MEASURING COSMOPOLITANISM IN EUROPE: STANDARDS OF JUDICIAL SCRUTINY OVER THE RECOGNITION OF RIGHTS TO NON-CITIZENS

Graziella Romeo*

Abstract

The paper aims at answering two research questions, the first concerns standards of judicial scrutiny national and supranational courts apply when deciding cases involving the recognition of rights to non-citizens, while the second regards how and why the differences among such standards of judicial scrutiny impact cosmopolitan theories. Authors supporting cosmopolitanism envisage the progressive construction of a cosmopolitan legal order in the recognition of rights irrespective of the status of citizenship, at least with regard to the European Courts' attitude. Indeed supranational courts challenged the theories that make the recognition of (at least some categories of) rights contingent upon the status of citizenship (ECtHR, *Koua Poiré v France*; CJEU, *Kadi v UK*) in cases involving third country citizens. European domestic courts adopted the same approach in a number of cases (House of Lords, *R v SSHD ex parte Limbuela*; French Constitutional Court, Decision No 89–269). Analysing judicial argumentation techniques, the Author argues that there are differences in the standards of judicial scrutiny applied by supranational and domestic courts, which in turn express distinctive views of cosmopolitanism as well as different understandings of the minimum content of the cosmopolitan citizenship.

Keywords

Cosmopolitanism, Europe, Judicial Scrutiny, Rights, Non-Citizens

1 Cosmopolitanism and *cives nec cives* in Europe

Studies on the protection of fundamental rights in Europe generally envisage the progressive construction of a cosmopolitan legal order in the recognition of

* Assistant Professor of Constitutional Law, Department of Legal Studies, Bocconi University, Milan. This paper was presented at the Cambridge Journal of International and Comparative Law's Third Annual Conference 'Stepping Away from the State: Universality and Cosmopolitanism in International and Comparative Law', held at St John's College Divinity School, University of Cambridge on 10–11 May 2014. The author wishes to thank participants to the conference for their appreciated feedback. The author is also thankful to Professor Robert J Kaczorowski (Fordham University School of Law) for his valuable advice on constitutional interpretation theory and to Professor Edmondo Mostacci (Bocconi University) for his thoughtful comments on an early draft of this paper. The usual disclaimer applies.

rights irrespective of the status of citizenship, at least within European borders, or more precisely within the borders of those states that are signatory members to the European Convention on Human Rights (ECHR).¹ These analyses owe much to the theory of the *constitutionalisation* of international law, that is, a theoretical framework maintaining the gradual affirmation of the binding nature of fundamental guarantees, originally born within the international legal system: the possibility of identifying an axiological foundation of international norms.²

There are at least two reasons why asserting cosmopolitanism and identifying it within the relationship between citizens of the ECHR Member States and the ECHR system is questionable. The first is that cosmopolitanism postulates the need to overcome the notion of membership with a view to replacing it with the idea of commitment to rights protection beyond the boundaries of a particular polity. The ECHR, stemming from the Council of Europe, is a specific legal order that aims at protecting rights primarily within its own jurisdiction.³ From this perspective, it is a 'bland brand' of cosmopolitanism in the sense that it still conceives of a form of membership, though not of a political kind and broader than that feasible within a national jurisdiction.⁴ The second and prevailing reason is that cosmopolitanism is *something more*⁵ than (while not

¹ See A Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 53.

² J L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (2010) xv. See also H Jarmul, 'The Effect of Decisions of Regional Human Rights Tribunals on National Courts' (1996) 28 *NYUJILP* 311, 334. On the ethical foundation of international law see also T Nardin, 'Realism, Cosmopolitanism and the Rule of Law' (1987) 81 *ASIL Proc* 416.

³ This assumption does not exclude the hypothesis of extraterritorial application of human rights treaties, especially of the ECHR: see M Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

⁴ The synergy between the supranational legal order and national legal systems is supposed to unleash an expansive force of rights that primarily embraces citizenship rights: see N McCormick, 'Beyond the Sovereign State' (1993) 56 *MLR* 1, 17, who argues that integration among different legal systems should be interpreted as the creation of a plurality of institutional systems 'each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which for most purposes can operate without serious mutual conflict in areas of overlap'. Through supranational protection, citizenship rights would enjoy not only an additional channel for protection, consisting of supranational courts, but also a 'reinforced' ideological foundation that constitutes a bulwark against any attempt at disownment. This argument seems to be supported both by D Held, 'Citizenship and Autonomy' in D Held (ed), *Political Theory and the Modern State* (1989) and B S Turner, *Citizenship and Social Theory* (1993) 14.

⁵ See R Tinnevelt & T Mertens, 'The World State: A Forbidding Nightmare of Tyranny. Habermas on the Institutional Implications of Moral Cosmopolitanism' (2009) 10 *German LJ* 63, 64, who

something completely different from) a theory of human rights,⁶ even though it is indisputable that the latter is a theoretical construction which contributes to the development of a cosmopolitan theory.⁷

Cosmopolitanism indeed requires transcendence beyond the nation state and, in parallel, an effort to stretch the concept of membership to the extent that it loses its original understanding and coincides with belonging to a borderless community that does not make the recognition of rights contingent on any form of 'affiliation'.⁸ Cosmopolitanism, however, does not intend to blur identities, differences and memberships in a single universal identity. On the contrary, it assumes that differences can be identified, expressed⁹ and finally accommodated

argue that 'taking the equal moral status of individuals seriously does not imply the commitment to some form of world state or global citizenship'. See also R Fine, 'Cosmopolitanism and Human Rights' (2007) 1 *Law, Social Justice and Global Development* 3, who argues that 'cosmopolitanism imagines a world order in which the idea of human rights is a basic principle of justice and in which mechanisms of governance are established for the protection of human rights'.

⁶ Although 'human rights' refers to a common concept within the theory of rights, it is appropriate to define them as they differ from both constitutional and fundamental rights, being defined as absolute subjective claims, valid *per se* and regardless of recognition within states by means of statutes or constitutions: see R Dworkin, *Taking Rights Seriously* (1977); J Raz, 'Rights and Politics' (1995) 71 *Indiana LJ* 27, tracing the difference between human rights as universal claims and constitutional rights as particular and specific claims.

⁷ See S Vertovec & R Cohen, *Conceiving Cosmopolitanism. Theory, Context, and Practice* (2002) 4. The authors define cosmopolitanism as follows: 'Cosmopolitanism suggests something that simultaneously: a) transcends the seemingly exhausted nation state model; b) is able to mediate actions and ideals oriented both to the universal and to the particular, the global and local; c) is culturally anti-essentialist; and d) is capable of representing variously complex repertoires of allegiance, identity, and interest'.

⁸ J Waldron, 'What is Cosmopolitan?' (2000) 8 *J Pol Phil* 227. There is symmetry, as already suggested by Rawls, between the principle of equality between individuals and that of equality between peoples. Indeed, Rawls' theory of justice acknowledges a duty of assistance for richer societies in favour of the poorest. However, the achievement of a global justice is incorporated into the more general theory of peace between peoples and is therefore conditional on the objective of guaranteeing the international order: see J Rawls, *The Law of Peoples with The Idea of Public Reason Revisited* (1999). It must be emphasised that these arguments have also been put forward by philosophers who, starting from Rawlsian principles of justice, link the problem of global justice with that of the weak subjects in contemporary states and, in doing so, presuppose an ethic of care that is sensitive to all possible manifestations of social justice: see M C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006) 30, 230. With specific reference to the duties of material assistance applying on a global scale, see M C Nussbaum, 'Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy' (2000) 8 *J Pol Phil* 176.

⁹ See T W Pogge, *World Poverty and Human Rights. Cosmopolitan Responsibilities and Reforms* (2002) 169; I Trujillo, *Giustizia globale* (2007) 164–6.

in any given polity that recognises, accepts and synthesises them.¹⁰ In other words, the cosmopolitan attitude of a legal system is to be assessed starting with the ability of its political and judicial institutions to overcome the logic of belonging without neglecting the need for conciliating different affiliations and loyalties, rather than assimilating them within a global institutional project.¹¹ This approach characterises cosmopolitanism as opposed to universalism or globalism, as it has been argued by both David Held¹² and Sheila Benhabib.¹³

Despite the common semantic denominator, different versions of cosmopolitanism coexist.¹⁴ For the purpose of this study, cosmopolitanism is interpreted as a theory that supports the need to transcend the national dimension when it comes to guaranteeing the equal treatment of all human beings, without necessarily implying the creation of global institutions intended to completely replace domestic jurisdictions.¹⁵ Adhering to this notion, this article tests the cosmopolitan attitude of European states, considering them both as domestic legal orders and as part of the ECHR, and argues that while the European Court of Human Rights (*ECtHR*) shows a form of *idealist* (or *pure*) *cosmopolitanism*, domestic consti-

¹⁰ Vertovec & Cohen, above n 7. See also H P Glenn, *The Cosmopolitan State* (2013) 176–7.

¹¹ J Habermas, *Postnational Constellation* (2001) 104, discussing the need for a ‘world domestic policy without a world government’. See also Glenn, above n 10, 290, arguing that the *ECtHR*’s doctrine of the margin of appreciation provides a good example of the functioning of a cosmopolitan legal order, as through this doctrine the Court ‘refuses to construct a univocal or univalent interpretation of the European Convention on Human Rights [...] in order to allow multiple and varied state interpretations of it’.

¹² D Held, ‘Principles of Cosmopolitan Order’ in G Brock & H Brighouse (eds), *The Political Philosophy of Cosmopolitanism* (2005) 16.

¹³ S Benhabib, ‘Democratic Iterations The Local, the National, and the Global’, in R Post (ed), *Another Cosmopolitanism* (2006) 20.

¹⁴ It is appropriate to mention at least the so-called moral cosmopolitanism as opposed to legal cosmopolitanism. Whilst the former calls for a kind of moral universalism that conceives of a commonality of rules, values, and belief in human dignity (see D Held, ‘Principles of Cosmopolitan Order’ (2005) *Anales de la cátedra Francisco Suárez* 145, 148; Pogge, above n 9, 169), the latter urges for the creation of global institutions that should bear the responsibility to enforce the law in a truly worldwide legal order (see H Kelsen, *Peace through Law* (5th edn, 2000) 5–6).

¹⁵ The idea of world institutions was objected to even by I Kant, *Zum ewigen Frieden* (1795: tr M J Gregor, 1996) 322. On this point see Tinnevelt & Mertens, above n 5, 4. The idea of global institutions charged with the duty to implement universal laws is supported by those authors upholding a peculiar version of cosmopolitanism that call for a reform of the international legal order: see R Falk, *On Human Governance* (1995); Trujillo, above n 9, 171. See also C J Friedrich, *The Philosophy of Law in Historical Perspective* (1963) 223–4, who argued that the creation of a constitutional order for the whole world is possible on one condition, that is a sufficiently large number of peoples, who participate in the creation of this global constitutional order, living themselves in constitutionally organised legal communities.

tutional courts express a kind of *pragmatic* (or *limited*) *cosmopolitanism*. The former approach aims at achieving a truly cosmopolitan guarantee of rights, whilst the latter ultimately affirms a sort of minimum content of cosmopolitan citizenship. In other words, idealist cosmopolitanism assumes that differing treatment of citizens and non-citizens is always objectionable, while pragmatic cosmopolitanism accepts that nationality matters in the recognition of rights.

This conclusion is based on an investigation of the standards of judicial review that courts resort to when addressing non-citizens' rights. Indeed, in order to test the cosmopolitan approaches, this article analyses the way in which courts, at both the domestic and the ECHR level, concretely realise the cosmopolitan aspirations of contemporary legal systems, that is, how they articulate and synthesise differences in their legal reasoning.¹⁶ The reasons for focusing on standards of judicial review in addressing this issue rest upon the idea that constitutional as well as supranational courts generally use the expansive strength of rights to reach the maximum level of protection,¹⁷ approximating their legal order to a cosmopolitan one.¹⁸ This idea resembles Waldron's theory of harmonisation of fundamental rights laws and interpretation.¹⁹ In other words, cosmopolitanism can be measured starting from courts' argumentation techniques, which in a way provide legal reasoning to a normative theory having moral foundations.²⁰

This article looks specifically at the standards of judicial scrutiny that courts apply when deciding cases involving the recognition of rights to non-citizens or, in the case of the ECHR, to third-country nationals. In other words, in order to be consistent with the general premise, this article tests the existence

¹⁶ There are many authors arguing that constitutionalism is inherently cosmopolitan. In other words, overcoming that state-centric conceptualisation of rights is the result of the constitutional soul of contemporary democracy: see V Perju, 'Cosmopolitanism in Constitutional Law' (2013) 35 *Cardozo LR* 711; S Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (2004). See also M Tushnet, 'The Cannon(s) of Constitutional Law: An Introduction' (2000) 17 *Const Comment* 187. Among European scholars see: E Pariotti, *La giustizia oltre lo Stato: forme e problemi* (2004) 43.

¹⁷ See M Loughlin, *The Idea of Public Law* (2009) 130, who argues that contemporary democracies are characterized by the 'expanding culture of rights'.

¹⁸ E A Posner calls this approach 'judicial cosmopolitanism': see E A Posner, 'Boumediene and the Uncertain March of Judicial Cosmopolitanism' (2007-2008) *Cato Sup Ct Rev* 23; K I Kersch, 'The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law' (2005) 4 *Wash U Global Stud LR* 345.

¹⁹ J Waldron, *Partly Laws Common to All Mankind* (2012) 119.

²⁰ See R Alexy, *A Theory of Legal Argumentation. The Theory of Rationale Discourse as Theory of Legal Justification* (2011) 14–15.

of a cosmopolitan legal order by focusing on the recognition of rights for those individuals who are citizens of states that are neither members of the ECHR nor (inevitably) the European Union. These individuals have differing levels of affiliation to the political communities in which they reside; the selected case law generally addresses those who are legal residents, though with differing degrees of permanency in the territory of the state, varying from temporary immigrant status to permanent resident status. In any case, they are not qualified to become citizens, and thus they are not members of the political community.

Furthermore, to stress the conceptual autonomy of cosmopolitanism, as opposed to a human rights theory, this article analyses cases involving the controversial category of social rights.²¹ Indeed, social rights are commonly believed to bear an impenetrable link to membership in a political community, as they require states to choose how to allocate their own resources. From this perspective social rights can be seen as a litmus test for cosmopolitanism, because they show the extent to which it is actually possible to conceive of a cosmopolitan attitude of legal systems as an effort to make membership more and more irrelevant in the relationship between individuals and states. Whilst the exclusive or prevailing reference to case law concerning civil rights underlines the common core of European values, it strives to identify cosmopolitanism with the culture of human rights. This in turn assumes the universalism of some human beings' claims,²² but does not necessarily link it to the need for the construction of a global community.²³

Having set the theoretical premise, this article is organised as follows: Section 2 draws a methodological framework on how the analysis of standards of judicial scrutiny is performed. Section 2.1 develops an inquiry of domestic constitutional court caselaw involving the recognition of social rights of foreign nationals, specifically focusing on models of reasoning. Section 2.2 addresses the decisions of the ECtHR, elucidating standards of judicial scrutiny concerning non-citizens. Moving from the analysis developed in the previous sections, Section 3 systematises the standards of review according to the classical categories of strict, in-

²¹ M Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12 *HRLR* 221.

²² See Raz, above n 6, 41, arguing that only some claims which are interpreted as truly universal deserve to be included in the category of human rights.

²³ The difference is clear in Waldron, above n 19, 133. R Dahrendorf, *The Modern Social Conflict* (1988) 57, arguing that it is fundamental to start from constructing a civilised society of citizens at home. But as long as it is contained within national borders, it will also be accompanied by stances, policies and rules of exclusion that violate the basic principles of civil society. The historical task of creating a civil society will be concluded only when there are citizenship rights for all human beings. Therefore, he concludes by saying '[w]e need a world civil society'.

intermediate and rational based scrutiny.²⁴ Section 4 concentrates on the views of cosmopolitanism that both constitutional courts and the ECtHR seem to support, arguing that courts express different understandings of cosmopolitanism that have consequences in the path to a cosmopolitan legal order. Finally, Section 5 provides concluding remarks, tracing the general framework surrounding the cosmopolitan vocation of Europe as a multilevel legal order.

2 Standards of judicial scrutiny and cosmopolitanism

Before addressing the case law of domestic and supranational Courts, it is appropriate to provide some methodological clarifications about the analysis of the standards of judicial scrutiny. First of all, it has been argued that constitutional or supreme courts tend to converge around a typical (and undeviating) interpretation of the principle of equality, which is the substantial parameter of non-citizen rights litigation.²⁵ Whilst it is essentially true that courts use common argument methods,²⁶ it should be emphasised that the intensity of scrutiny (borrowing the US Supreme Court categorisations of strict,²⁷ intermediate²⁸ and rational basis)²⁹, and therefore the weight of rights and interests involved in the adjudica-

²⁴ For a definition for each of the aforementioned standards see below nn 27–8.

²⁵ D Beatty, 'Human Rights and the Rule of Law' in D Beatty (ed), *Human Rights and Judicial Review* (1994) 15.

²⁶ For example, the French Constitutional Court (*Conseil Constitutionnel*) refers to *critères objectifs et rationnels* (objective and rational criteria) to test if a difference in treatment of citizens and non-citizens can be justified; the German Constitutional Court (*Bundesverfassungsgericht*) maintains that justification of different treatments must have a reasonable and persuasive foundation, inferable from the 'nature of things' (*Natur der Sache*). In both cases the argumentative method requires that judges' evaluation is guided by objective considerations see: French Constitutional Court, Decision No 83–164, 29 December 1983, para 10; K Schlaich, *Das Bundesverfassungsgericht* (1985) 233. See also A Frank, 'Les critères objectifs et rationnels dans le contrôle constitutionnel de l'égalité' (2009) *RDP* 84.

²⁷ That is a kind of scrutiny that requires the governmental interest justifying the different treatment (classification) to be compelling and the classification to be absolutely necessary to fulfil the compelled interest: see *Korematsu v United States*, 323 US 214 (1944).

²⁸ That is a kind of scrutiny that requires the governmental interest justifying the different treatment to be important and the classification to be substantially related to the public interest: see *Craig v Boren*, 429 US 190 (1976).

²⁹ That is a kind of scrutiny that requires a legitimate governmental interest and a reasonable correlation between the classification and the interest it is supposed to realise: see *McCulloch v Maryland*, 17 US 316 (1819).

tion, vary even across a relatively harmonised legal culture such as that in Europe. Secondly, standards of judicial scrutiny are crucial in deciding hard cases; that is, when judicial decisions have political consequences or imply judgement of a political nature, such as those concerning the treatment of individuals who are not members of the political community.³⁰ Indeed, standards attempt to provide a reasonable justification to courts' decisions, hence circumscribing judges' discretion, especially in the most controversial cases.

In order to identify standards of judicial scrutiny, this article investigates constitutional courts' and ECtHR decisions in a twofold perspective, looking at: (a) the identification of the grounds upon which the different treatment of non-citizens can be justified; and (b) the recognition of 'untouchable areas', i.e., cases in which there is no admissible justification for treating citizens and non-citizens differently.

This methodological framework guides the analysis of decisions with the goal of understanding what kind of cosmopolitanism courts support.

2.1 The horizontal dimension of the case law analysis: domestic courts' approach to non-citizens rights

Critics have raised methodological objections against cosmopolitan theories that argue for the recognition of rights irrespective of citizenship. These critics maintain that cosmopolitanism tends to destroy the conceptual tools that constitutional lawyers traditionally used to explore the topic of rights—first and foremost the hendiadys 'rights-citizenship', which considers membership in a political community to be the basis for entitlement to rights.³¹ From this point of view, cosmopolitanism calls into question the political dimension of the protection of rights under constitutional law, and more specifically the role of

³⁰ See G Agamben, *Homo Sacer* (2005) 7.

³¹ See M Sandel, *Liberalism and the Limits of Justice* (1982). Among Italian scholars see S Veca, *Della lealtà civile: saggi e messaggi nella bottiglia* (1998) 79. In *The Origin of Totalitarianism* (1951: tr A Guadagnin, 2004) 412, Hannah Arendt argued that the use of instruments to deprive people of their citizenship was one of the hallmarks of the totalitarian state. Forced migrations, mass expulsions and systematic exclusion from the *status civitatis* were used as instruments in order to strip individuals of all legal protection and to relegate them to a condition of absolute weakness. By removing the individual from his social existence, the stateless status substantiates the exclusion from the rest of humanity. Ultimately, being part of a community represents a vehicle for the recognition of human dignity.

the political process in their recognition.³² Cosmopolitanism indeed supports the recognition of rights without linking it to the ordinary path of democratic processes, in which claims are stated and finally upheld within the dialectic between citizens and their political representatives. According to this approach, claims for universal rights within a given polity, irrespective of how basic or fundamental the rights are, reach political recognition without demanding the participation of the potential recipients.

On the contrary, scholars who support cosmopolitan theories maintain that studies of citizenship as membership in a specific political community limit themselves to identifying and classifying the relationship between individuals and the legal orders to which they belong, ignoring the transformation faced by contemporary states.³³ There is no doubt that the decline of the nation state due to the internationalisation of political and economic relations has resulted in a certain weakening of the logic of belonging, and thus paved the way for a 'secular' idea of citizenship. Accordingly, within more recent studies, the historical and cultural link fades and ceases to represent the principal element qualifying the idea of citizenship. National identity is to be redefined on bases other than those strictly cultural. At the same time, the concept of citizenship as membership expresses a trend towards the inclusion of different members of society with a view to resolving tensions and conflicts within modern pluralist democracies. It is precisely the historical emancipatory function of citizenship which leads to the conclusion that any merely ethno-cultural connotation of belonging must be rejected.³⁴ In other words, citizenship can be interpreted as an on-going process of the construction of civil cohabitation that is perfectly compatible with the cosmopolitan attitude of states.³⁵

This theory, originally elaborated by Sheila Benhabib, seems to have circulated in Europe and to have transformed the concept of citizenship in judicial

³² M V Tushnet, 'New Forms of Judicial Review and the Persistence of Rights-And Democracy-Based Worries' (2003) 38 *Wake Forest LR* 813, 825.

³³ L Bosniak, 'Constitutional Citizenship through the Prism of Alienage' (2002) 63 *Ohio State LJ* 1285, 1306.

³⁴ A C Guelzo, 'The Most Awful Problem that Any Nation Ever Undertook to Solve. Reconstruction as a Crisis in Citizenship' (2009) 12 *Chap LR* 705. See also Z Bauman, 'The Fate of Humanity in the Post-Trinitarian World' (2002) 1 *JHR* 283, 285, according to whom the emancipation from the concept of belonging of the most strictly historical and cultural elements is however anything but certain. The communitarians interpret citizenship in the light of the concept of belonging to the same 'historical community of destiny', or to a specific form of political organisation that represents the constitutive element of the identity of its citizens: see Sandel, above n 31.

³⁵ Benhabib, above n 13.

litigation; paving the way for theses that do not exclude foreign nationals, even from the enjoyment of inherently citizenship-related rights.³⁶ Indeed, European domestic courts have adopted an approach akin to the aforementioned theory in a number of cases involving the rights of foreign nationals.³⁷ European constitutional or supreme courts generally support the idea that some categories of rights deserve to be protected irrespective of citizenship.³⁸ This thesis would not have been a novel outcome if it had not applied to (at least) social entitlements usually reserved for citizens. As previously touched on in the introduction, social rights have a nexus with the concept of citizenship as they imply the allocation of public resources, which is normally guided by the principle of *preference for countrymen*.³⁹

This line of reasoning of constitutional courts (and, in the UK case, the Supreme Court) is grounded in the scrutiny of the reasons for differentiating treatment of foreigners from that of citizens. From the courts' perspective, they must identify a strictly rational correlation between the distinctive factor (being citizens versus being non-citizens) and the purpose a rule is intended to achieve. For example, the Italian Constitutional Court argued that if a law establishes the right to free circulation in public transportation services for disabled persons, it cannot exclude individuals from its enjoyment on the basis of citizenship. The only goal for which the law can reasonably aim is the protection of vulnerable people. Therefore, differentiating between individuals because of their citizenship status is not logically consistent with the purpose of the law, even

³⁶ Ibid.

³⁷ See *R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66, para 77 (Baroness Hale) (*Limbuela*); French Constitutional Court, Decision No 89-269, 22 January 1990.

³⁸ For the purpose of this study, decisions of constitutional courts are analysed in countries such as Italy, Germany, France and Spain where there is a specialised court charged with the judicial review of legislation. In the case of the UK, the Supreme Court case law is considered.

³⁹ See R Nozick, *Anarchy, State and Utopia* (1974) 283, arguing that a state's public resources should be destined for the sole benefit of its citizens. See also M Adler, 'What States Owe Outsiders' (1993), 20 *Hastings Const LQ* 267, 391. On the reasons for preferring countrymen to others, see the analysis of D Miller, 'Justice and Global Inequality' in A Hurrell & N Woods (eds), *Inequality, Globalization and World Politics* (1999) 187; Trujillo, above n 9, 33-4. Discussing the same issue M Walzer, *Spheres of Justice* (1983) 42, 60 justifies the regulation of immigration by the need to preserve the cultural identity of the host society. Nevertheless, he argues that in cases involving lawfully resident workers, the rules requiring exclusion from some citizenship rights should be tempered, taking into account requirements of a distributive nature. Against the principle of preference for countryman, see B Ackerman, *Social Justice in the Liberal State* (1980) 419.

considering the need to take account of available resources.⁴⁰

Courts generally acknowledge that legislators can classify individuals as far as the entitlement of rights is concerned. The classification however needs to be rationally justified. The German Federal Constitutional Court solves the problem of reasonable justification in a different way:⁴¹ any differentiation addressing citizens and non-citizens deserves a presumption of legitimacy,⁴² which is negotiable⁴³ only in cases involving fundamental rights expressly recognised in favour of all human beings (*Jedermannsrechte*).⁴⁴ In other words, in these specific cases different treatment is arbitrary because no persuasive and reasonable grounds, arising from the nature of the differentiation (national origin), can be given to justify diverging treatment.⁴⁵ The Federal Constitutional Court clarified that there is a fundamental right to a dignified minimum existence to which Germans and foreign nationals who reside in Germany are equally entitled.⁴⁶ The legislator can consider the characteristics of specific groups of individuals (i.e., citizens as opposed to non-citizens) when determining the dignified minimum existence; however it can only differentiate treatment on the basis of individuals' residence status if the need for existential benefits significantly diverges among the targeted groups.

The Spanish Constitutional Tribunal developed the same line of reasoning and argued that the equal treatment of foreigners and citizens is constitutionally

⁴⁰ Italian Constitutional Court, Decision No 425 (2005).

⁴¹ The methodological approach of the German Constitutional Court has been extensively discussed by legal scholars: see *ex multis* J Bomhoff, *Balancing Constitutional Rights: The Origin and Meanings of Postwar Legal Discourse* (2013) 199.

⁴² D Schefold, 'Aspetti della ragionevolezza nella giurisprudenza costituzionale tedesca' in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale* (1994) 124; A Somek, 'The Deadweight of Formulae: What might Have Been the Second Germanization of American Equal Protection Review' (1999) 1 *U Pa J Const L* 284, 311.

⁴³ In the area of equal treatment, the position of the German constitutional judges can be synthesised by referring to one of their most famous cases, where they maintained that it is 'not the concern of the Federal Constitutional Court to consider whether the most just or appropriate rules have been adopted, but simply whether the outermost limits have been respected': see German Constitutional Court, BVerfG 17, 319 (330), 14 April 1964, available at <<http://opiniojuris.de/entscheidung/1348>> [accessed 2 November 2014]; R Alexy, *A Theory of Constitutional Rights* (2010) 269.

⁴⁴ C Kannengießer, 'Art. 2. Allgemeines Freiheitsrecht', in B Schmidt-Bleibtreu & F Klein (eds), *Kommentar zum Grundgesetz* (1999) 146.

⁴⁵ Alexy, above n 43, 266–7.

⁴⁶ German Constitutional Court, 1 BvL 10/10, 18 July 2012, available in English at <http://www.bundesverfassungsgericht.de/entscheidungen/ls20120718_1bvl001010.html> [accessed 2 November 2014].

mandatory only for universal human rights.⁴⁷ Differentiations in other cases should be subject to reasonable scrutiny and sanctioned only when the law cannot provide a rational justification for the classification. This approach has been followed by the French Constitutional Court. It maintained that the legislator can differentiate between nationals and foreigners for constitutionally justified purposes, which are essentially connected to the concept of public policy (*ordre public*).⁴⁸ However, the diverging treatment cannot affect fundamental rights and liberties (*les libertés et droits fondamentaux de valeur constitutionnelle*), among which social rights have been included at least since 1993.⁴⁹

More recently, the requirement of reasonableness in classification has been interpreted in quite a flexible fashion, defined in terms of the absence of *erreur manifeste* by legislators.⁵⁰ This construction extends the legislators' margin of appreciation in the sense that diverging treatment is unconstitutional only when it is the result of an evidently inconsistent choice for the purpose of the objects/means test.

Within the UK, in a different legal tradition, the pivotal case *ex parte Limbuela* clarified that there is a limited set of social entitlements that must be recognised irrespective of the status of citizenship, because doing otherwise would infringe upon the basic rights enshrined in the ECHR and incorporated by the Human Rights Act 1998.⁵¹ The standard of scrutiny over foreigners' rights is strict only where certain categories of rights are concerned. The Law Lords indeed considered whether the denial of social entitlements amounted to a violation of Article 3 of the ECHR, which prohibits inhuman and degrading treatment, hence including in the scrutiny only those entitlements that fulfil basic rights.⁵²

This overview of constitutional and supreme court decisions concerning the rights of non-citizens demonstrates that there are generally no reasonably justifiable grounds for differentiating between citizens and foreign nationals

⁴⁷ Spanish Constitutional Court, Decision No 107 (1984); I Gutiérrez Gutiérrez, 'Los derechos fundamentales de los extranjeros en la Constitución y en las leyes españolas' (2003) *Boletín de la Facultad de Derecho UNED* 19.

⁴⁸ French Constitutional Court, Decision No 93–325, 13 August 1993.

⁴⁹ *Ibid*, para 3.

⁵⁰ French Constitutional Court, Decision No 2006–539, 20 July 2006.

⁵¹ See *Limbuela* [2005] UKHL 66, 77 (Baroness Hale). See also P Billings & R Edwards, '*R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department*. A case of "Mountainish Inhumanity"' (2006) 12 *J Soc Sec L* 167.

⁵² See also *EM (Lebanon) (FC) v Secretary of State for the Home Department* [2008] UKHL 62, in which the House of Lords seems to reiterate the distinction between guarantees of fundamental importance and the other rights.

when it comes to the enjoyment of fundamental rights. In other words, courts are reluctant to allow legislators to classify individuals using the criteria of membership as far as basic rights are concerned.

The category of fundamental rights however is highly controversial; in most cases it tends to correspond to civil/first generation rights. Only occasionally do courts expressly recognise that social rights deserve to be labelled as fundamental.⁵³ More frequently, courts hold that some social guarantees contribute to the enjoyment of basic rights and thus deserve to be recognised for all individuals.⁵⁴ As a consequence, the protection of social rights irrespective of citizenship always involves claims pertaining to the category of fundamental rights or to selected social entitlements accomplishing fundamental rights. In any case, the crucial consequence is that they are included in the essential content of the cosmopolitan citizenship envisaged by constitutional court judges. In contrast, when it comes to those rights that represent social entitlements not fulfilling any fundamental right,⁵⁵ constitutional courts apply a sort of rational basis scrutiny.⁵⁶ In these cases, constitutional judges will strike down a law not recognising a social right for non-citizens only if it is blatantly irrational or arbitrary.

Focusing for a moment on a rough synthesis of a far more problematic issue (explored in more details hereinafter), it can be argued that citizenship still matters for constitutional courts: it remains a status that entitles individuals to the full enjoyment of rights. Thus cosmopolitanism is interpreted as an ideal that cannot be completely achieved without a political decision. In its place, courts uphold a sort of *minimal cosmopolitan citizenship*, which entails the recognition of (some) typically citizenship-related rights.

⁵³ French Constitutional Court, Decision No 89–269, 22 January 1990, qualifying social rights as human rights. On this issue, see I Hare, 'Social rights as fundamental human rights' in B Hepple (ed), *Social and labour rights in a global context: international and comparative perspectives* (2002) 176; J F Akandji-Kombé, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights' in G de Búrca & B de Witte (eds), *Social Rights in Europe* (2005) 90.

⁵⁴ Italian Constitutional Court, Decision No 306 (2008). For the French case, see French Constitutional Court, Decision No 93–325, 13 August 1993, para 3; E Aubin, *Droit des Étrangers* (2009) 221.

⁵⁵ Italian Constitutional Court, Decision No 148 (2008).

⁵⁶ See J C Escarras, 'Conseil constitutionnel et ragionevolezza: d'un rapprochement improbable à une communicabilité possible' in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale* (1994) 212. See also French Constitutional Court, Decision No 2005–528, 15 December 2005, paras 11–9.

2.2 The vertical dimension of the case law analysis: the European Court of Human Rights' approach to rights

Both the ECtHR and the Court of Justice of the European Union (CJEU) have challenged the theories that make the recognition of (at least some categories of) rights contingent upon citizenship in cases involving third-country nationals.⁵⁷ The ECtHR case law is interesting for the purpose of this article, because the Court's attention to social rights (which are not expressly enshrined in the ECHR)⁵⁸ impacts the theory of cosmopolitanism, and tends to reshape the conceptual tie between rights and citizenship, paving the way for a peculiar version of cosmopolitanism.

The ECtHR interprets the ECHR as extending its guarantees into the sphere of social rights and covering claims of third-country nationals.⁵⁹ In doing so, the

⁵⁷ *Koua Poiriez v France* [2003] ECtHR App 40892/98 (*Koua Poiriez*); Case C-402/05 P, *Kadi v UK* [2008] ECR I-6351.

⁵⁸ In its decision *Airey v Ireland* (1979) ECHR Ser A No 32, para 305, the ECtHR clarified that: 'the mere fact that an interpretation of the Convention may extend into sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention'. Valuing to the maximum extent the content of the Convention and, at the same time, renouncing to the rigid classical distinction between civil and social rights, the ECtHR developed an interesting case law concerning social rights. They have been interpreted as the specification of some of the guarantees enshrined in the Convention. The clearest example is workers' right to have their collective agreements implemented, which is derived from the freedom to assemble and join trade unions, recognised by Art 11 ECHR. See *Demir and Baykara v Turkey* [2008] ECtHR App 34503/97. The topic has been deeply analysed by scholars: see Hare, above n 53; L Clements & A Simmons, 'European Court of Human Rights: Sympathetic Unease', in M Langford (ed), *Social Rights Jurisprudence* (2008) 409. As for the CJEU's case law, which is not addressed in this article, it should be mentioned that there are a limited number of decisions specifically addressing the issue of third-country citizens' social rights. Furthermore, those cases concern only the specific and purely transnational circumstances under which the foreign national can actually claim the recognition of social entitlements before the CJEU. In general, on the CJEU's case law on social rights: see K Lenaerts & P Foubert, 'Social Rights in the Case-Law of the European Court of Justice. The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law' (2001) 23 *Legal Issues of European Integration* 267.

⁵⁹ International law scholars argued that courts should extensively interpret first generation rights in order to afford protection also to social and economic rights: see D Beatty, 'The Last generation: when rights lose their meaning', in D Beatty (ed), *Human Rights and Judicial Review* (1994) 326. The author argues that 'first generation bills of rights can provide [...] as much protection for the social and economic spheres of people's lives as they have for their political and civil liberties'. See also F Sudre, 'La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de "jurisprudence fiction"?' (2003) *Revue trimestrielle des droits de l'homme* 755.

Court experimented with a form of genuine cosmopolitan legal order, providing legal argument to the need to treat citizens and non-citizens equally even with respect to rights typically connected with citizenship. The cosmopolitan attitude of the ECtHR has been discussed primarily regarding whether it actually fostered the harmonisation of rights protection throughout the ECHR Member States. The case law however shows that the Court went beyond this, specifically addressing the situation of marginalised individuals, mainly through a substantial recourse to the principle of equality enshrined in Article 14 of the ECHR.⁶⁰

In the decision *Gaygusuz v Austria*,⁶¹ the ECtHR clarified that states cannot discriminate on the basis of nationality in the enjoyment of social entitlements. The case arose when Mr Gaygusuz, a Turkish citizen, brought a complaint regarding the Austrian authorities' refusal to grant him emergency assistance because he did not have Austrian nationality. The Court unanimously found that the denial of a social security benefit to an individual on the sole ground of his foreign nationality violated Article 14 of the ECHR, together with Article 1 of Protocol 1 guaranteeing enjoyment of possessions. The reasoning of the ECtHR judges proceeds as follows: states are not compelled to recognise such a category of rights, except to the extent which they actually contribute to the fulfilment of rights expressly guaranteed under the ECHR.⁶² However, once states decide to safeguard social rights, their enjoyment shall be protected under Article 14. In other words, the merits of the allocating decision are not within the province of the ECtHR, but the judgment over the selection of recipients is a matter for the Court, and must respect the principle of non-discrimination. Consequently, the selection of individuals entitled to rights is not fair if it assumes citizenship as a discriminatory criterion, even if the rights concerned are commonly understood as citizenship-related claims.

The judgments in the cases *Koua Poirrez v France*⁶³ and *Andrejeva v Latvia*⁶⁴ provide further examples of the same line of reasoning. The ECtHR in both circumstances reiterated that social entitlements must be equally allocated irrespective of the citizenship status of the claimant. The first case concerned a

⁶⁰ Glenn, above n 10, 107, maintaining that the protection of marginalised people and minorities was not in the contemplation of the founders.

⁶¹ *Gaygusuz v Austria* [1996] ECtHR App 17371/90, paras 36–7, 41 (*Gaygusuz*). On this decision, see M-B Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *HRLR* 689.

⁶² See for example judgments *G N v Italy* [2009] ECtHR App 43134/05; *Larioshina v Russia* [2002] ECtHR app 56869/00.

⁶³ *Koua Poirrez* [2003] ECtHR App 40892/98, ECtHR 2003

⁶⁴ *Andrejeva v Latvia* [2009] ECtHR App 55707/00 (*Andrejeva*).

Côte d'Ivoire citizen claiming entitlement to a disability allowance under French law. The ECtHR opined that if the purpose of the entitlements is to afford social protection to individuals in need, there are no reasonable grounds for weighing the needs of citizens and foreigners differently; they are in the same position for the purpose of welfare policy. The second decision addressed the case of a permanent resident of Latvia demanding to be treated equally to citizens in the application of state social security law. The Court expressly rejected the government's argument that the financial burden and limited capacity of the national budget prevented the extension of social rights. So, the principle of equality has been interpreted as an absolute rejection of the 'preference for nationals' doctrine even in the circumstances of the economic crisis.⁶⁵ In other words, states cannot give preference to their own citizens over foreigners because of financial and fiscal constraints originating from the economic crisis. This kind of policy challenges both the social cohesion and the principle of equality.

The case law of the ECtHR has had a limited influence on domestic courts as far as non-citizens' social rights are concerned.⁶⁶ Indeed, even if they generally find that the exclusion of foreign nationals from social entitlements is without an 'objective and reasonable justification', they limit this conclusion to fundamental rights or, as may be the case, social entitlements fulfilling a fundamental right.⁶⁷ On the contrary, there is no sign in the ECtHR's decisions of this idea of an essential or minimal content of cosmopolitan citizenship and a margin of complete discretion for legislators to discriminate between citizens and foreigners in the recognition of rights other than those labelled as fundamental. It is crucial in this respect to notice that the ECtHR's judgments clarify that once a specific right or entitlement is established, there is no space for discrimination on the basis of nationality, no matter the 'quality' of the right concerned.

⁶⁵ Besides *Andrejeva*, see *De Souza Ribeiro v France* [2012] App 22689/07. Certain judges stressed that the policy of denying non-citizens' equal access to civil and social rights in times of unemployment and fiscal constraints 'not only challenges social cohesion in European countries, but goes to the heart of the principle of equality' (Judges Pinto De Albuquerque, joined by Judge Vučinič).

⁶⁶ Even though a direct inspiration may be expressly traced in the French case: see Aubin, above n 54. See also Dembour, above n 61, 690, arguing that '*Gaygusuz* has not triggered tremendous changes to policy and/or legislation either in Austria or elsewhere. Nor has it generated a quantitatively or qualitatively important case law at Strasbourg'.

⁶⁷ *Gaygusuz* [1996] ECtHR App 17371/90, para 42.

3 Systematising standards of judicial review over non-citizens' rights

Before addressing how the case law on recognition of social rights for non-citizens impacts theories of cosmopolitanism, it is appropriate to systematise the standards of judicial review employed by courts at both the national and the supranational level. Indeed, legal argumentation theory examines courts' reasoning from the perspective of the techniques employed in order to organise and explain the grounds for a given decision. Using the theory of legal argumentation to explore the case law concerning non-citizens' rights helps to reveal the degree of cosmopolitanism the courts are concretely willing to express. The choice of standards of judicial review depends on either the court's identification of the rights involved in the decision, or on its assessment of the kind of violation under scrutiny. In either case, applying standards inevitably has consequences, or at least theoretical implications, for rights protection. This holds true regardless of the court's mindfulness in the choice of standards, which can be consciously chosen by judges before a decision is taken, or applied as a matter of fact without the willingness to articulate a specific standard of judicial review.

Applying this method to the aforementioned case law, it is possible to maintain that domestic constitutional and supreme courts adopt two different standards, which in turn correspond to the nature of the right under scrutiny. Strict scrutiny is embraced in cases involving the recognition of those social rights that are held to be fundamental. The same standard applies when the decision concerns the essential core of a social right, which is deemed to be essential to the fulfilment of a separate fundamental right.⁶⁸ In other words, this diverging treatment concerning fundamental rights easily results in laws being struck down for violating the principle of equality.

The standard of reasonableness, which can also be defined as a quasi-intermediate scrutiny according to the classical American categorisation, is largely employed in any other case (that is non-fundamental rights cases). The main consequence is that a law simply showing reasonable grounds, such as the financial restrictions imposed on public expenditure choices by the amount of available resources, will pass judicial scrutiny on the basis of a rational and objective justification. This is the judicial trend, for example, in German and French constitutional case law. The result of these two different levels of judicial scrutiny is that the nature of the right involved often controls the outcome of the case, be-

⁶⁸ *Limbuela* [2005] UKHL 66.

cause the nature of the right determines the standard applied by the courts to resolve the controversy. Fundamental rights or entitlements accomplishing fundamental rights require strict scrutiny, while non-fundamental rights are examined under the reasonableness test.

The ECtHR's approach diverges in both the presuppositions surrounding the judgement and the choice of the standard of scrutiny. Indeed the ECtHR does not distinguish between fundamental and non-fundamental rights for the purpose of performing scrutiny. Even though the distinction is occasionally considered in the ECtHR's case law, it does not affect the kind of scrutiny performed when a violation of Article 14 has been invoked.⁶⁹ Consequently, the right involved in the case has no controlling influence *per se* on the standard of scrutiny that judges decide to apply. On the contrary, it is the classification between citizens and non-citizens (that is, the kind of violation of the rights involved) that leads to the identification of the standard. The ECtHR invariably applies strict scrutiny when laws differentiate treatment on the basis of nationality.⁷⁰ As a consequence, as the aforementioned case law shows, the economic crisis cannot be used as an argument to justify the preference given to nationals over foreigners.

4 Pragmatic versus idealist: how standards of judicial review impact theories of cosmopolitanism

Analysing the case law on the recognition of rights for non-citizens according to the above-mentioned conceptual grid is helpful in understanding the theoretical implications of courts' decisions. In order to answer to the second research question (that is, how models of judicial scrutiny impact the theoretical framework of cosmopolitanism), standards of scrutiny must be analysed from a different perspective. It is not a matter of how courts construe their legal analysis. It is rather a

⁶⁹ See *F v UK* [2004] ECtHR App 17341/03, para 13, in which the Court distinguishes between guarantees of fundamental importance and qualified civil and political rights, arguing that a contracting state 'for pragmatic reasons could not be expected to guarantee such qualified rights for individuals outside the umbrella of the Convention'. See also *N v UK* [2008] ECtHR App 26565/05.

⁷⁰ Indeed, some authors argue that the ECtHR uses a due process model of scrutiny to the extent in which it does not call into question whether a social right should be in principle recognised by states. The Court simply states that when national legislators decide to establish that right, it should be guaranteed on an equal basis: on this point see Hare, above n 53. On the contrary, Dembour, above n 61, 691, maintains that the Court performed a strict scrutiny analysis.

matter of linking the legal analysis, synthesised in the *formulae* of standards, to the consequences it has on the relationship between individuals and legal systems.

From this point of view, as was briefly touched on in the introduction, it is possible to retrace two distinctive views of cosmopolitanism or, to be more precise, the kind of cosmopolitanism that contemporary European legal systems have realised. The first can be named *idealist* (or *pure*) *cosmopolitanism* and corresponds to the ECtHR's approach, according to which any differentiation between citizens and non-citizens must be scrutinised under Article 14 and is presumed to be suspect. Diverging treatment based on nationality lacks a reasonable justification. This line of reasoning supports the idea that even rights inextricably related to resource allocation choices must be recognised irrespective of the tie of membership in a political community. This thesis is idealistic in that it assumes the tie of citizenship is substantially irrelevant as far as entitlement to rights is concerned. To put it a different way, this approach assumes that allocation choices should address the polity in a broad sense; that is, they should consider the political community as encompassing both citizens and non-citizens. This approach has received a limited follow-up in the case law of domestic courts, who generally appear reluctant to admit a complete equality between citizens' and non-citizens' status. Some have argued that this form of 'judicial cosmopolitanism', rather than creating a synergic effort with domestic legal orders, yields a backlash because legislators may be tempted not to recognise some entitlements if they are compelled to grant them to everyone.⁷¹

Constitutional courts, indeed, have developed what can be designated as *pragmatic* (or *limited*) *cosmopolitanism*. They consider that there are circumstances in which different treatment for citizens and non-citizens is reasonably justified and is placed within the legislators' assessment. Nevertheless, constitutional courts maintain an untouchable core of guarantees that must be recognised for everyone, irrespective of status. In doing so, courts envisage a 'minimal cosmopolitan citizenship' which demands entitlement to fundamental rights (including those social claims fulfilling fundamental rights).⁷² It may be argued that even if domestic courts do not herald the arrival of a completely cosmopolitan conception

⁷¹ See, for example, the arguments developed by Dembour, above n 61, 695, who seems to believe that the ECtHR's approach did not improve foreigners' status in European domestic legal systems.

⁷² On the issue of the recognition of social rights, see J A King, 'The Justiciability of Resource Allocation' (2007) 17 *MLR* 197, 224, who argues that 'the justiciability of resources allocation is now established under human rights law'. See also W Kaguongo, 'Resource allocation towards socioeconomic rights: lessons from domestic courts' (2012) 13 *HRR* 86.

of rights, they succeed in ensuring a set of guarantees to non-citizens.⁷³ This approach is precisely pragmatic in that, without lingering on a comprehensive theory of cosmopolitanism, it achieves a crucial goal, i.e., the equal treatment of citizens and foreigners, even if only with regard to a limited set of rights. That result is achieved through the use of standards of scrutiny, which helps de-politicise difficult cases such as those dealing with the question of what states owe to those who are not members of their polities.

The two views of cosmopolitanism diverge as the former assumes that equal entitlement to rights is a fundamental principle of justice within any legal order, while the latter acknowledges that there are circumstances in which the choice over entitlement to rights is placed within legislators' (rational) discretion. This conclusion is supported, for example, by the explicit reference to the social cohesion made by the ECtHR in its case law.⁷⁴ According to the European judges, giving preference to nationals over foreigners challenges social cohesion (besides violating the principle of equality). This conceptualisation of the polities—under which non-citizens' claims must be taken into account as much as those arising from citizens—demonstrates indeed how the Court conceives of a cosmopolitan principle of justice that should govern the European legal order.

If one rigorously applies the notion of cosmopolitanism as identified in the introduction, the essential conclusion is that the constitutional courts' approach detaches the theory of rights from cosmopolitanism. Rights thus do not contribute to the creation of a cosmopolitan legal order. Being members of the polity is crucial when it comes to the recognition of rights; strict scrutiny is applied only in limited cases, when fundamental rights are concerned. In all the remaining cases, citizenship is still a reasonable discriminatory criterion.

The diverging theories indicate once again that equal commitment to a theory of human rights does not necessarily have equal implications for cosmopolitanism. The theory of human rights is indeed something more than an authentic theory of cosmopolitanism, as entitlements to rights are only one element for a theory of this kind.

⁷³ K A Appiah, 'Global Citizenship' (2007) 75 *Fordham LR* 2375.

⁷⁴ See the references above n 58.

5 Concluding remarks: the path to a cosmopolitan legal order

Cosmopolitan thought has grown extensively in the last decade, synthesising and elaborating a cultural tradition with ancient roots. One of the driving forces of this improved scholarship's effort has been the creation and development of integrated legal systems (the EU and the ECHR). They have been studied as models of cosmopolitan legal order because of their commitment to the protection of rights on a legal basis other than that provided by citizenship.⁷⁵ In other words, the so-called transnational constitutional legal order has been interpreted as the factual realisation of the ideal *kosmopolis*.⁷⁶

However, the cosmopolitan character of the contemporary state can be more effectively tested by looking at the situation of those individuals without any affiliation, other than residence, with the legal order from which they claim treatment equal to that of citizens. Applying this idea, this article used legal argumentation analysis to synthesise the diverging approaches of the ECtHR and constitutional courts to the recognition of rights for non-citizens, to underline how standards of judicial review impact theories of cosmopolitanism as European courts contribute to its realisation.

The conceptual matrix employed was framed on a two-tier basis: the identification of the grounds upon which different treatment of non-citizens can be justified, and the recognition of cases for which there is no admissible justification for treating citizens and non-citizens differently. Whilst both domestic courts and the ECtHR extensively use strict scrutiny, they attach this model of case examination to different elements. Constitutional courts apply strict scrutiny when fundamental rights are concerned. The ECtHR resorts to this most severe standard of judicial review when deciding cases concerning discrimination between citizens and non-citizens, irrespective of the nature of the right involved in the decision.

The first model of judicial review for non-citizens' rights expresses a pragmatic (or limited) cosmopolitanism that renounces the realisation of complete equality, affording a limited equal protection. Contrastingly, the second model conveys an idealist (or pure) cosmopolitanism that presumes nationality to be an illegitimate criterion in the selection of rights holders.

⁷⁵ See Glenn, above n 10, 250.

⁷⁶ See E Stein, 'Lawyers, judges, and the making of a transnational Constitution' (1981) 75 *AJIL* 1; Friedrich, above n 15, 224.

In any case, in contemporary Europe, cosmopolitanism is interpreted as a theory that solves the tension between globalisation and the localism of citizen status (with its bundle of rights), without completely superseding the idea of national citizenship. Of course these judicial solutions depend on a multi-level legal order that in some circumstances compensates for the unsatisfactory protection of rights afforded at the domestic level. The ECtHR has indeed afforded protection to foreigners residing in ECHR Member States when constitutional courts failed to do the same.

Ultimately, the progressive construction of a cosmopolitan legal system rests upon the opposing drives of national and supranational courts. The ability to coordinate approaches and the progressive harmonisation of standards of judicial review are crucial elements to forming a *de facto* cosmopolitan transnational polity.⁷⁷ At the same time, the cosmopolitan attitude of European courts poses a general test of their ability (and willingness) to reach this final outcome.

⁷⁷ Ibid, 78.