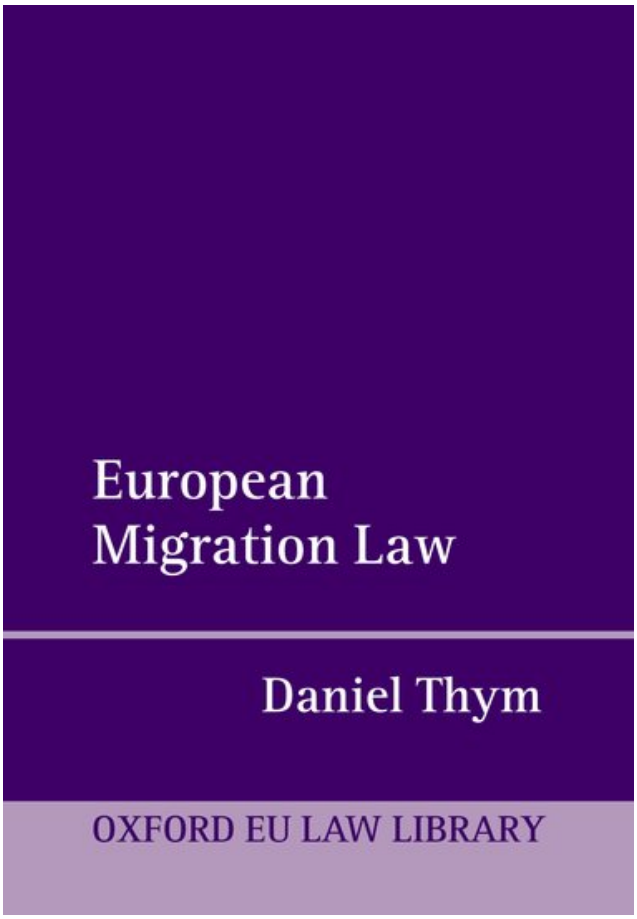
"States and Migration in Europe" Podcast
Episode #16 "Free Movement in European Migration Law"
With Daniel Thym
Enhanced transcript
By Emmanuel Comte

Abstract: In this episode, we delve into European migration law, exploring the pivotal concept of free movement within the European Union. Our guest, Professor Daniel Thym, author of the recent book *European Migration Law* (Oxford University Press, 2023), unravels the status of this fundamental principle and its implications for both EU citizens and third-country nationals. We navigate through the multifaceted relationship between free movement, migration policies, and the legal dynamics shaping Europe today. Engaging with current events and trends, this discussion enlightens listeners on the critical issues and debates surrounding migration in Europe.

Introduction

Emmanuel Comte: Welcome to "States and Migration in Europe." In this episode, we delve deep into European migration law, focusing on the essential principle of free movement within the European Union. Given the increasing debate on migration within Europe, we explore this principle that applies to EU citizens and its relation to the rest of EU migration law. We are joined by Professor Daniel Thym, a top expert in European migration law, who has recently published a book on the topic with Oxford University Press in 2023.



Professor Thym brings unparalleled insights into the complexities of migration law, its current challenges, and its context. Thank you, Daniel, for joining us. Today's discussion is structured to provide an understanding of the extent to which free movement remains an important element in European migration law. The EU was formed around the principle of the single market from the 1950s onwards, which included the principle of free movement for people. In the last 40 years, there has been a rise in EU regulations on individuals who are not nationals of the EU, where the principle of free movement is much less important. Let's dive deep into this topic and assess to what extent free movement is still an important element in European migration law. Daniel, how did you come to study European migration law?

A journey into European migration law

Daniel Thym: I was an expert in EU studies and law, and I decided to pursue a professorship. As a German professor, you have to write books to secure a professorship, so I decided to write my second book on migration and asylum. Then came 2015 and 2016, when migration and asylum became a major topic not only in Germany but across Europe. Since then, I have delved ever deeper into the field, discovering many fascinating issues. The broader picture remains really fascinating and very important for our societies and politics, as asylum can significantly influence political debates, including those between member states.

Emmanuel Comte: Why did you move to migration law before the events of 2015?

Daniel Thym: I wrote the book and finished it in 2010, so it was published long before 2015. My interest in migration and asylum dates back to before those events. I found it to be a fascinating and important new topic. At the time, it wasn't much about asylum but about the demographic change in Germany. We are an ageing society, and it is predictable that in the future, Germany will need migration to thrive as a country and an economy. This will be the case for many European countries due to ageing populations across the continent. Organising migration is a significant challenge.

Emmanuel Comte: Interesting. So, seeing the need for more migrants in Germany led you to consider this an important public problem, and as a legal expert, you decided to focus on this topic, which then gained substantial attention in the media. As a lawyer, how do you conduct your research?

Daniel Thym: My research involves spending time in libraries, at my desk, reading books, judgments, and legislation, mostly through the internet nowadays. While I occasionally engage with people at the borders, most of my insights come indirectly from reading judgments where intelligent individuals – judges, lawyers, and others – have contributed to resolving specific legal issues. This approach offers a condensed form of encountering the empirical, factual situation on the ground through the lens of judgments.

Free movement for Europeans vs cooperation on third-country nationals

Emmanuel Comte: Let's dive now deep into the core matter at hand. Given my French background and current residence in Greece, I've been influenced by Descartes, Montesquieu, and Plato. When considering European migration law, I wonder, what can be considered the soul of this body of legislation? For an English audience, the necessity for a strict structure might not be as apparent due to the differences in the foundations of British and English law compared to continental traditions. However, assuming there's a spirit to the law, what would

you identify as the essence of European migration law? Would you agree that the principle of free movement remains a cornerstone of this legal area?

Daniel Thym: Absolutely, the principle of free movement is crucial, serving as a central axis in many respects. Yet, the answer to its significance depends on who you ask. European migration law results from rich and dynamic political debates among national governments, the Council of Ministers, and the European Parliament, each holding different perspectives on the law's core and mission. This diversity leads to a typically European outcome: a compromise. Nonetheless, free movement is undeniably central. Living in Konstanz, on the border with Switzerland, I experience daily the significance of crossing European borders, whether for work or leisure, emphasising the importance of free movement. This dimension necessitates comprehensive rules on asylum and related matters, as free movement internally demands regulations on who is responsible for asylum seekers and the rights of those granted asylum.

Emmanuel Comte: As you highlight, the principle of free movement applies not just to EU member states but also to associated countries like Switzerland. The evolving relationship between Switzerland and the EU still supports free movement on the ground, allowing for open borders and the absence of physical barriers, except during specific periods like the COVID-19 pandemic. However, free movement encompasses more than just the act of crossing borders; it includes the rights to residency, employment, and entrepreneurship. More fundamentally, you are touching upon an important debate point. European law distinguishes between EU nationals, governed by the principle of free movement, and individuals from outside the EU. This differentiation has led to the development of a body of law aimed at allocating asylum seekers among EU member states and controlling the EU's external borders, such as those between Greece and Turkey or Spain and Morocco. The question then arises: is the establishment of control measures at the EU's external borders a necessary consequence of free movement within Europe, or does it stem from other motivations? Specifically, are restrictive practices within European countries, unable to manifest internally due to the principle of free movement, redirected towards external frontiers? Essentially, is restriction an inherent complement to freedom of movement, or is it an unrelated mechanism, not a direct consequence of internal freedom?

Daniel Thym: Are we talking about movements within member states – for instance, from Italy to Norway or Sweden, from Greece to Bulgaria, or from Spain to France – or movements from Morocco to Spain, or are we including both?

Emmanuel Comte: Let's focus on the external borders first and then discuss the internal movements.

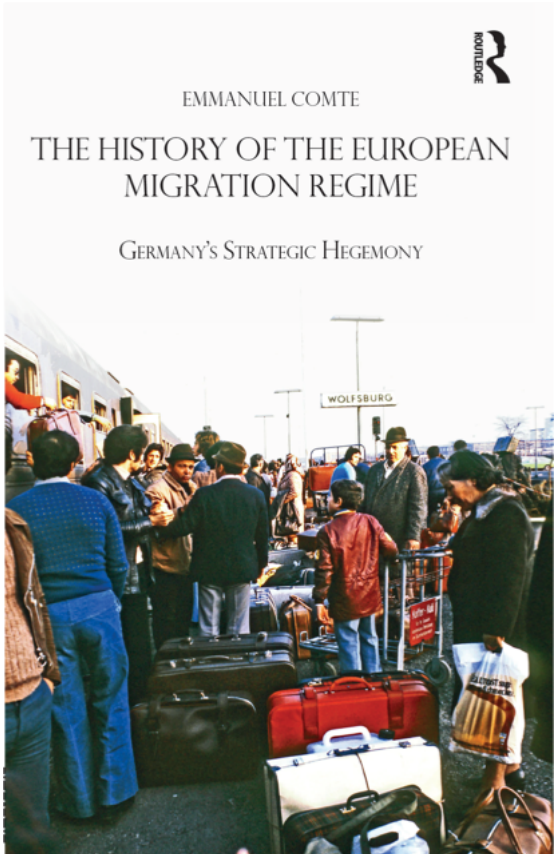
Daniel Thym: My understanding, although I am not the historian here, is that the Treaty of Rome indirectly addressed external borders. The treaty specified that only nationals of the member states, or EU citizens as we call them today, were to enjoy the benefits of free movement, excluding third-country nationals. This exclusion was a prerogative of the member states, lacking a consensus in Europe for free movement to be a global right. This stance was particularly influenced by the movements from former colonies in Africa and the Caribbean, especially to France, Belgium, and the Netherlands. This decision to exclude former colonies has been critically analysed in post-colonial literature, highlighting a tradition of internal free movement within Europe while excluding those from former colonies.

Emmanuel Comte: Yes, free movement was intended for nationals of the member states. Yet, the big question was about the evolving nature of what constituted Europe and its member states. Also, the notion existed that countries, even if not member states, could engage in association agreements that included the principle of free movement as outlined in European law. This approach was open-ended, as seen with Greece and the proposed but unimplemented agreement with Turkey and attempts by other countries like Tunisia to negotiate similar agreements. Additionally, free movement encompasses various aspects, including access to residency and the labour market, and even implications for social security transfers. Thus, it wasn't an all-or-nothing situation; some elements of free movement could be granted to third-country nationals, indicating a lack of clear borders in practice.

Daniel Thym: Yes, I don't mind if we disagree, but I actually agree with you that there are always shades of grey. The association agreements, particularly the case of Greece, serve as an obvious example. This was a very first step towards the later accession of Greece to the European Union. The cases of Switzerland and Norway are again different. They do not wish to become members, but their economic and political equality allowed us to let them participate in almost all aspects of the single market. Regarding other countries, like Turkey and Tunisia, it's true there are provisions on free movement. However, as you mentioned, these were never implemented. There has been political resistance against granting free movement to non-European countries. Let's move more towards the present. The restrictions we see today, are they to preserve free movement? As I mentioned earlier, free movement is one reason why the European Union started dealing with migration, asylum, and border controls because Schengen required cooperation on all these fronts. You cannot realistically have an internal area of free movement if you do not agree on what to do at the external borders. You need a common visa policy. So, while theoretically, you can imagine a free travel area without these controls, practically speaking, it was a necessity to cooperate on these issues. Free movement was the reason why the EU started addressing these issues, leading to a debate, which persists today, about how open or closed the external border should be. The European Commission, particularly, is more in favour of openness. On the other side, you have national interior ministries, which usually insist more on restriction. It was not a coincidence that Schengen was originally a treaty outside the EU framework, initiated by like-minded member states to promote a restrictive agenda and side-line the European Commission, Parliament, and Court of Justice, which were seen as too favourable towards free movement. Schengen was a tool to introduce an alternative and competing vision to the European project. In recent years, this more restrictive view has perhaps become dominant in Brussels, focusing much on external restrictions to preserve the European project and internal free movement.

Emmanuel Comte: To comment on what you said, especially regarding the integration of non-Europeans into free movement, overseas areas of certain member states, primarily French territories, were integrated into the principle of free movement by the late 1960s. Regarding Turkey, it was not clear at the beginning that Turkey would not join the member states. There was a clear commitment in the Treaty of Ankara that Turkey would benefit from the free movement of people. Initially, some historical documents and migration officials' typologies of origin countries included Turks among Europeans. It was more in the 1970s, and especially in the early 1980s, that it became clear that the commitments made with Turkey would not be implemented – with Germany playing a pivotal role in this evolution.

Daniel Thym: I highly recommend your book on these topics, from which I've learned a lot.



Emmanuel Comte: Thank you. It's crucial to understand that once internal border control was removed, there was a need to define who was allowed to cross external borders, especially for law enforcement purposes. This is undebatable. Once the decision to remove internal border controls was made, cooperation on external borders became necessary. However, discussing free movement isn't just about the absence of controls at internal borders. As observed during COVID and even today, many member states have restored internal border controls. The UK has always maintained them, but this did not prevent these countries from applying the principle of free movement. Showing a passport or ID at the border is a routine procedure, and being asked to show an ID does not fundamentally conflict with the principle of free movement. Do we agree, then, that it was the abolition of internal border controls that necessitated cooperation on third-country nationals regarding migration, but not the core of free movement itself?

Daniel Thym: I fully agree that showing a passport is not a legal hindrance to free movement. Yet it symbolises that European states are forging a common future. The symbolism of an internal area without border controls is crucial, especially since the initiative began with the leaders of France and Germany. It symbolised Franco-German reconciliation after World War II.

Emmanuel Comte: There were also trade reasons, notably Germany's desire to rejuvenate the single market by removing border controls, facilitating cross-border traffic, and boosting exports. Nevertheless, we've agreed that a symbolic aspect of free movement made cooperation among member states necessary on migration issues, but not the core of free movement, which is the right to reside, work, or start a business.

Daniel Thym: Exactly.

The EU as a machine to create free movement

Emmanuel Comte: Now, considering the developments over the last 40 years, what is the current legal landscape of European migration law? How do we understand the major components and their interrelations? That is, the control of migration flows for third-country nationals on one hand, and the free movement of people for EU citizens on the other. How do these elements coexist within European migration law? Would you say that we now have a bipolar migration law, with fundamentally two distinct elements? Are these elements of equal importance today, or does free movement still dominate? For instance, in Brussels, when the term 'migration' is mentioned, does the mind leap to free movement, or does it consider control?

Daniel Thym: The landscape of migration is highly complex, encapsulated within my 700-page book across 16 chapters. To start with the term "migration," it's interesting to note the distinct linguistic separation made in Brussels. EU officials often differentiate between free movement, which pertains to EU citizens, and migration, which refers to third-country nationals. This distinction is not just linguistic but is also embedded in the EU treaties, illustrating a clear demarcation between EU citizens and third-country nationals. Nevertheless, the Brexit referendum highlighted the absence of such distinctions in the UK, where the government did not differentiate between EU immigration and other forms of migration. Within the EU, countries like Poland, the Czech Republic, Romania, and Bulgaria are now part of the internal movement. As a result, Germany has seen a net inflow of more than 2 million EU citizens over the past decade, mainly workers from Poland, Romania, and Bulgaria. Yet, this massive movement hardly receives attention compared to the focus on asylum seekers and third-country nationals.

Emmanuel Comte: As for defining migration, it generally involves crossing an international border with the intention of long-term settlement. Internal movements, such as relocating from Paris to Marseille, is rather internal displacement. The concept of migration fundamentally pertains to the state and involves establishing a relationship between two states through the movement of people.

Daniel Thym: In Brussels, there's a perspective, especially among EU-friendly political groups, that moving within the EU, say from Stockholm to Lisbon, is akin to interstate movement in the United States, such as from New York to Colorado.

Emmanuel Comte: This comparison raises questions about European sovereignty and the nature of statehood within the EU. While there are differences in regulations across US states, the EU's internal movement is unique due to the absence of a singular sovereign authority. Discussion on European sovereignty is ongoing, but the reality remains that the EU is still an international organisation, not a sovereign state. Brussels, despite aspirations, is not a major power capital.

Daniel Thym: The politics in Brussels and the legal framework for EU citizens can often seem more visionary than realistic. There are controversial judgments by the European Court of Justice that highlight these issues, particularly in cases where citizens from one EU country move to another without having worked there and then apply for social benefits. Initially, judgments affirmed the right to receive social benefits, which was an expression of this

visionary stance, like in the United States. However, recent judgments have become more cautious.

Emmanuel Comte: Yes, the discussion about benefits not linked to contributions is significant. The principle is that individuals should not become burdens on the social assistance systems of their destination countries, while they have full rights to what they're entitled to through their contributions. And this is fundamentally an agreement between states on accepting such terms. Regarding the definition of migration, it seems we agree, given the discussion in your book on European *migration* law, where you talk also about free movement.

Daniel Thym: Indeed, I sought to introduce some controversy, and the topic of social benefits is particularly contentious. The shift in judicial perspective disappointed many in the academic community, who are generally more liberal and pro-European than their governments.

Emmanuel Comte: The negotiations among member states have been quite clear, with countries like Denmark stating that access to social assistance should not occur. Judges had to stick to this principle. The Dano case, for example, was emblematic. But let's stick to our question of whether the EU is a mechanism for creating free movement or for controlling movement. In the 1960s, it was aimed at facilitating free movement among member states, despite certain limitations. However, today, we must consider whether it still serves to promote free movement or has become a tool for restricting it.

Daniel Thym: Internally, the EU significantly promotes migration. For example, without EU law, Germany wouldn't have seen an influx of over 2 million people, mainly from Poland, Romania, and Bulgaria, over the last 10 to 15 years. EU law essentially acts as a mechanism supporting the free movement of certain groups, notably workers and students, but it's important to note that this doesn't extend to non-economically active individuals. These people only have the right to free movement if they possess sufficient financial resources. For instance, ethnic Roma from Romania or Bulgaria can only exercise their right to free movement if they secure employment. Furthermore, their right is curtailed if they require social assistance in the destination country, which limits the scope of free movement. Nevertheless, it's worth emphasising that EU citizens face different conditions compared to third-country nationals regarding movement and residence within the EU.

Emmanuel Comte: This distinction underlines the EU's role as a facilitator of free movement within certain parameters. EU member states, which are individually quite restrictive in their migration policies, do not need the EU to exercise restrictive policies. This showcases the EU's distinctive character in fostering free movement among countries.

Free movement more sustainable than control

Emmanuel Comte: But let's return to your earlier point about Germany receiving significant numbers of migrants from within the EU. This intra-EU migration often surpasses the numbers from outside the EU, a trend that has reshaped migration dynamics, and the discourse surrounding intra-EU migration is notably quieter compared to the debates on migration from third countries. Remember the discussions on the "Polish plumber" and posted workers? These debates have diminished over time, reflecting a shift towards appreciating the benefits of free movement, especially as the demand for workers like plumbers has grown. That brings us to the question whether a sustainable migration policy leans more towards encouraging free movement rather than imposing restrictions. Once free movement is established, debates and

resistance diminish, unlike when restrictions prevail, which only escalates conflicts and debates. What's your perspective on this?

Daniel Thym: The United Kingdom is a prime example of how free movement is not universally accepted. The populace's decision for Brexit in 2016 was significantly influenced by concerns over free movement, illustrating its contentious nature. Looking at Germany, a country I'm quite familiar with, we can see a similar wariness. Germany delayed opening its labour market to Eastern Europe until the early 2010s, utilising transitional periods to restrict movement after these countries' accession. This was primarily due to Germany's unemployment situation at the time, which stood at a high level. Opening the labour market under these conditions could have led to resentment towards foreign workers, exemplified by the hypothetical scenario of a German plumber being put out of work by a Polish counterpart. However, the situation has dramatically shifted in the past 15 years due to economic growth, transforming Germany into a country desperate for skilled workers, including from EU member states. Currently, there are around 4,000 Romanian doctors in German hospitals, a situation that poses a dilemma given these doctors were educated at the expense of the Romanian taxpayer.

Emmanuel Comte: Do you think free movement could become controversial again if economic conditions were to change?

Daniel Thym: Yes and no. All European countries, except France, are experiencing significant population declines. This decline underscores a critical need for workers, making free movement, which is limited to those employed and not those seeking social benefits, highly beneficial. It is perceived as useful migration by politicians and the public alike, thus not currently a controversial issue. This need is especially pronounced in countries that have seen significant emigration, like Poland, Romania, and Hungary, which also anticipate further population declines.

Emmanuel Comte: Regarding the UK, if we hypothetically imagine there was no Brexit vote in 2016, by today, concerns over European immigrants in the UK would likely be minimal. The initial controversy in the UK was exacerbated by the country's immediate opening to migrants from new EU member states, contrasting with countries like Germany. However, standards tend to equalise over time with migration, reducing tensions. By the time Germany opened its borders in 2011, the Brexit vote was only five years away. Yet I believe that shortly after 2016, this issue diminished significantly in the UK. My view is that free movement is more sustainable than imposing controls, as it allows for natural labour market adjustments. Conversely, restrictions often force people into marginal positions or the black market, potentially leading to criminality and further social resentment, creating a vicious cycle of increasing control demands.

Daniel Thym: The context of intra-European migration is distinct from the migration of third-country nationals into Europe. In the second case, countries can exert control over immigration, though it's never absolute. While complete control over migration is unachievable, it's possible to significantly limit the influx of migrants with strict policies. Establishing strict restrictions can effectively block movement This may be necessary considering the vast economic disparities globally. Completely open borders with the rest of the world would not be viable for Europe.

Emmanuel Comte: It is important to clarify that my argument isn't for open borders without any regulation. Border controls are useful for identifying criminals, but preventing individuals from working is counterproductive. States struggle to prevent migrants from crossing borders, evidenced by the significant number of irregular migrants. Over-policing normal individuals creates a substantial burden.

Daniel Thym: Your point is understood but consider a hypothetical situation where Greece and Bulgaria reduce their controls at their borders with Turkey, and Spain does the same with Morocco. Would the number of people crossing these borders remain the same?

Emmanuel Comte: Certainly, removing physical barriers would increase migration. However, the illusion that fences can prevent all cross-border movement is part of a broader misunderstanding of migration in Europe. Offering migrants the opportunity to work and engage in business is a more effective strategy for integration and addressing issues associated with migration. Moreover, gradualism is useful when implementing free movement – i.e., expanding little by little the area to which free movement applies. This approach then contributes to reducing global disparities. As the European experience demonstrates, with cases like Poland and Romania, countries with significant migration potential can gradually address economic imbalances.

Transfers of free movement elements to third-country nationals

Emmanuel Comte: But let's focus on European migration law, our main topic for today. We acknowledge that free movement is a crucial aspect of it. An interesting point of debate is now whether the EU has managed to extend some elements of free movement to third-country nationals, a topic often criticised by far-right parties in many countries. They argue that the EU imposes its policies of free movement too broadly. Is it true that the EU has been able to incorporate elements of free movement in policies towards third-country nationals?

Daniel Thym: Yes, it has, but only for selected groups. The term used in interdisciplinary migration literature to describe this is bifurcation. This concept illustrates that travel across borders is profoundly dual. On one side, we have bona fide travellers, for whom states endeavour to facilitate the movement through infrastructure like airports and e-gates, which allow entry upon passport scan and facial recognition by software. On the opposite spectrum, we encounter mechanisms like Frontex, fences, and significant efforts by states to prevent certain individuals from entering. This duality creates two distinct experiences of migration law for third-country nationals. Tourists, visa-qualified individuals, wealthy families, and certain nationals can move relatively easily within Europe for tourism, whereas entry and internal movement for others are considerably restricted. Wealthy families from Saudi Arabia and Indian IT specialists are actively encouraged to migrate to Europe. This contrasts sharply with the treatment of asylum seekers, who face considerable restrictions. While an Indian IT specialist may never encounter Frontex, the European border control agency, Syrian refugees or impoverished Nigerians attempting to reach Europe are likely to face it. This discrepancy highlights the variability in European migration law, which ranges from stringent restrictions for asylum seekers to more lenient conditions for tourists and highly skilled workers with qualifications, such as those holding a Blue Card.

Emmanuel Comte: I concur with your observations and the significant role played in investments in infrastructure like e-gates to facilitate movement. However, such facilitation isn't exclusively a result of EU initiatives, as seen with the UK's extensive efforts. My focus,

particularly reflecting on your book, revolves rather around the legal principles at play, such as the principle of family unity. This principle enables scenarios where, for instance, a third-country national married to an EU citizen can remain in the country post-divorce, along with their dependents. It raises the question of whether European law, by influencing rules on family unification, indirectly supports what critics, particularly from the far-right, describe as "opening the gates".

Daniel Thym: EU citizenship rights extend not only to EU citizens but also to family members of EU citizens who possess passports from third countries. This is relevant even in divorce situations. While this has led to numerous judgments and legal articles, it practically affects a relatively small group of people.

Emmanuel Comte: So, European regulations have evolved to somewhat protect the rights of third-country nationals, especially in the context of marriages and divorces, showing that the approach to migration law is not simply liberal towards EU nationals and restrictive towards third-country nationals. There's a nuanced overlap, with family reunification regulations at the European level limiting states' abilities to restrict the immigration of third-country nationals as well.

Demand for expertise

Emmanuel Comte: The subject of European migration law is currently very relevant. Daniel, you've been notably active and sought-after in this field recently. I read a recent article of yours in *Die Welt* that discussed new developments. Given these circumstances, do you believe there is an increasing demand for expertise in European migration law? How do you respond to this demand?

Daniel Thym: Indeed, the demand for expertise in this area is substantial. Just yesterday, I spent eight hours at the German Ministry of Interior, participating in a hearing with many officials from different ministries and about five or six experts from various disciplines. We discussed the proposal, now widely supported by German politicians across several political parties, of emulating the UK and Italian approach of transferring asylum applicants to third countries like Rwanda and Libya. We evaluated the feasibility of such measures, the legal prerequisites, and the practical complexities involved. As someone who has been in this field of migration for a while and recently turned fifty, I find the dynamism and growth in this area, especially among younger scholars and academics, truly remarkable.

Emmanuel Comte: Regarding the advice on potential migration practices you mentioned, when governments seek expertise, do they already have a specific goal in mind and simply seek the means to achieve it? Or are there instances where officials are open to re-evaluating the objectives themselves?

Daniel Thym: Often, when governments request expertise, they have already established their objectives and are looking for ways to accomplish them. This could involve restrictive measures, such as processing migrants in third countries and seeking expert guidance on implementing these plans. However, there is also a demand for expertise that challenges and redefines these objectives, questioning the appropriateness of current migration policies and exploring alternative approaches. So, it depends on the context. For instance, I found yesterday's session particularly engaging because it was an open-ended hearing. They had received a political mandate from the group of regional prime ministers in Germany to explore

the issue comprehensively. The session involved a deep dive into understanding the various models, pros and cons, and the complexities involved. It was essentially a brainstorming session, albeit a very intense one, lasting over eight hours. In contrast, there are times when opinions have already been formed, and the role of experts is to provide insights on pre-decided matters. Occasionally, we can influence minor aspects, demonstrating that our expertise is valued and can lead to legislative changes. However, the influence of academics is more about shaping ideas and perspectives rather than direct decision-making. We play a crucial role in informing journalists and, through them, the public, thereby indirectly influencing public opinion and policy decisions.

Conclusion

Emmanuel Comte: That's very interesting and I concur with your observations. I therefore recommend your book *European Migration Law*, published by Oxford University Press in 2023. It reviews various aspects of this legal domain, emphasising the significance of free movement within Europe. The book also explores the application of certain European principles to third-country nationals. This episode has furthermore discussed the sustainability of free movement versus controlled movement. It has delved into how intellectuals and experts can shape public and policy discourse on migration in Europe. So, thank you, Daniel. Would you now like to share with our listeners where they can follow your work?

Daniel Thym: Certainly. Those interested can find my contributions in various newspapers and television programs. Additionally, I write blog posts for an international audience. I am also involved with the Odysseus network based in Brussels, which focuses on immigration and society. I contribute to discussions on new asylum legislation, which, after eight years of negotiation, has seen the European Parliament and the Council agree on changes to EU asylum law. This new legislation is complex, totalling over 800 pages, and poses a significant challenge even for experts. Alongside colleagues from Odysseus, we aim to guide the public through this intricate legal landscape with a series of informative blog posts.