one of ageing populations – a phenomenon that

demographers would recognize as within their domain. Already now, understanding the *blocage* is a project stretching over four disciplines, and it would not be difficult to add others as political sciences, medicine, sociology or psychology. A multidisciplinary, multiannual research program with a corresponding budget might seem to be a plausible way to research the *blocage*.

At the present juncture, however, a different type of study seems to be called for: exploratory and argumentative in style, and quicker to reach tentative outcomes. The consideration of law's *telo* within law needs to be reinvigorated, I believe, and the findings of other disciplines have to be brought into a conversation with law. This chapter is an attempt at doing that. I shall outline an argument that starts with law and ends with law, and that follows a path of reasoning where relevant findings from other disciplines are integrated. Far from being novel or original, this approach acknowledges that we are all tethered to one or a few disciplines that give a foothold in any exploration of that which is beyond. It reaches for an outcome which helps us decide whether or not we should invest further and more comprehensive efforts into the research of that *blocage*.

Here are the limits of my project. My question is how the ageing of populations in EU Member States will affect their making of migration and asylum law. I shall test the hypothesis that EU asylum and immigration law and policy might develop in a way that is increasingly exclusionary towards large groups of immigrants due to an interlocking of the economic and political consequences of ageing. Here is a simplified version of what might underlie such a development, making up for the *blocage*:

Improved health care makes populations in the West live longer. The resulting 'demographics of ageing' entails slowing growth as every worker needs to support an increasing number of ageing persons. Slowing growth makes redistribution harder and leads to a further increase of domestic income inequality. To the extent increasing domestic inequality can be tied to nation-statist and protectionist policies, we may expect more exclusionary migration laws. This denies states one important remedy for a 'demographics of ageing', namely immigration. As family-friendly politics and stimuli for procreation have had limited or no effects in reality, growth will continue to be sluggish due to unfavourable demographics, freezing or deepening domestic income inequality, and, with it, the move to nationalist and protectionist policies. This vicious circle can be expected to play out if the mutual reinforcement of demography, growth, inequality and immigration policies can be demonstrated.

This paragraph drives my chapter as a hypothesis, and my main interest is to map a number of *pro tanto* arguments speaking to each of the relations that

make up the hypothesis. What intrigues me in this is the interposition of law with democracy, demography and economic growth – factors often compartmentalized into disciplinary silos. In particular, my study shall explore how findings on these linkages are of relevance for the evaluation of existing migration law, and the processes of making future migration law. When uncovering future constraints on law-making, the factor of voter preferences on migration policy under conditions of stalling growth and increasing domestic inequality is of special concern.

In Section 3.2, I shall present the current regulatory model of the EU and give reasons why it has come to its outer limits. Section 3.3 engages with the *blocage* hypothesis, setting out the correlative chain in its entirety before breaking it down into three interlinked correlations. Section 3.4 reflects on how the nexus between ageing, demography, growth and migration law impacts on the themes of democratic decay, populism and migrant rights, and Section 3.5 considers implications of my tentative findings for the law in the short to medium term.

I will argue that the restriction of migrants' rights is but a symptom of a vicious circle of democratic decay, as ageing European societies undermine their own resource base for achieving economically tenable, politically stable and sufficiently egalitarian communities. I shall elaborate on the importance that population ageing will come to play for migration policies. By itself, the law cannot provide for resilience against restrictive migration policies. While the law is a useful tool in single cases and the short term, it emerges from the same foundational assumptions that lie behind a long-term and amplifying trend of restrictionist politics. The point is to uncover this shared foundation, and to show that a continuation of politics along its lines amounts to economic and societal self-harm.

### 3.2 THE FOUNDATIONAL NORM ON MIGRATION IN EU LAW

Contemporary migration law emerged within a project of economic and political integration across a group of nation states in the West. Its key driver was a liberal logic of expanding market access and mobility to facilitate commodification and growth. Western integration continues to be a dynamic process that demands a sufficiently clear distinction between in- and outside. I submit that there is a foundational norm on migration reflecting and managing that distinction and rooted in European integration.<sup>1</sup> I describe it

<sup>1</sup> I prefer the adjective 'foundational' over 'fundamental' when labelling this norm to avoid fleeting associations to fundamental rights.

as a staple of EU history from the 1950s until today.<sup>2</sup> It combines a promotional and a repressive aspect in that it packages the acceptance of the freedom of movement for nationals of cooperating parties with the power to exclude nationals from countries outside the group. The foundational norm on migration comprises three dimensions. First, the nationals of a party bound by it are privileged by the freedom to move within the territories of all parties, and, conversely, that party is obliged to accept the entry of nationals of other parties. Second, a party retains the right to exclude colonial subjects and third country nationals from that freedom. Third, a minimum of migration control obligations is imposed on all parties.

Historically, this norm is rooted in the inscription of a freedom of movement for EC workers into the Treaty of Rome. Being one of the four freedoms gives the norm a quasi-constitutional quality, yet its story is usually told without mention of its repressive price. As the negotiating history of the Treaty of Rome indicates, political acceptance for the freedom of movement was conditional on the exclusion of the Member States' colonial subjects. Economic growth of the metropolis was imagined to be contingent on the mobilization of metropolitan European workers, while relegating workers from European colonies and those of third countries to an outside.<sup>3</sup> This dovetails well with the heritage of colonialism in areas such as European human rights law as interpreted by the ECtHR. As Thomas Spijkerboer argues in Chapter 4 in the present volume, current-day migrants, being people from former European colonies, are subjected to a split form of legality that was perfected at the end of the colonial era. That split form of legality also reverberates in today's distinction between intra-EU mobility and immigration from third countries, as its legal techniques originate in the heritage of colonialism.

This foundational structure of mobilization and exclusion would remain even after decolonization. In the following decades, the Commission

<sup>2</sup> The turn to contemporary migration law is perhaps best reflected by the widely quoted US Supreme Court judgment in the 1892 *Nishimura Ekiu* case, confirming the right to exclude aliens. This judgment, and the protectionist policies of the 1920s in many immigration countries, are of a different quality than the exclusionist laws emerging from European integration. While the former grew out of the context of single nation states, the latter are characterized by a collective action element bringing together a group of nation states.

<sup>3</sup> By the mid-1950s, France made clear that it wished to join a Common Market only in conjunction with its overseas countries and territories. As it saw population movements between those and European countries as problematic, these were to be excluded from any freedom of movement. Other negotiating parties followed suit. Peo Hansen and Stefan Jonsson, *Eurafrica. The Untold History of European Integration and Colonialism*, (Bloomsbury 2014) 150–1.

repeatedly made clear that the Member States retain their full freedom to exclude third country nationals, if only they accept the obligation to include workers from other Member States. Generally, 'freedom of movement' means the freedom of privileged nationalities to move across borders of the cooperating parties with a minimum of bureaucratic friction, while friction would be maximized for undesired populations from third countries. Until the 1970s, it was workers who were central to freedom of movement, but with the case law of the European Court of Justice, this freedom gradually became a privilege of all citizens of Member States.

As serious work began to promote freedom of movement with the Single European Act in 1986, it became clear that the *privilege* to exclude third country nationals successively morphed into an *obligation*. The realization of freedom of movement presupposed obligatory "flanking measures" as the precursors to today's main legal instruments as the Dublin Regulation, the Schengen Border Code and the Visa Regulation.

With successive phases of enlargement, the foundational norm on migration expressed itself in novel ways. The question of how the citizens of acceding states would use their novel freedom of movement was central in political debates. Already before formal membership, candidate countries were offered the privilege of accelerated circulation in the form of visa-free travel for their nationals while assuming obligations on border control and refugee protection in exchange. This led to readmission agreements under international law, concluded in conjunction with visa liberalization agreements, all of which became moot once the candidate was admitted to the EU. It follows the pattern established by the liberalization of trade since the 1930s, which first manifested itself in bilateral agreements, and later served as a model for the multilateral GATT.<sup>4</sup> After enlargement, the foundational norm manifested itself in the privileged position of EU citizenship bartered against a full set of *acquis* norms on border control and refugee protection.

Today, after the 2004 and 2007 EU enlargement rounds, few states are left to permanently integrate into the project of Westernization (negotiations are ongoing with Montenegro, Serbia and Turkey; Albania and Macedonia being official candidates). This takes the foundational norm to its limits. The 2016 EU–Turkey agreement contained a barter element on visa-free travel, which is of great significance to the Turkish side. Its implementation appears to be forever postponed, as the EU Commission believes that its agreed preconditions remain unfulfilled. Ongoing negotiations with Tunisia and Egypt barter

<sup>4</sup> Anne Orford, 'Theorizing Free Trade', in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016) 701, 729–30.

readmission of migrants against simplified visa procedures, illustrating very clearly that citizens of these countries are at most given a privileged position amongst the excluded.<sup>5</sup> The February 2017 France–Germany note was an illustrative intermediary step: it demanded a mechanism for the ad hoc designation of safe third countries in crisis; it was tailor-made for the Libyan situation, and, realistically, it does not even mention possible bartering with visa-free travel.

How is the foundational norm part of a liberal accumulation logic? When Westernization adds new states to the Western group, these are given privileged access to the overall resources for the purposes of accumulation. The mobilization of Westernizing nationals is an important aspect of this logic, as is the immobilization of third country nationals. Since the 1950s, the assumption prevails that both projects promote growth while enjoying the acceptance of electorates in the Member States. In recent years, central parts of this assumption have been drawn into doubt.

Let us start with the power to exclude third country nationals, which is one of three elements of the foundational norm of migration, as I stated at the beginning of this section. What do I mean by the ‘power to exclude’? In what sense is that a power? In the 1950s context, it was a power to uphold colonial exclusion within a continued domestic competence, untainted by the Rome Treaty. In the phases preceding the two enlargements of 2004 and 2007, it was a power in the sense that Western partners equipped candidate states with the capabilities to control borders, which included the processing of asylum seekers.

In the relationship between the EU and Turkey, it means that Turkey is empowered to process asylum seekers returned from Greece or blocked from onward travel with EU funding. But the promise of visa-free travel to EU countries for Turkish citizens has not materialized yet. So, Turkey offers critical assistance to render the exclusion of third country nationals from the EU effective, but it has not – yet – been given the benefit of facilitated mobility by visa exemption. It is comparable to a person paying the full membership fee for a club whose advantages that person can only use in part. This explains why the conflict between the EU and Turkey is so deep and protracted – the withholding of visa-free travel is really a core element of the

<sup>5</sup> ‘The European Union is offering simplified visa procedures and increased economic aid to Tunisia and Egypt in exchange for smoother deportations of unwanted African migrants, two senior officials in Brussels said.’ ‘EU pushes Migration Talks with Tunisia, Egypt’ (*Reuters*, 20 February 2017).

‘non-agreement’<sup>6</sup> between Turkey and the EU. Considering the potential of visa-free travel, which facilitates business and promotes the integration of economies waiving visa requirements for each other’s citizens, the Turkish frustration at EU recalcitrance in this regard is based on a rational and long-term economic interest.

In the Libyan context, the power to exclude manifests itself only rudimentarily. Already under Gaddafi’s reign, Italy provided speedboats permitting Libyan authorities to pursue human smugglers. It is hardly conceivable that single Member State or the EU would offer Libyan nationals visa-free travel under current conditions and without a functioning central government upholding control over the territory. Without a functioning central government, the EU lacks a counterpart for activities as cooperating with, funding or training Libyan coast guards or border guards.<sup>7</sup> This deprives the EU and its Member States of the carrot needed for the stick on border protection to be acceptable in the long term. The much larger question of how the EU might stabilize a fledgling Libyan government<sup>8</sup> that would cooperate on the point of migration control is currently impossible to answer, given the disagreement between EU governments and the recent attempts by Russia and by Turkey to side with competing powerholders in Libya.

Looking back, we realize that the foundational norm on migration has moved from a static logic of ensuring the needs of the labour market to an ever-larger societal project of mobility for wider groups of EU citizens and their families. Third country nationals’ access to the Union has been regulated with a growing number of norms since the 1990s, moving from a few intergovernmental agreements to a dense texture of supranational instruments, of which a core is couched in the form of regulations. Enlargement brought a new dynamic to labour market supply, as a number of new Member States brought with them mobile labourers willing to work under competitive conditions. In these developments, we have two expansions: one moving from a narrowly defined group of labourers to a wider group of persons tout court, and another moving from a relatively static membership to the integration of

<sup>6</sup> EU–Turkey Deal Not Binding, says EP Legal Chief, *EUObserver*, 10 May 2016 <<https://euobserver.com/justice/133385>> accessed 23 December 2020.

<sup>7</sup> For an exploration of how the absence of a Libyan government affected Operation Sophia by the EU, see Renske Vos, *Europe and the Sea of Stories. Operation Sophia in Four Absences* (VU Amsterdam, 2020) 115–38.

<sup>8</sup> Internal EU Report Exposes Libya Turmoil, (*EUObserver*, 10 February 2016) <<https://euobserver.com/migration/136973>>; EU External Action Service, ‘EUBAM Libya Initial Mapping Report Executive Summary’ 25 January 2017, available at <<http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>> accessed 23 December 2020.

new members and new partner countries into the system of mobility and border control. The end of both moves is in sight, which calls into question how growth can be produced by better labour supply and better controlled borders in the future.

### 3.3 ADAPTING MIGRATION LAW TO AGEING?

The foundational norm on migration might be based on wrong assumptions on the drivers of growth. Since its inception, it assumes that labour mobility within the EU promotes overall growth in the long term. EU expansion would then provide for a sufficient expansion of the necessary resource base of internally mobile labour. With expansion, the EU would not outgrow itself. This assumption now meets the reality of demographic change – a reality whose long-term effects on the economy have been underestimated up until quite recently. Demographics are probably related in a much stronger way to growth than economic policy. This is a relatively novel insight with profound implications for policy as much as for research. A 2016 paper by the US Federal Reserve research division suggests that demographics are responsible for virtually all of the decline in economic growth of the past thirty-five years.<sup>9</sup>

In a 2016 RAND paper, Maestas, Mullen and Powell report the following findings for the US economy:

Our estimates imply that 10% growth in the fraction of the population aged 60 and older decreases growth in GDP per capita by 5.5%. Decomposing GDP per capita into its constituent parts – GDP per worker and the employment-to-population ratio – we find that two-thirds of the reduction in GDP growth is driven by a reduction in the rate of growth of GDP per worker, or labour productivity, while only one-third is due to slowing labour force growth. This finding runs counter to predictions that population aging will affect economic growth primarily through its impact on labour force participation, with little effect on average productivity . . . In addition, we find that the decline in productivity growth does not only reflect changes in the age composition of the pool of workers (who are on average older in states that age faster). Instead, evidence that population aging slows earnings growth

<sup>9</sup> E Gagnon, B K Johannsen and D Lopez Salido, 'Understanding the New Normal: The Role of Demographics', (Board of Governors of the Federal Reserve System, 2016), available at <[www.federalreserve.gov/econresdata/feds/2016/files/2016080pap.pdf](http://www.federalreserve.gov/econresdata/feds/2016/files/2016080pap.pdf)> accessed on 23 December 2020.

across the age distribution suggests that it leads to declines in the average productivity of workers in all age groups, including younger workers.<sup>10</sup>

Against this backdrop, the question of how the demographics of ageing relate to the restrictiveness of immigration and asylum law and policy attains greater urgency. It is clear that the foundational norm on migration did not take the full complexity of how migration relates to growth into account. As any regulatory regime, its core ideas become costlier to revise over time. Seen like this, it might be a good thing that it has come to the end of its lifecycle for non-demographic reasons, stated in the preceding section.

However, we should envisage the possibility that EU asylum and immigration law and policy will grow more exclusionary towards large groups of immigrants, in and beyond the final stages of the model based on the foundational norm on migration. This would be due to an interlocking of democratic and economic factors associated to population ageing. In economic terms, population ageing results in too small a workforce to provide for growth sufficiently large to address domestic inequality. In addition, democracy needs to be factored in: as domestic inequality continues to be pegged at a sufficiently high level, a sufficiently large number of voters supports anti-immigrant policies to express their continuing preference for economic equality.<sup>11</sup> Also, ageing electorates are more risk-averse in their voting behaviour, suggesting there is limited appetite for a systemic shift, the field of immigration being a pertinent example. This represents a considerable opportunity for populist parties, and it will impact on the formulation of migration law even by mainstream parties seeking to compete with populists on this point. This opens a vicious circle where political remedies for the economic and social drawbacks of population ageing become unavailable.

What could these remedies be? Stimulation of fertility, immigration and raising participation in the labour force, for example, by delayed retirement or the activation of those without employment, are standard methods for keeping up growth in an ageing society. Lately, automation has been added to the list.

<sup>10</sup> N Maestas, K Mullen and D Powell, 'The Effect of Population Aging on Economic Growth, the Labor Force and Productivity' (RAND Corporation, 2016) 3–4, (references omitted) <[www.rand.org/pubs/working\\_papers/WR1063-1.html](http://www.rand.org/pubs/working_papers/WR1063-1.html)> accessed on 23 December 2020.

<sup>11</sup> According to a 2016 study, UK regions whose industry was affected negatively by cheap imports from China tended to vote for Brexit. Regions affected by immigration, however, did not stand out in their support for Brexit. I Colantone, P Starig, 'Globalisation and Brexit' (VOX CEPR Policy Portal, 23 November 2016) <<http://voxeu.org/article/globalisation-and-brexit>> accessed on 23 December 2020.

Pronatalist politics have proven to be ineffective over the long term.<sup>12</sup> Their impact on the number of births is modest, as a 2018 study by Clements and others suggested with further references, although they might affect the timing of births, and to have a positive impact on the labour supply decisions of mothers.<sup>13</sup> Expanded immigration and delayed retirement are both unpopular at the ballot box. Also, as migrants age and the productivity of all older workers is impacted by decreased health, neither of them is a straightforward remedy. While acknowledging the importance of delayed retirement as an issue, the question of whom to admit is at the heart of how democracy organizes itself and also how nation states reinvent themselves. On automation, it is probably too early to pass a predictive verdict.

Moving from economic to democratic considerations, the following subsections break down my hypothesis into manageable correlations and discuss research outcomes under each. The question is whether these outcomes, once integrated into the argumentative sequence of my hypothesis, would provide *prima facie* support of my hypothesis.

### 3.3.1 *Does the Demography of Ageing Decrease Growth?*

Is the population of EU Member States ageing? If so, does it influence growth? Since more than a decade, population ageing has established itself as an academic discipline<sup>14</sup> and has become a topic for think tank strategizing<sup>15</sup> and popular writing.<sup>16</sup> It is by now uncontroversial that populations indeed are ageing,<sup>17</sup> with advances in medical sciences and care as well as reduced fertility being main factors. Two of the ten key findings of the *UN World Population Prospects 2019* state that the world's population is growing older, with persons over sixty-five being the fastest growing group, and that

<sup>12</sup> Connelly compares countries having pursued active population politics with countries not having done so and finds that outcomes are the same in both categories over time. M Connelly, *Fatal Misconceptions* (Harvard University Press 2010).

<sup>13</sup> B Clements, K Dybczak, V Gaspar et al, 'The Fiscal Consequences of Shrinking and Ageing Populations' (2018) 43 *Ageing International* 391.

<sup>14</sup> An academic journal dedicated to *Population Ageing* has been published since 2008.

<sup>15</sup> R Jackson and N Howe, 'The Graying of the Great Powers', (Center for Strategic & International Studies, 2008) available at <[www.csis.org/component/option,com\\_csis\\_pubs/task,view/id,4453/](http://www.csis.org/component/option,com_csis_pubs/task,view/id,4453/)> accessed on 23 December 2020.

<sup>16</sup> A recent example is D Bricker and J Ibbotson, *Empty Planet. The Shock of Global Population Decline* (PenguinRandomHouse 2019).

<sup>17</sup> D E Bloom, S Chatterji, P Kowal, P Lloyd-Sherlock, M McKee, B Rechel, L Rosenberg, J P Smith, 'Macroeconomic Implications of Population Ageing and Selected Policy Responses' (2015) 385 *The Lancet* 649, 649.

falling proportions of working-age people are putting pressure on social protection systems.<sup>18</sup>

I already referred to the two 2016 studies which both argued that there was a stronger linkage between demographics and growth than earlier assumed.<sup>19</sup> The existence of the linkage is corroborated in other research as well. By way of example, Aksoy and others suggest that the current trend of population ageing ‘may contribute to reduced output growth and real interest rates across OECD economies’ after tracking age profile changes in a macroeconomic analysis.<sup>20</sup> This leads to the question why output growth is reduced by population ageing. In their 2014 article, Goodhart and Erfurth point out two factors: first, the support ratio, defined as the ratio of producers to effective consumers shifts sharply from being beneficial to being adverse, and, second, the rate of growth in the number of workers globally slows down.<sup>21</sup> The negative effects of ageing population on growth can be observed in countries such as Japan already. A 2018 article by Cooley and Henriksen based on growth accounting across the G7 argues that countries that aged fastest – such as Japan – tend to have been growing at a slower pace, to have a positive growth contribution from higher capital accumulation, and to have negative growth contributions from total factor productivity and from labour supply on the intensive and extensive margins.<sup>22</sup> ‘Total factor productivity’ is the ratio of aggregate output to aggregate input, while labour supply on the intensive margin reflects how many hours those in the labour force work on average. Labour supply on the extensive margin denotes participation in the labour force. Less workers, and workers working less by and large confirms the second factor of Goodhart and Erfurth. At this point, it is sufficiently clear that European populations are ageing, and that this impacts negatively on growth.

<sup>18</sup> United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019: Ten Key Findings* (2019), key findings 7 and 8, available at <[https://population.un.org/wpp/Publications/Files/WPP2019\\_10KeyFindings.pdf](https://population.un.org/wpp/Publications/Files/WPP2019_10KeyFindings.pdf)> accessed on 25 November 2020.

<sup>19</sup> See E Gagnon, B K Johannsen and D Lopez Salido (n 9); N Maestas, K Mullen and D Powell (n 10).

<sup>20</sup> Y Aksoy, H Basso, T Grasl and R Smith, ‘Demographic structure and the Macroeconomy’ (*VoxEU*, 8 April 2015) available at <<https://voxeu.org/article/demographic-structure-and-macroeconomy>> accessed on 27 November 2020.

<sup>21</sup> C Goodhart and P Erfurth, ‘Demography and Economics: Look Past the Past’ (*VoxEU*, 4 November 2014) available at <<https://voxeu.org/article/demography-and-economics-look-past-past>> accessed on 29 November 2020.

<sup>22</sup> T Cooley and E Henriksen, ‘Demographics and Long-Run Growth’ (*VoxEU*, 11 June 2018) available at <<https://voxeu.org/article/demographics-and-long-run-growth>> accessed on 23 December 2020.

### 3.3.2 *Could Immigration Increase Growth?*

Might immigration remedy the loss of growth due to population ageing? This question brings economists to examine the past as well as to speculate on the future. Obviously, the variation in their responses is a product of the methodological choices they make. It depends if the perspective of an inquiry is limited to individual taxpaying and social service benefits, or widened to look at the collective impact of immigration on growth at large. If the latter is chosen, gains set off by societal diversity and played out in the number of patents or other innovations are included, potentially leading to different conclusions compared to the former. It is relatively easy to support an ideological argument in this field by moving the frame in an adequate way. These differences notwithstanding, it is possible to identify a field of convergence where many writers meet.

Examining twenty-two OECD countries, Boubtane et al (2016) found that migrants' human capital has a positive impact on GDP per capita, and that a permanent increase in migration leads to a positive impact on GDP per worker. A fifty per cent increase in net migration of the foreign-born generates, on average, an increase of three-tenths of a percentage-point in per worker GDP per year in OECD countries. The long-run effect is, on average, about two per cent. Increasing the selectivity of migration policies does not appear to have a more marked effect on GDP per worker, except perhaps in countries where recent immigrants are somewhat less educated than the resident population.<sup>23</sup> Two lessons can be derived from this. First, immigration adds growth by adding to the GDP per worker. This growth can be achieved by non-selective immigration policies as well, suggesting that incoming refugees and other persons in need of protection contribute to growth on a collective level. This goes to show that immigration would in itself be a suitable means to offset the negative growth brought about by population ageing.

Drawing on a 2014 study by Lisenkova et al, we could ask what reduced migration does to the economy, as a kind of projective counter experiment to the work by Boubtane et al.

The authors of the 2014 study took its cue from the UK Conservative Party migration target valid at the time, purporting to reduce net migration to the UK 'from hundreds of thousands to tens of thousands'. Comparing a baseline scenario with a scenario where net migration is reduced by around fifty per cent, Lisenkova et al find strong negative effects on the UK economy. By

<sup>23</sup> E. Boubtane, J-Ch Dumont, C Rault, 'Immigration and Economic Growth in the OECD Countries 1986–2006' (HAL, 2016), 354–5.

2060 the levels of both GDP and GDP per person would fall by 11.0 per cent and 2.7 per cent respectively.<sup>24</sup>

As the EU has embarked on a course of labour mobility early on, research establishing the positive effects of migrant workers on the economy would seem to vindicate its approach. With its foundational norm on migration, the European Union embarked on a long-term experiment with worker mobility at its core. However, while economic analysis found that it promoted growth, it did not promote economic convergence, because the gains of one region were the losses of others. This much is stated by Huber and Tondl (2012) who examined the effects of immigration on unemployment and GDP in EU27 NUTS2 regions<sup>25</sup> between 2000 and 2007. The timespan of their study covers the 2004 enlargement, bringing early effects of East-West labour migration into view. An increase in immigration by 1 per cent is associated with 0.02 per cent higher GDP per capita and 0.03 per cent higher productivity, although the long-run effects are higher and estimated at about 0.44 per cent for GDP per capita and 0.20 per cent for productivity.<sup>26</sup> We may conclude that the intra-EU labour mobility has a limited potential to offset the negative effects of population ageing on growth. So, if we would assume that all remaining candidate countries became Member States in the near future, the effects would be insufficient. Greater volumes of migration would be required to counteract the negative effects of ageing in a more tangible way, further confirming that the foundational norm on migration is insufficient in this regard.

How could this translate into numbers? Recall the assertion by Maestas and others, quoted in the preceding section, suggesting that 10 per cent growth in the fraction of the population aged sixty and older in the USA decreased growth in GDP per capita by 5.5 per cent. Let us apply this as a first, rough indicator, accepting the differences between the USA between 1980 and 2010 and the EU after 2020, and noting that UN statistics only offer percentages of population aged sixty-five years and older (instead of sixty years and older, as in US statistics used by Maestas and others). Between 2020 and 2030, the fraction of Europe's population aged sixty-five years and older will grow by 3.9 per cent

<sup>24</sup> K Lisenkova, M Mérette, M Sánchez-Martínez, 'The Long-Term Economic Impact of Reducing Migration in the UK' (2014) 229 *National Institute Economic Review* R22

<sup>25</sup> NUTS stands for *Nomenclature des unités territoriales statistiques*, a geocode standard used to classify regions within the EU.

<sup>26</sup> P Huber and G Tondl, 'Migration and Regional Convergence in the European Union' (2012) 39 *Empirica* 439

from 19.1 per cent to 23 per cent.<sup>27</sup> This increase of the older parts of the European populations would translate into a 2,145 per cent decrease of European growth in GDP per capita. If European policymakers intended to offset that decrease in growth by a migration increase alone, that increase in migration would amount to 4,875 per cent.

It is not enough, though, to ponder percentages of additional migrants needed to compensate for the detrimental effects of population ageing. Obstacles to migrants' labour market participation are a very important factor. Bélanger and others brought out the difference this makes in a 2020 study for the European Commission that mapped how natives, intra-EU migrants and extra-EU migrants contributed to and benefited from social services. Their report submits that natives currently show a higher net fiscal contribution than extra-EU migrants and a similar contribution to intra-EU migrants. Once the ageing of the native population is taken into account, however, this will change. By 2035 an average extra-EU migrant would be a net beneficiary of public transfers, yet to a lesser extent than the average native, while intra-EU mobile citizens would continue to be net contributors. Most importantly, Bélanger and others underscore that an increase of the flows of new migrants without removing obstacles to their full labour market integration would yield only small fiscal benefits for the host country. By contrast, labour market policies targeted at increasing labour participation of migrants could generate large fiscal gains.<sup>28</sup>

The reported correlations should be applied to migrants' economic contributions in their totality, and not be limited to the aspect of fiscal contributions. It is not enough, I conclude, that governments muster political support for a liberalization of immigration law in general. To trigger benign economic effects, a liberalization of labour market legislation as well as a more stringent enforcement of anti-discrimination legislation could be needed. This puts new demands on law-making and enforcement in contexts where nation-state borders are perceived as natural barriers to immigrants, as is foreignness to full societal participation on equal conditions. Any push for full labour market participation of migrants will likely be framed as undue ethnic preference by populist parties.

What happens once states start opening up towards immigration to stimulate lagging growth? Clements argued in 2018 that keeping the old-age

<sup>27</sup> United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019, Volume II: Demographic Profiles* (2019) 69.

<sup>28</sup> A Bélanger, M Christl, A Conte, J Mazza, E Narazani, *Projecting the Net Fiscal Impact of Immigration in the EU*, EUR 30407 EN (Publications Office of the European Union, 2020) 7.

dependency ratio constant over the next eighty-five years in more developed economies would require an immediate eightfold increase in net migration (from 2.5 million to eventually over 21 million per year net migrants from the less developed to the more developed countries). He points out that such levels of migration would eventually deplete the working-age population in less developed economies.<sup>29</sup> Bruni argues in a 2013 article that the decline in Chinese fertility, and the end of the one child policy that has been partially responsible for it, will provoke immigration flows above replacement level.<sup>30</sup> Considering the size of the Chinese labour market, this would have a tangible impact on other states' access to skill. If we accept Bruni's conclusions, many ageing nation states have reasons to compete for immigrants on a global market in the future. Any 'migrant shopping' by EU member states might meet stiff competition by non-EU economies. This would be another factor calling into question the sustainability of the EU foundational norm on migration.

So far, there is agreement that immigration affects growth positively. However, compensating the negative growth effects of ageing populations with immigration alone would be a very complex undertaking, as a comparatively large volume of additional migrants would be needed. The political challenge is enormous indeed.

### 3.3.3 *Does Ageing and Growing Inequality Increase Political Support for Anti-Immigration Parties?*

But is it at all likely that a policy turn towards a greater intake of migrants could take place in the EU? We could explore this question either in today's political situation, or in a future shaped by the ageing of populations and its consequences. I limit myself to point out two factors that make a turn towards additional immigration to the EU less likely: one is the effect of biological age on voting, the other is the effect of comparable inequality across EU regions on voting.

'The rational policy response to ageing,' Juhana Vartiainen writes, 'is to increase the labour supply by trimming unemployment benefits, increasing retirement ages and encouraging employment-based immigration'. She goes

<sup>29</sup> B Clements, K Dybczak, V Gaspar, S Gupta, and M Soto. 'The Fiscal Consequences of Shrinking and Ageing Populations' (2018) 43 *Ageing International* 391.

<sup>30</sup> M Bruni, 'China between Economic Growth and Mass Immigration', (2013) 21 *China and World Economy* 56, 56–7.

on to state that '[i]t is precisely such policies, however, that have eroded the support for traditional political parties and created a fertile ground for nativist populism'.<sup>31</sup> The relation between nativist populism and ageing turns out to be more complex upon a closer look, though. Ageing can play out as ageing of the electorate on municipal, regional, national or European level, leading to the question of how an increasing share of older voters perceive immigration. Or it can play out in the lived experience of society, where feelings of relative advantage or disadvantage might affect voting behaviour of young as well as old.

Schotte and Winkler asked in a 2018 paper why the elderly are more averse to open immigration policies than their younger peers.<sup>32</sup> In earlier studies, individuals tended to display high levels of opposition against increased immigration, even though the potential welfare gains were considerable. The elderly in particular indicated the highest levels of opposition to liberal immigration regimes in most countries, these studies showed.<sup>33</sup> Using household surveys for twenty-five countries over a twelve-year period, Schotte and Winkler added nuance to this picture when they found generational change to be an important factor, suggesting that an ageing electorate might turn less averse to more liberal immigration over time. Applied to our context, this would suggest that any present attempts at reforming the EU foundational norm on migration will be dominated by a growing number of a migration-averse cohort of older voters, but that future reform attempts in a liberalizing direction might meet less resistance by a generation that has grown up and aged with immigration as a normal element of life. That would imply that we would have to live with the reform *blocage* for a limited time, but that it would dissolve once more immigration-friendly generations would start to age.

However, age affects the willingness to take risks irrespective of the historical experiences of particular generations, a 2018 article by Dohmen et al suggests. While history does play a role in shaping the readiness to assume risks, the authors were able to show that our willingness to accept risks declines with biological age, a result that remained robust even if

<sup>31</sup> J Vartiainen, 'The Future of the European Welfare States: The Intriguing Role of Demography?' (2017) 16 *European View* 131, 131.

<sup>32</sup> S Schotte and H Winkler, 'Why Are the Elderly More Averse to Immigration When They Are More Likely to Benefit? Evidence across Countries' (2018) 52 *International Migration Review* 1250.

<sup>33</sup> Schotte and Winkler referred to Facchini and Mayda 2008; O'Rourke and Sinnott 2006, Card, Dustmann, and Preston 2012.

controlled against economic indicators.<sup>34</sup> This study appears to dampen any cautious optimism on the reform of EU migration law arising due to Schotte and Winkler's study.

But it might be too crude to model the future of EU migration law on liberalizing attitudes or the effects of biological age alone. Inequality is a relative phenomenon, dividing parts of a population that are better off from other parts worse off. The experience of relative disadvantage might very well influence voting behaviour in its own right, irrespective of age-contingent risk aversion.<sup>35</sup> For the purposes of this chapter, however, research bringing together the factor of relative disadvantage with the factor of population ageing would be most helpful. A 2020 MIDEM study turns out to be the right resource in that respect.<sup>36</sup> The MIDEM team researched the consequences of emigration for the support of populism, concluding that populist parties advance in economically weak regions with considerable outward migration. This is a factor that may explain the success of populist parties. For Germany, the report finds a nexus between emigration and support for the *Alternative für Deutschland*, a nationalist-populist party on the right. The more a region has been affected by outward migration in the past three decades, the higher election percentages the *Alternative für Deutschland* was able to muster. On the European level, these relations are more subtle. Emigration does not generally translate into support for parties of the populist right. In economically weak regions, however, high emigration rates do translate into additional votes for such parties.<sup>37</sup>

This dovetails with the tendency of the elderly to oppose immigration, as acknowledged by referenced research. In economically weak regions of net emigration, the share of the elderly can be expected to be more significant. To what extent this alone can account for a strengthening of support for the populist right, or what degree of relative deprivation would be needed to bring that effect about would require further research. An ageing and economically stagnating EU is more likely to produce emigration. In that, it would be similar

<sup>34</sup> T Dohmen, A Falk, B Golsteyn, D Huffman, U Sunde, 'Identifying the effect of age on willingness to take risks', (*VoxEU/CEPR*, 21 January 2018) available at <<https://voxeu.org/article/effect-age-willingness-take-risks>> accessed on 20 December 2020.

<sup>35</sup> For an argument that group relative deprivation, the feeling that one's group is unfairly deprived of desirable goods compared to other out-groups, is a major explanation for the ethnic threat of immigration, see B Meuleman, K Abts, P Schmidt, T F Pettigrew and E Davidov 'Economic Conditions, Group Relative Deprivation and Ethnic Threat Perceptions: A Cross-National Perspective' (2020) 46 *Journal of Ethnic and Migration Studies* 593.

<sup>36</sup> MIDEM 2020: *Emigration in Europa* (Dresden 2020).

<sup>37</sup> *Ibid.*, at 9 and 37.

to the disadvantaged EU municipalities affected by emigration today, whose ageing population moves towards the populist right in its voting behaviour.

### 3.4 UNDERSTANDING AGEING AND MIGRATION LAW-MAKING

Taken in conjunction, the literature I reviewed supports my hypothesis that a vicious circle of population ageing threatens migration law-making in Europe. How will the ageing of populations in EU Member States affect their making of migration and asylum law? With the research reported above in mind, it is reasonable to expect the perseverance of existing restrictions and the introduction of further restrictions of migration and asylum law. The threat of the vicious circle is not confined to migration law-making, though. It extends to the economic model on which European nation states rely, and, in the long run, it strikes at societal cohesion at large. How does this relate to a broader question pursued in this book, namely to what extent restrictions of migrant rights represent a form of democratic decay in populist times? I shall now consider the themes of democratic decay, populism, and the rights of migrants in that order.

First, add population ageing to the consideration of migrant rights, and see how the diagnosis of *democratic decay* is pushed far beyond the rule of law alone. Democracy is decaying not only as a particular way of organizing politics (with a loosening of the self-restraint built into it), but also as a depletion of the demographic and economic resources on which any such politics rests. Seen as such, restrictions on migrant rights reach their apex at a moment when the resource base on which democracy rests in ageing societies is giving way. The vicious circle demonstrates the importance of methodological framing for the analysis of migration law and migrant rights to legal analysis. Once we base our work on a wider societal context, including the economy, demography, politics and history of Europe, restrictions to migrant rights no longer appear as a momentary implementation problem. Once we narrow it down and put migration and constitutional stability into separate silos, we are blinding ourselves to the real threats ahead: economic crisis, growing political division and its exploitation by populist actors.

Second, adding demographic change makes contemporary European *populism* appear as a decline indicator, gaining in strength as the foundational norm on migration is about to reach the end of its geopolitical resources. In its polemics against migrants and their rights, populism exploits the historical dependence of European states – and the EU – on the nativist core that provides the foundational norm on migration with discursive power. This nativist core sees the state, including its supranational extensions in EU law,

as ultimately being in service to the nation.<sup>38</sup> Resistant to any definition, the nation remains an amalgamation of ethnicity, history and demography whose continuity hinges on a permanent distinction between the native and the non-native.<sup>39</sup> Once it is widely realized that a politics that lives out this idea of the nation is leading ageing societies into stagnation, the nativist case of populists could be expected to unravel. But one characteristic trait of populism is that it shirks political responsibility for how its own assumptions play out in reality. Populists not in power tend to affect and infect the political agendas of mainstream parties, without having to take responsibility for emergent policies. Populists in power work with scapegoat enemies (as the image of stealthy powerholders pursuing population exchange) to whom ultimate responsibility for policy failures is passed on. While European nation states also build on the distinction between the native and the non-native, as populists do, the option of shirking political responsibility for the failure of the foundational norm on migration is not open to them. Populism therefore turns into a strong and dangerous catalyst for the systemic failure in the making. Indicting it as the primary culprit of this failure would be to make too much of it. The European Community invested into nativism in 1958 at the level of its primary law, and if we are hunting for causation, here is a candidate.

Third, the demographic challenge to ageing European societies brings us to consider how contingent *rights* are on conditions prevailing during finite historical periods. Enshrining rights in binding law and adding institutional guardians for its implementation provides a certain stability, but one which does not withstand major political shocks. For the formulation of migrant rights as we know them today, the demographical, political and economic conditions prevailing between 1958 to 2008 were essential. The wave of restrictive law and practice after 2015 should illustrate as much. As these conditions are slowly giving way, so do the rights of migrants. To state this is not to naturalize the decline of migrant rights, and neither to vindicate those who are actively pursuing this decline. Rather, it suggests how pressing the task of reimagining the very foundation of European societies is.

<sup>38</sup> In a 2020 interview with the German weekly *Die Zeit*, Viktor Orbán suggested that the 'basic unity' of the EU is the Member State: 'But Europe needs to grow from below, and be built by its peoples with its gloriously different cultural and historical traditions'. *Die Zeit* (Hamburg 26 November 2020) 7 (translation by this author).

<sup>39</sup> This becomes very visible when immigration policies of EU members governed by populist parties are analyzed. In Chapter 8 on Hungary in this volume, Nagy and Kovacs demonstrate that Hungarian immigration policy is ethnicist and economically utilitarian. While the Hungarian government appears to condemn migration in all its forms, Hungary actively seeks certain migrants from third countries based on ethnonationalist criteria.

Taken together, these considerations suggest that it would be wrong to focus on a better implementation of migrant rights alone, as much as it would be wrong to frame populism as a root cause of democratic decay and the decline of rights. Populism is an indicator of a deeper crisis, and not its cause. As we tackle this crisis, we are concomitantly addressing populism, democratic decay and the decline of migrant rights along with it. While the law is a useful tool to remedy single cases of rights violations in the short term, it emerges from the same foundational assumptions that lie behind a long-term and amplifying trend of restrictionist politics. The point is to uncover this shared foundation, and to show that a continuation of politics along its lines amounts to economic and societal self-harm. Teachers and practitioners of law must not get embroiled in a false dichotomy, however. A provisional agenda pushing for the implementation of migrant rights by legal avenues does not contradict the overarching agenda of reforming the very fundament of the European social contract.

### 3.5 CONCLUSION

Is a reform *blocage* of EU migration law likely enough to motivate more comprehensive efforts into researching the *blocage* and possible ways of overcoming it? Within this chapter, I have provided a first overview of research, mostly stemming from the field of economics. Once we integrate these findings into an argumentative sequence, a continued and more thorough reflection on the vicious circle facing the EU seems definitively motivated. But the hypothesis of the vicious circle starts with the law – a law whose *telos* of reconciling nativism with limited labour mobility has turned out to be inadequate in the present, and counterproductive for the future of European societies. While I have reflected on the negative consequences of the *blocage* for migrant rights in the preceding section, the question remains what a new *telos* for European law might look like. While an answer is beyond this chapter, a number of reflections guiding it might be in order.

First, if capitalism is a driver of politics in the West, how could an anti-growth norm as the foundational norm on migration persist in it over such a long time, and get a new lease of life under populist influence? Is this an indication that the Westernization project of the EU featured ordoliberal tenets, with ordoliberals suggesting that state institutions are needed to bring the market to optimal performance? If that is so, are we wrong to give capitalism too large a role by placing it at the beginning of the argumentative chain in the form of Westernization and the imperative to ensure growth? Once we consider how an ideology of growth contributed to the depletion of

natural resources, a response to population ageing cannot be to treat surplus populations and their livelihoods as expendable when seeking to resurrect European growth. That would be to follow the script of colonialism.

Second, longer life in Europe possesses an aura of naturalness, whose normative implications should be challenged. After all, it pushes for a further dismantling of social divisions, and perhaps it will do so on a scale comparable to industrialization. This reminds of Marx' dictum 'Alles Ständische . . . verdampft', translated as 'everything solid melts into air', but actually suggesting that social strata evaporate by virtue of advances in (steam) technology.<sup>40</sup> Today, population ageing flows from an advance in medical technology which possesses the potential to grind down social stratification, including those built on nativist assumptions. At its extreme, the narrative of ageing and diminishing growth translates into an anti-nation-statist and pro-growth argument that is libertarian rather than ordoliberal. The state with its insistence on borders and divisions between nationals and non-nationals appears to be a mere obstacle to growth, an element that is to be grinded down if it behoves accumulation. This threat comes with its reactionary mirror image. It rests on a direct interplay between domestic nativism and an imagined European autochthonous culture, with the state being subordinated to their dialectics. Therewith, the challenge to those of us looking for a new telos that could, one day, become that of the law is to imagine an economic sociability that states of the future should sustain.

<sup>40</sup> See Jem Thomas' helpful clarification in his letter to the editors of the *London Review of Books* of 16 June 2013 <[www.lrb.co.uk/the-paper/v35/n11/letters](http://www.lrb.co.uk/the-paper/v35/n11/letters)> accessed on 23 December 2020.