IMISCOE Research Series

Rainer Bauböck *Editor*

Debating European Citizenship

IMISCOE

Springer Open

IMISCOE Research Series

This series is the official book series of IMISCOE, the largest network of excellence on migration and diversity in the world. It comprises publications which present empirical and theoretical research on different aspects of international migration. The authors are all specialists, and the publications a rich source of information for researchers and others involved in international migration studies.

The series is published under the editorial supervision of the IMISCOE Editorial Committee which includes leading scholars from all over Europe. The series, which contains more than eighty titles already, is internationally peer reviewed which ensures that the book published in this series continue to present excellent academic standards and scholarly quality. Most of the books are available open access.

For information on how to submit a book proposal, please visit: http://www.imiscoe.org/publications/how-to-submit-a-book-proposal.

More information about this series at http://www.springer.com/series/13502

Rainer Bauböck
Editor

Debating European Citizenship

Springer Open

Editor
Rainer Bauböck
European University Institute
San Domenico di Fiesole, Italy

ISSN 2364-4087 ISSN 2364-4095 (electronic)
IMISCOE Research Series
ISBN 978-3-319-89904-6 ISBN 978-3-319-89905-3 (eBook)
https://doi.org/10.1007/978-3-319-89905-3

Library of Congress Control Number: 2018953168

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Acknowledgements

This volume brings together three forums originally published online and as Robert Schuman Centre Working Papers and adds to these an original essay by Jo Shaw. Each of the debates was co-edited by myself with the authors of the lead essays introducing them. The forum 'Should EU Citizens Living in Other Member States Vote There in National Elections?' was kicked off and co-edited by Philippe Cayla and Catriona Seth, the forum 'Freedom of Movement Under Attack: Is It Worth Defending as the Core of EU Citizenship?' by Floris de Witte, and the forum 'Should EU Citizenship Be Duty-Free?' by Maurizio Ferrera. I am very grateful to them for agreeing to this book publication as well as to the altogether 41 authors in this book whose contributions have engaged with the controversial questions we asked them to answer in a spirit of a respectful and frank debate. My most profound thanks go to Jelena Dzankic and Oriane Caligaro who were involved in these debates at different times as coordinators of the EUDO Citizenship project, as well as to Anna Kyriazi who has provided extremely competent and reliable assistance in editing this book.

Robert Schuman Centre
European University Institute
Fiesole, Italy

Rainer Bauböck

Preface

Are the nationals of EU member states also citizens of the European Union? This is what Art. 20 of the Treaty on the Functioning of the European Union says they are. But what precisely does it mean to be a citizen of a union which some observers still describe as an international organization that just coordinates the interests of its member states across a wider range of policies than most others do?

The present volume addresses this question in an unusual way. There is already a large number of excellent books on the topic that collect standalone chapters from authors presenting different answers.[1] Readers interested in historical, legal and political science perspectives on EU citizenship should consult these volumes. Yet in such publications, scholars rarely speak and behave as citizens are supposed to do – they present their views without engaging with each other in a dialogue on questions that citizens are concerned about. The present book is different; it is a collection of debates, each of which asks a question that is at the core of the present EU citizenship dilemmas.

In a political debate, speakers are expected to listen to each other and to address each other. The three debates in this book are the results of online debates that have been actually structured like a conversation. The first contribution in each debate is a kick-off that defends a specific answer to the lead question. The subsequent contributions were not all commissioned at the same time but over several months and each author was asked to respond not only to the question and the kick-off text, but to take into account or criticise also the views of the previous responses without repeating points already made by others. Contributions are short, written in a non-technical

[1] See e.g. Bellamy, R. and Warleigh, A. (eds.) (2001), *Citizenship and governance in the European Union*. London, New York: Continuum; Bellamy, R., Castiglione, D. and Santoro, E. (eds.) (2004), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation-States*. New York: Palgrave Macmillan; Isin, E. F. and Saward, M. (eds.) (2013), *Enacting European Citizenship*. Cambridge: Cambridge University Press; Kochenov, D. (ed.) (2017), *EU Citizenship and Federalism: The Role of Rights*. Cambridge: Cambridge University Press; Thym, D. (ed.) (2017), *Questioning EU citizenship: judges and the limits of free movement and solidarity in the EU*. Oxford; Portland, Oregon: Hart Publishing.

language and addressed to a broader audience than the respective discipline of the author. We have also deliberately invited non-academic authors whose practical knowledge or civic engagement provides important insights. This format should be very useful for teaching purposes at undergraduate as well as graduate level. I sincerely hope that the book will also be read by practitioners and those often insultingly called 'ordinary citizens' who are interested in the future of Europe.

In the past, organising such a conversation across a wide range of countries and academic disciplines would have been extraordinarily difficult. Today, this can be done on the Internet. All three debates in this book have been originally published online in the Forum section of the EUDO CITIZENSHIP observatory, which has recently expanded into GLOBALCIT, the Global Citizenship Observatory. The book also meets another important requirement for debates among citizens: they must be public and freely accessible to all. This was of course true for the original online publication of the three debates. Yet it is still exceptional for academic books to be freely accessible under a 'golden open access' licence. I am therefore very grateful to the IMISCOE editorial committee and to Springer for accepting to publish the book in their open access series.

There is one way in which the debates in this book differ from the ideal of political deliberation among citizens in the public sphere. These debates do not aim to reach conclusions in the sense of a political decision taken by majority vote or a consensus achieved through the force of the better argument. They leave the initial question open. One reason is that it is really hard to make academic scholars change their views. The other and more important reason is that it is not for them to decide these questions. The aim of these debates is thus to inform readers about a wide range of views presented by authors who respectfully disagree with each other even after having made strong efforts to engage with each other. What the reader gets from this is, hopefully, different and also less time consuming than what she can learn from ploughing through thick academic volumes.

The three debates collected in this volume concern all three dimensions of citizenship that T. H. Marshall identified in his seminal essay of 1949: the civil, political and social aspects of EU citizenship. The first debate was held in 2012, before the 2014 European Parliament elections and should be picked up again before the forthcoming ones in May 2019. It raises the question of why mobile EU citizens can vote in local and EP elections in their host EU member state, but not in national elections. For some authors this is a serious democratic deficit, for others it illustrates that the EU is not a federation but a union of states.

The second debate addresses the civil right of free movement, which is at the core of EU citizenship. The context for this debate was the Brexit referendum, in which EU free movement became the most controversial policy issue and before which the UK government had negotiated concessions that included new powers to restrict temporarily access of EU citizens to certain welfare benefits. The question posed to the authors is whether free movement should still be defended and expanded because it enhances freedom from state interference, or whether this dimension has been overstretched through decisions by the Court of Justice of the European Union at the expense of the political will of majorities in the member states and of national welfare regimes.

The third and most recent debate continues in many ways the second one. It starts from the question of why EU citizenship does not include any citizen duties, although the Treaties speak in a general way about the rights and duties of the citizens of the Union. This puzzle leads very quickly to a general controversy about the 'weight' of EU citizenship and its main beneficiaries. Several authors regard EU citizenship as a progressive force precisely because it protects individual liberties beyond the nation-state without imposing legal duties or thicker identities on them, while others advocate a stronger social component that would also address cleavages resulting from rising social inequality and the populist backlash among the less mobile Europeans. This debate in particular discusses also practical policy proposals for EU duties and social rights.

Although the debates were held at different periods over the last six years, none of them has become irrelevant or outdated. There are, however, important aspects of EU citizenship that are not covered in them. These concern in particular the impact of EU citizenship on the citizenship of member states from which it is derived and the – as yet unknown – solutions to the loss of EU citizenship rights enjoyed by UK citizens in Europe and of EU citizen rights in the UK after Brexit. The three debates are therefore complemented by an introductory essay on these topics specifically written for this volume by Jo Shaw, a prominent EU lawyer and co-director of the GLOBALCIT observatory.

This book has a companion volume on the 'Transformations of National Citizenship' that will be published in the same series later this year and that collects four more GLOBALCIT forum debates on current challenges for citizenship in democratic states.

Florence Rainer Bauböck
February 2018

Contents

About the editor

Rainer Bauböck is currently a part time professor at the Robert Schuman Centre of the European University Institute. He held the chair in social and political theory at the Department of Political and Social Sciences of the EUI from 2007 to 2018 and was Dean of Graduate Studies from 2012 to 2016. Rainer Bauböck is also a corresponding member of the Austrian Academy of Sciences and chair of its Commission on Migration and Integration Research.

His research interests are in normative political theory and comparative research on democratic citizenship, migration, European integration, nationalism and minority rights. Together with Jo Shaw (University of Edinburgh) and Maarten Vink (University of Maastricht), he coordinates GLOBALCIT, an online observatory on citizenship and voting rights.

His most recent book publications are: Democratic Inclusion. Rainer Bauböck in Dialogue, Manchester University Press: Manchester, 2017; The Oxford Handbook of Citizenship (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, Maarten Vink, eds.). Oxford: Oxford University Press, 2017; Transnational Citizenship and Migration (Rainer Bauböck, ed., London: Routledge, 2017).

Contributors

Roxana Barbulescu University Academic Fellow in New Migrations in UK and Europe, School of Sociology and Social Policy, University of Leeds
Richard Bellamy Professor of Political Science and Director of the Max Weber Programme, European University Institute
Alain Brun Former officer of the European Commission
Philippe Cayla Européens sans frontières, Paris, France
Sue Collard Senior Lecturer in French Politics and Contemporary European Studies, University of Sussex Department of Politics, Sussex European Institute, Sussex Centre for Migration Research
Floris de Witte Associate Professor, Department of Law, London School of Economics and Political Science
Andrew Duff President of the Spinelli Group and Visiting Fellow at the European Policy Centre
Maurizio Ferrera Professor of Political Science, Department of Social and Political Sciences, University of Milan
Sarah Fine Senior Lecturer in Philosophy, Department of Philosophy, King's College London
Kees Groenendijk Emeritus Professor of Sociology of Law, founder and Research Fellow of the Centre for Migration Law, Radboud University
Anton Hemerijck Professor of Political Science and Sociology, Director of Graduate Studies, Department of Political and Social Sciences, European University Institute
Julia Hermann Post-doctoral research fellow, Department of Philosophy and Religious Studies, Utrecht University
Christian Joppke Professor of General Sociology, Institute of Sociology, University of Bern
Dimitry Kochenov Chair in EU Constitutional Law, Faculty of Law, University of Groningen
Saara Koikkalainen University researcher, University of Lapland
Dora Kostakopoulou Professor of European Union Law, European Integration and Public Policy, School of Law, University of Warwick
Theresa Kuhn Associate Professor of Political Science, Department of Political Science, University of Amsterdam
Ilaria Madama Associate Professor of Political Science, Department of Social and Political Sciences, University of Milan
Glyn Morgan Associate Professor of Political Science, Maxwell School, Syracuse University and Collegio Alberto

Päivi Johanna Neuvonen Academy of Finland Postdoctoral Researcher, Faculty of Law, University of Helsinki
Kieran Oberman Lecturer in Politics, School of Social and Political Science, Edinburgh University
David Owen Professor of Social and Political Philosophy, Division of Politics and International Relations, University of Southampton
Vesco Paskalev Lecturer, School of Law and Politics, University of Hull
Ángel Rodríguez Full Professor of Constitutional Law, Facultad de Derecho, University of Málaga
Martin Ruhs Chair in Migration Studies and Deputy Director of the Migration Policy Centre, European University Institute
Andrea Sangiovanni Professor of Philosophy, Department of Philosophy, King's College London
Julija Sardelić Marie Skłodowska Curie Postdoctoral Fellow, Leuven International and European Studies, University of Leuven
Susanne K. Schmidt Professor of Political Science, Bremen International Graduate School of Social Sciences, University of Bremen
Martin Seeleib-Kaiser Professor of Comparative Public Policy, Institute of Political Science, Eberhard Karls Universität Tübingen
Catriona Seth Marshal Foch Professor of French Literature, All Souls College, University of Oxford
Sandra Seubert Professor of Political Theory, Department of Political Science, Goethe University Frankfurt
Jo Shaw Salvesen Chair of European Institutions, School of Law, University of Edinburgh
Dorte Sindbjerg Martinsen Professor of Political Science, Department of Political Science, University of Copenhagen
Hannes Swoboda Former member of the European Parliament (Austria) and President of the Progressive Alliance of Socialists and Democrats in the European Parliament
Daniel Thym Jean-Monnet-Chair of European, International and Public Law and managing Director of the Research Centre Immigration and Asylum Law, University of Konstanz
Martijn van den Brink Postdoctoral researcher, Max Planck Institute for the Study of Religious and Ethnic Diversity
Philippe Van Parijs Hoover Chair of Economic and Social Ethics, Centre for Ethics, Social and Political Philosophy, University of Louvain
Frank Vandenbroucke University Professor, University of Amsterdam
Tony Venables Founder of the European Citizen Action Service
Martin Wilhelm Director of Citizens For Europe
Reuven (Ruvi) Ziegler Associate Professor in International Refugee Law, School of Law, University of Reading

EU citizenship: Still a Fundamental Status?

Jo Shaw

Introduction

Modern history is littered with the corpses of failed federations and busted unions. These processes of breakup have had significant and often damaging citizenship consequences on many occasions and in many places. Examples can be found in the dissolution of Yugoslavia and of the Soviet Union, as well as in the dismantling of the various European empires and the creation of numerous new (and generally arbitrarily defined) states, often as part of the decolonisation process.[1] Breakup may, of course, eventually be the fate of the European Union. Or it may be the opposite – the transmutation of the EU into something more like a federal state, through an intensified constitutionalisation process.

This essay explores some of the pressures that are being placed on the concept of citizenship of the Union at the present time, highlighting how these stem both from exogenous pressures (assuming Brexit can be thought to be such) and endogenous forces such as Eurosceptic voting publics and a resistance to showing solidarity across the member states in an era of austerity.

EU citizenship is paradoxical in nature: formally constitutionalised in the Union's treaty framework, yet dependent upon national citizenship to provide the gateway to membership. Its fate remains intimately tied to the broader question of the trajectory of European integration, as well as to changing perspectives about the character of citizenship as a membership status. To highlight that paradoxical character, I offer below some brief reflections on the autonomy of national citizenship laws, on the consequences of Brexit, and on how choices and actions by individuals and groups may

[1] For an overview of different 'imperial' repertoires see Gammerl, B. (2017), *Subject, citizens, and others: Administering Ethnic Heterogeneity in the British and Habsburg Empires, 1867–1918.* New York/Oxford: Berghahn Books.

This essay was written whilst I was holding a EURIAS Fellowship at the Helsinki Collegium for Advanced Studies, and the financial support of the EURIAS Programme and HCAS is acknowledged with thanks. I am very grateful to Rainer Bauböck for comments on a draft.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_1

impact upon the future of EU citizenship. This discussion is prefaced by an initial exploration of the challenges and complexities of EU citizenship and of the relationship between citizenship and concepts of integration and Europeanisation.

Challenges and complexities of EU citizenship

The current difficulties faced by the European Union are many and varied. They include the pressures caused by the UK's Brexit vote, the effects of increasingly illiberal, populist and anti-constitutionalist regimes in Hungary and Poland, the lingering impacts of the financial crisis, among them austerity and challenges to the health of the Eurozone, and the continued aftermath of the migration/refugee crisis. These all raise questions about the vitality of citizenship of the European Union as a political, socio-economic and constitutional construct of a supranational kind, and many of them are debated in different ways by the various multi-author 'forums' presented in this book. Whether these difficulties do or do not pose an existential threat to the EU and thus to EU citizenship lies beyond the scope of this essay. Even so, contemplating the possibility of disintegration and/or de-Europeanisation is central to the task of reinterpreting EU citizenship, 25 years after it formally entered into force through the Treaty of Maastricht in 1993. This is because of the centrality and overwhelming importance of the Brexit challenge (both for the individuals directly affected and also for the historical trajectory of the European Union), to which we will return later in this short reflection on some of the 'constitutional' characteristics of EU citizenship.

It is important to remark, however, that at the current stage of the European integration, no person deprived of their EU citizenship through dissolution of the Union or departure of a member state would normally be at risk of losing their *national* citizenship and their anchor within the system of states, their 'right to have rights'.[2] Although the functions and forms of citizenship are dispersed across the multi-level structure of the EU polity and EU citizenship is established constitutionally in Article 9 TEU and Articles 20 and 21 TFEU, at the present time states retain a monopoly over determining who their citizens are, and would continue to do so were the EU to dissolve in the future.

At whatever point we choose to 'stop time' and write a historical reinterpretation of the EU's experiment with a form of supranational citizenship, it will always be a complex and contested story. It is important to resist the

[2] Arendt, H. (1967), *The Origins of Totalitarianism*. London: George Allen & Unwin, 296.

temptation to take a 'frozen in time' approach to explicating this story. On the contrary, we should remind ourselves, by reference to classic texts such as that of TH Marshall,[3] that the location of citizenship forms and functions has always been a mobile process, morphing at different points in history between the local (e.g. the city), the regional, the national and the supranational. In fact, we can use the concept of citizenship across all of these levels, wherever there are institutions of political authority.

The idea of the link between a community of citizens and a political authority was not really the starting point for EU citizenship. The European Union began its journey towards recognising a uniform legal status for individuals at the supranational level not by acknowledging and supporting the political agency of individuals as citizens, but by giving them rights and freedoms. Specifically, it was through the civil and socio-economic rights and freedoms that are inherent in the idea of a single market that a notion of the individual having a stake in the integration project originally emerged. Much of the power of these rights and freedoms to effect a transformation of individual rights lay in the recognition of individuals as autonomous legal actors within the European legal order by the European Court of Justice (CJEU). This was an important conclusion, which the Court derived from a purposive reading of the founding treaties. In addition, some further contributions towards the development of the rights of EU market actors were also made by the EU legislature, especially when it came to giving effect to the principles of non-discrimination on grounds of nationality and mutual recognition. Most of this work predated the formal establishment of the legal concept of the Union citizen.

Only later was a modest edifice of political rights constructed (once the Treaty of Maastricht had entered into force and the constitutional provisions we recognise today had been introduced) and it was even later still that we have come to see a closer legal and constitutional intertwining of the legal statuses of EU citizenship and national citizenship, again largely as a result of the interventions of the CJEU. We will come back to this dimension of EU citizenship shortly. What has been most noticeable about this process has been that the idea of the 'civil' (a 'Europe of law') has underpinned and accompanied every stage of the putative building of supranational citizenship. This looks, at first blush, like a wholly top-down construction of

[3] Marshall, T.H. (1950), *Citizenship and Social Class*. Cambridge: Cambridge University Press.

citizenship that does little to illuminate the broader political quest to identify 'who are the Europeans?'.[4]

Another way of highlighting the idiosyncracies of EU citizenship involves looking at the classic elements commonly associated with modelling citizenship as a form of full membership (e.g. status, rights, identity, duties). It is only in the sphere of rights that EU citizenship seems well developed. As to the issue of identity, the sense of 'Europeanness' that exists across the collectivity of citizens is relatively thin in nature, again focused on rights, and it is hardly comparable with the form of societal glue that gives community cohesion to the national (and subnational) polities on which the EU is built.[5] Moreover, the status itself remains derivative from national citizenship – only citizens of the member states are citizens of the Union.

And yet despite all of this negativity, there is also a more optimistic reading that suggests that EU citizenship could be evolving into a different sort of concept than was perhaps anticipated when the member states originally set up the legal framework, mainly as an additional bonus for market participants. Scholars laud EU citizenship as an emerging postnational concept that escapes 'narrow' nationalist constraints of state-based citizenship regimes.[6] The comparison with other forms of supranational citizenship, such as Commonwealth citizenship, makes EU citizenship look like a relative success story. Commonwealth citizenship largely withered on the vine because of the evisceration of most of the rights attached to it (e.g. right of abode in the UK), or the non-adoption of the concept by Commonwealth countries. By contrast, we have a rich, if sometimes contradictory, case law of the Court of Justice on the status of EU citizens resident in other member states that ensures that in many spheres of life EU citizens have to be recognised as holding rights under the precise same conditions as nationals of the host state.

Furthermore, there is now a discussion, as evidenced by section 3 of this book on citizenship duties and social solidarity, as to whether this dimension of EU citizenship should be filled out in due course, in ways that would make EU citizenship relevant not only to mobile citizens, but also to those

---

4 See generally Shaw, J. (2011), 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism', in P. Craig & G. de Búrca (eds,), *The Evolution of EU Law*, 2nd Edition, 575–609. Oxford: OUP.

5 Bellamy, R. (2008), 'Evaluating Union citizenship: belonging, rights and participation within the EU', *Citizenship Studies* 12 (6): 597–611.

6 Kostakopoulou, D. (2018), '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens', *JCMS: Journal of Common Market Studies*, doi: https://doi.org/10.1111/jcms.12683.

who remain in their member state of origin. At that point, EU citizenship could be said to be moving much closer to being a recognisable variant, at the supranational level, of the classic national model of membership as a status and as a reference point around which citizens can cohere, even if it is not (yet) recognised in international law as a form of 'nationality'. In order to achieve this transformation it would, however, have to be no longer just a 'citizenship of mobiles'. Only then could it also become the vehicle for a wider sense of citizen mobilisation.

Europeanisation and de-Europeanisation in EU citizenship

It will already be evident that many of the concepts I have tossed around in these short paragraphs are contested and hardly have stable meanings. This complicates considerably the task of reinterpreting EU citizenship, whether constitutionally or politically. The concept of EU citizenship needs to be understood in the context of both citizenship theory and integration theory. Our interpretation of the distinctive features of EU citizenship requires a combination of the analytical frames offered by both citizenship studies and European Union studies. It is only by this means that we can construct a historically and contextually sensitive interpretation of this evolving and contested concept. To put it another way, EU citizenship is a product not only of a hesitant process of polity-building beyond the state but also of a move away from a predominantly state-centred conception of citizenship. It relies equally on rethinking ideas about 'integration' and on rethinking citizenship as a relational concept and not a fixed structure,[7] combining both plural and multi-level institutional elements and also the bottom-up practices of citizens as legal and political actors in a non-state context. Rethinking integration in turn requires acknowledgement that the story of the EU is not one of linear progress towards 'an ever closer union', even though it is quite common still for EU citizenship to be lauded as somehow embodying this historic mission. The better view, however, is to recognise that there is no unidirectional process of Europeanisation in which the elements and constraints generated by EU citizenship are simply downloaded onto national citizenship regimes, with alterations to policies and institutions made accordingly.[8] In fact, uncovering and analysing the narrative of EU citizen-

[7] See Wiesner, C. et al. (2018), 'Introduction: Shaping Citizenship as a Political Concept', in C. Wiesner et al. (eds.), *Shaping Citizenship*, 1–17 (10). New York: Routledge.

[8] For an extended analysis in these terms see Thym, D. (ed.) (2017), *Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU*. Oxford: Hart Publishing.

ship reveals that there is no such story of linear progress, but rather a set of complex and often countervailing narratives of Europeanisation and de-Europeanisation, which together combine to make up the full picture.

For the purposes of this essay, we need to think of Europeanisation as more than just the principle that membership of the EU means that member states must comply with EU law and implement legislative measures and new administrative requirements introduced by the EU legislature. It is also a two-way track in which elements of national choice and institutional 'style' find their way into EU-wide measures and approaches to policy-making as well as into its institutional forms, not least through the participation of member states in the legislative process. This is a broader and more sociological concept of Europeanisation than is commonly deployed in political science, and it incorporates also aspects of legal culture as well as formal compliance with EU law. A similar approach is also useful when analysing counter moves of de-Europeanisation. At the collective level, there is the trend towards intergovernmental approaches to become once again the norm, with a resurgence of control by the member states vis-à-vis the Commission or the Court of Justice. At the level of member states it encompasses not just deviations in compliance, but equally the alienation of (some) member states from the core requirements or principles of integration, through practices such as flexibility and differentiated integration. Finally, it includes also the hitherto unique phenomenon of Brexit, where a member state is negotiating a formal exit from the EU, but also, for the future, a revised relationship perhaps akin to association or membership of the EEA via a 'Norway' or EFTA model, or perhaps much looser in character. Under the former model, some of the underpinning principles of EU citizenship, such as free movement, may continue to apply, which is one reason why it is presently very controversial in the UK as a possible post-Brexit scenario.

We can now take a closer look at some of the criss-crossing pathways of Europeanisation and de-Europeanisation. What might be seen as opposing trends of 'integration' and 'disintegration' are in fact occurring simultaneously. First we examine the extent and character of the apparently increasing EU law constraints upon the citizenship laws of member states. This raises the question of how autonomous national citizenship laws may be in the future. Second, we explore some of the main 'citizenship consequences' of the Brexit vote and the anticipated departure of the United Kingdom from the EU. The two issues are interrelated in many ways, and not just through a common preoccupation with the question of the autonomy of different levels within the EU's current multilevel citizenship regime. Furthermore,

the reflections below will help to show, amongst other insights, that EU citizenship is not just a matter of institutional choices but also, increasingly, of choices made and routes followed by individuals and groups. It has both a top-down and a bottom-up dimension.

How far does EU citizenship constrain member state sovereignty in matters of nationality law?

The EU has been accused of being 'over-constitutionalised'.[9] That is, that too much in terms of substance and too many constraints on national sovereignty have been packed into its founding treaties, and handed over for authoritative interpretation and application to the CJEU. This has the effect of over-emphasising the role of the judiciary, both at the supranational and the national level (as the starting point for most pathways to the Court of Justice, especially for individual litigants, lies in the national courts, not the EU courts). Some have argued that there is no obvious legitimating factor justifying this function. It just looks like overpowerful and overweaning judges, undermining political constitutionalism.[10] This unnecessarily subverts the role of elected institutions and thus of 'the people' who elect those institutions. Equally, EU legislative measures are often – of necessity – somewhat broad and protean in their drafting, and require frequent judicial reinterpretation even once they have been transposed into the national legal orders. They are also very difficult to amend because of multiple veto points within the system.

The field of EU citizenship is arguably ripe for such an interpretation. EU citizenship, established in Articles 20 and 21 TFEU, has operated as a backstop in cases where the most important secondary legislation, notably the so-called citizens' rights or free movement directive,[11] does not apply. CJEU case law, on issues such as the rights of third country national family members of mobile EU citizens, has proved challenging for national authorities to accept and implement.

Exploring the well-known point that fears about loss of national sovereignty over immigration and about CJEU judicial power have been important factors in the Brexit vote, Susanne Schmidt has shown in some detail how this process has worked in the case of free movement, leaving little

---

9 Grimm, D. (2015), 'The Democratic Costs of Constitutionalisation: The European Case', *European Law Journal* 21 (4): 460–473.

10 See Bellamy, R. (2007), *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press.

11 Directive 2004/38/EC [2004] OJ L158/77.

obvious leeway for national authorities to protect either the interests of the state or societal cohesion.[12] Of course, that sense of an infringement of sovereignty has largely emerged out of a narrow and restrictive interpretation of the idea of free movement as a unilateral track involving non-UK citizens (generally called 'EU migrants', not 'EU citizens') moving *towards* the UK, which has dominated in the Europhobic popular media. The choice to name certain social actions in terms of 'immigration' rather than 'co-citizenship' will always have consequences. Its impact should not be underestimated. It contributed to a strong perception in the UK – against the backdrop of an increasingly rigid immigration policy backed up by harsh enforcement actions against those falling foul of the law – that EU free movers are lucky, undeservedly lucky, migrants, doing better in the UK than UK citizens themselves, not least because the family reunion rules they benefit from are more generous than those applicable to UK citizens under UK law. On that count, they are not seen as sharing a status with UK citizens – i.e. that of EU citizen. And the sense that this status involves a twin track of mobility in both directions as well as the possibility to take common political action, e.g. in relation to European Parliament elections, is lost entirely.

It could be said that national reactions (and the UK is hardly alone in this) to the constitutionalising case law in the sphere of 'citizenship', especially in relation to the status and rights of mobile EU citizens and their families (including third country nationals) resident in other member states, has lain behind the retrenchment of that same case law in recent years. Judges are not immune from political pressures. They read newspapers. The newest case law has become more respectful of the welfare sovereignty of the member states, and has stated clear limits to the dictum that the Court once pronounced, that there should be a 'certain degree of solidarity' amongst the member states when it comes to the question of which set of taxpayers should support which types of economically inactive, or less active, citizens. But while the CJEU has been busy in recent years stating that free movement is not free from limits, this move may have come too late for the UK.

It is therefore perhaps surprising that we can see constitutional constraints on member state sovereignty continuing to accrete in relation to some of the choices that those states can make as regards the application of their domestic citizenship laws and its consequences, especially in the

[12] Schmidt, S. (2017), 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of "Over-Constitutionalisation", in Thym, D. above n.8, at 17–36.

sphere of immigration and family reunion. It is well established that it is a matter for the member states to decide who may acquire their citizenship, thus making the member states the gatekeepers of access to EU citizenship, although from early on the CJEU has made it clear that member states may not refuse to recognise an 'EU citizenship'. In *Micheletti*,[13] for example, Spain could not choose to treat a dual Italian/Argentinian national as simply Argentinian for the purposes of access to the territory or to benefits associated with presence on the territory. This is an early example of the CJEU requiring such national competences around nationality and the recognition of nationality to be exercised, in situations covered by European Union law, in a manner that has due regard to the requirements of EU law.

The 'situations covered by EU law' have included the type of scenario that arose in the case of *Rottmann*,[14] where the applicant had moved from Austria to Germany, and had obtained German citizenship by fraud, failing to inform the authorities that he was the subject of possible criminal proceedings in Austria. The reversal of the naturalisation decision by the state authorities in the case of *Rottmann* fell within the scope of EU law because of that mobility, and thus Germany had to apply its withdrawal rules in a manner that had regard to the impact of the withdrawal on Rottmann's status as an EU citizen and the loss of rights that would flow from this. By becoming German, Rottmann had lost his Austrian citizenship by operation of law. Thus depriving him of German citizenship left him, at least for the time being, stateless. The CJEU made it clear that measures withdrawing citizenship and depriving a person of their EU citizenship needed to be capable of judicial review at the national level and they needed to be proportionate, in order to comply with the requirements of EU law. In drawing this conclusion, the Court referenced the early case of *Grzelczyk* where it stated that citizenship of the Union is intended to be the fundamental status of nationals of the member states.[15] In general, though, the Court indicated that withdrawal of citizenship on grounds of fraud during the process of naturalisation expresses a legitimate state interest. It declined to rule on the question of what, if any, measures Austria should take if Rottmann sought to recover his original nationality.

Rottmann is the only case thus far where a CJEU ruling has intruded directly into the field of citizenship law, although pending before the Court is the *Tjebbes* case on the effects of Dutch rules which deprive persons, by

[13] Case C-369/90 ECLI:EU:C:1992:295.
[14] Case C-135/08 ECLI:EU:C:2010:104.
[15] Case C-184/99 ECLI:EU:C:2001:458, para. 31.

operation of law, of their Dutch citizenship on the grounds of habitual residence outside the EU for more than 10 years, where they have another nationality (whether acquired afterwards or before).[16] It will be interesting to see whether the CJEU recognises habitual residence abroad as a legitimate state interest justifying withdrawal of citizenship and thus loss of EU citizenship, especially since such a withdrawal of citizenship *by operation of law* by definition deprives individuals, including children, of the possibility of individual (judicial) review of their cases. This case is especially interesting because after Brexit the UK is set to become be a third country *vis-à-vis* the EU. Thus EU citizenship will presumably not offer the counterbalance to the lack of recognition of dual nationality under Netherlands law, which currently reduces the options available to migrant Dutch citizens.

This case should be seen, however, alongside interesting political developments. After the Brexit vote, the Prime Minister of the Netherlands appeared to double down on his country's resistance to dual citizenship, despite pressure from Dutch citizens resident in the UK.[17] However, perhaps as a harbinger of further changes to come in other member states in order to be responsive to the citizenship consequences of Brexit, the new coalition agreement reached in October 2017 as the basis for the creation of the new government adopted a more liberal approach to dual citizenship. This had been the existing party policy of just one of the four coalition partners (the D66 Liberal Democrats party). It offers the prospect of legal reform in order to provide assurances to Dutch citizens resident in the UK that they will be able to keep their Netherlands citizenship after naturalising in the UK.[18]

---

16 Case C-221/17. For a brief commentary see de Haart, B. and Mantu, S. (2017), 'Loss of Dutch nationality ex lege: EU law, gender and multiple nationality', *GlobalCIT blog*, http://globalcit.eu/loss-of-dutch-nationality-ex-lege-eu-law-gender-and-multiple-nationality/.

17 'Dutch nationals taking UK citizenship "will lose Netherlands passports"', *The Guardian*, 17 July 2017, available at https://www.theguardian.com/politics/2017/jul/17/dutch-nationals-brexit-uk-citizenship-lose-netherlands-passports-mark-rutte; for details on loss of citizenship by acquisition of foreign citizenship, see GlobalCIT Citizenship Modes of Loss database, http://globalcit.eu/loss-of-citizenship/.

18 See 'Brexit: Dutch nationals living in Britain will be allowed dual citizenship', *The Guardian*, 10 October 2017, available at https://www.theguardian.com/world/2017/oct/10/dutch-nationals-living-britain-allowed-dual-citizenship-brexit. The details of how this might work are not as yet known. Details of the earlier D66 proposal, which cited research showing that the Netherlands is now an outlier in the matter of dual citizenship in Europe can be found here: http://fasos.maastrichtuniversity.nl/weekly/macimide-dataset-cited-in-proposed-amendment-of-dutch-citizenship-law/.

Finally, the mantra of EU citizenship's fundamental importance for nationals of the member states has also been invoked in order to justify restrictions on national rules on the assignation or recognition of names,[19] in the context of civil status laws,[20] and certain national rules restricting the right to vote in European Parliament elections.[21] These cases buttress the argument that EU citizenship is emerging as an autonomous constitutional status for nationals of the member states.

In a small number of instances, the CJEU has defended a territorial principle in relation to the enjoyment of EU citizenship, finding in a series of cases from *Ruiz Zambrano*[22] onwards that where a minor EU citizen would be forced to leave the territory of the Union if one or more of his or her third country national parents with direct caring responsibilities were to be deported from a member state (thus depriving the EU citizen of the enjoyment of his or her citizenship rights), then the parent(s) will enjoy derived rights of residence stemming from Articles 20 and 21 TFEU. Here, the constitutional effects of EU law are largely felt in the sphere of national immigration law, restricting decision-making in respect of third country nationals by reference to the status of the EU citizen dependent child.[23] The possibility of protection for third country nationals stems in this case from the effects of citizenship laws conferring nationality *at birth*. The principle can apply even if only one of the parents is a third country national. The key question is whether the EU citizen child has a primary relationship of care with the parent at threat of losing their residence.

Acquisition of a new EU nationality *after birth* (e.g. through naturalisation) has also become an issue, provided that the person naturalising still retains her or his original (EU) nationality. The CJEU concluded in the 2017 *Lounes* case[24] that an EU citizen who has made use of her free movement rights and naturalises on the basis of residence and integration within the

---

19 Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539.

20 See Pataut, E. (2016), 'A Family Status for the European Citizen?', in Azoulai, L. et al. (eds.), *Constructing the Person in EU Law Rights, Roles, Identities*, 311–322. Oxford: Hart Publishing.

21 Case C-650/13 *Delvigne* ECLI:EU:C:2015:648.

22 Case C-34/09 ECLI:EU:C:2011:124.

23 For a recent analysis, see Peers, S. (2017), 'Think of the children: the ECJ clarifies the status of non-EU parents of EU citizen children living in their own Member State', *EU Law Analysis Blog*, 10 May 2017, available at http://eulawanalysis.blogspot.com/2017/05/think-of-children-ecj-clarifies-status.html.

24 Case C-165/16 ECLI:EU:C:2017:862.

host member state will no longer benefit from Directive 2004/38 (and thus no longer has the family reunion rights conferred under the Directive on mobile EU citizens). However, she will benefit still from her status as an EU citizen under Articles 20 and 21 TFEU. This means that the host state must grant her rights to family reunion that are no more restrictive than those laid down in the Directive. What makes this controversial is that the EU citizen in these circumstances benefits from EU law measures on family reunion that are notably less restrictive than the national rules applicable in most member states for citizens.[25]

The lack of symmetry in the dual nationality rules applied by the member states across the EU means that this approach, while superficially attractive in terms of special protection of the interests of those who go so far as to naturalise in the host state, has an unhelpful aura of arbitrariness about its scope of application. For example, it would seem that if the *Lounes* case, involving a Spanish woman acquiring UK citizenship and keeping her Spanish citizenship, and benefiting from family reunion with her Algerian partner, were reversed, the position would not be the same. Suppose that a British woman resident in Spain were to acquire Spanish citizenship by naturalisation. The theoretically stricter requirements in relation to dual citizenship in Spain would mean that she would not be able to continue benefiting from her UK citizenship under Articles 20 and 21 TFEU because, at least as far as the Spanish authorities would be concerned, she would have renounced that nationality.

Can EU citizenship be retained after Brexit?

The developments in relation to the constitutional constraints generated by EU citizenship may prove to be of central importance when it comes to figuring out the effects of Brexit on EU citizenship (and indeed of EU citizenship on Brexit). The orthodox international law-based position would be as follows: once the UK leaves the EU, the Treaties and the various rights and obligations applicable under them no longer apply. Absent a consensual arrangement under Article 50 TEU in the exit negotiations, the treatment of EU27 citizens resident in the UK and UK citizens resident in the EU27 reverts to being a matter for national immigration law subject only to certain international human rights obligations. Each member of these two groups has to seek stable legal residence from their host state. At most, those in this situation could benefit from residual protection of their family life interests

[25] See Peers, S. (2017), 'Dual citizens and EU citizenship: clarification from the ECJ', *EU Law Analysis Blog*, 15 November 2017, available at http://eulawanalysis.blogspot.com/2017/11/dual-citizens-and-eu-citizenship.html.

under the European Convention on Human Rights[26] or perhaps – where EU immigration law applies in the EU27 – protection under Directive 2003/109, which harmonises rights of long term resident third country nationals.[27] It is unsurprising that the EU has made the situation of these groups of EU citizens, who have previously relied upon their free movement rights, a priority within the Article 50 negotiations, and it can broadly be assumed that if there is an Article 50 withdrawal agreement then most of their rights will be protected under its provisions. This will not be just like benefiting from EU citizenship, but such a legal measure will surely, wherever it applies, institute a new category of relatively privileged alien, although there are bound to be plenty of cases of uncertainty that will generate litigation that will end up before the CJEU, or some specially constituted judicial institution.

This outcome marks the resurgence of the fundamentals of national immigration law over the postnational promise of EU citizenship, and the same could be said of the alternative, which is that the former beneficiaries of EU citizenship rights should seek naturalisation in the host state. According to Dora Kostakopoulou, this would 'lead to the absorption of the status of EU citizenship by national citizenship.'[28] In any event, as is well known, naturalisation will not provide the answer in all cases, because of uneven member state policies on dual citizenship, not to mention other issues such as naturalisation tests and costs. That has not stopped many UK citizens (whether static or mobile) from exploring how they might access a member state nationality that would preserve their EU citizenship rights, or indeed many EU27 citizens from naturalising in the UK. Gareth Davies has argued that *Lounes* was decided by the CJEU with one eye on Brexit, but he is hardly complimentary about the nature of the CJEU's reasoning.[29] But exploration of citizenship options represents just one of the many ways in which individuals are reacting to the difficult choices that Brexit is forcing on them.

Other pathways followed by those objecting on either personal or political grounds to the UK leaving the EU (and the circumstances in which it is doing

---

[26] *Kuric and Others* v *Slovenia*, No 26828/06, [2013] 56 EHRR 20.

[27] Directive 2003/109 on the status of third country nationals who are long term residents OJ 2003 L16/44.

[28] See Kostakopoulou above n.6, 7.

[29] Davies, G. (2018), 'The State of Play on Citizens' Rights and Brexit', *European Law Blog*, 6 February 2018, http://europeanlawblog.eu/2018/02/06/the-state-of-play-on-citizens-rights-and-brexit/ and Davies, G. (2018), '*Lounes*, Naturalisation and Brexit', *European Law Blog*, 5 March 2018, available at http://europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit/.

so) include increased political activism, via well-established actors such as the European Citizens' Action Service, newly formed NGOs such the 3Million (EU27 in UK) and British in Europe, or repurposed pro-EU NGOs such as New Europeans or European Alternatives which have been given a new impetus by the urgency of the issues raised by Brexit. Brexit has given rise to unprecedented civic mobilisation around demands for the protection of acquired rights, including several European Citizens' Initiatives registered by the European Commission.[30] Some have raised the possibility of EU citizenship becoming a freestanding status that can be acceded to other than through the nationality of the member states, with UK citizens being offered the possibility of 'associate citizenship',[31] but at present such proposals remain utopian (and probably undesirable) rather than practical in character. All of these initiatives unfortunately remind us what a divisive issue Brexit is and will remain especially, but not only, in the UK. Part of the reason for the Brexit vote was precisely that EU citizenship was not recognised as a social fact by the majority of voters. Yet even if EU citizenship could be said to be a prime example of conceptual change occurring before political, institutional and social reality changes, for a group of directly affected persons EU citizenship very definitely is an established social fact, as well as a source of legal rights. Once established, can the rights of EU citizenship simply be taken away by state *fiat*?

There have been several attempts to bring this issue before the CJEU, to see whether it may be inclined to engage in judicial activism in order to protect the status of EU citizenship. In a major victory for those who have been seeking to use law and litigation in the battle for EU citizenship rights,[32] a Dutch first instance court faced with such a claim by UK citizens resident in the Netherlands initially decided in February 2018 to make a reference to the CJEU under Article 267 to seek authoritative answers to questions it saw as essential to deciding the case before it. It wanted to know whether

---

30 See for example http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000005 and http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000003. For reflection see Garner, O. (2017), 'The European Citizens' Initiative on a European Free Movement Mechanism', *European Law Blog*, 23 February 2017, available at http://europeanlawblog.eu/2017/02/23/the-european-citizens-initiative-on-a-european-free-movement-mechanism-a-new-hope-or-a-false-start-for-uk-nationals-after-brexit/.

31 See the discussion in Schrauwen, A, (2017), '(Not) Losing out from Brexit', *Europe and the World: A Law Review* 1 (1): 1–18.

32 Maugham, J. (2018), 'Why I helped bring the Dutch case over Britons' EU rights', *The Guardian*, 18 January 2018, available at https://www.theguardian.com/commentisfree/2018/jan/18/dutch-case-britons-eu-rights-brexit-uk-citizens.

withdrawal of the UK from the EU automatically leads to the loss of the EU citizenship of UK nationals and the elimination of the rights and freedoms deriving from EU citizenship, and if it does not what conditions should then be imposed. The decision to make a reference has now been appealed to the superior Dutch courts, but if the case does reach the CJEU it may be expedited for rapid resolution given the obvious urgency of the situation.

The issue being tested here is not the UK's future compliance with EU citizenship rights, but rather that of another member state, where a group of concerned UK citizens are resident. This is, of course, a hugely political question for the CJEU to be faced with, and it is likely to find ways to dodge the bullet because of the negative impact such a judgment could have upon its credibility. The Dutch district court was faced with the argument, put forward by the defendants in the case (the Netherlands and the city of Amsterdam) that the question was merely a political issue not a legal question, and that the dispute – at this stage – was purely fictional. The judge concluded, however, that there was a real and present threat of harm flowing from the possibility of Brexit, including UK withdrawal without an agreement under Article 50 TEU. The CJEU may, to the contrary, conclude that this is – at this stage – a purely hypothetical dispute and so the request for certain questions to be answered under the reference procedure is inadmissible. Even if the reference is accepted as admissible, there are formidable obstacles to making the case that EU citizenship somehow maintains a life after Brexit,[33] even though applicants see themselves as relying upon the logical consequences of the line of case law leading up to and beyond *Ruiz Zambrano*, which has been defended extra-judicially by no less a personage than the President of the CJEU himself.[34] Perhaps the best that could be hoped for in terms of legal outcome for the applicants will not be the assertion that EU citizenship somehow continues as a status, but rather the sort of 'freezing' of basic rights articulated for the very different case of Slovenia after the administrative 'erasure' of certain non-citizens following independence in 1992 and adjudicated in the *Kuric* case before the European Court of Human Rights.[35] In fact, we do not really need the CJEU to tell us that

---

33 McCrea, R. (2018), 'Brexit EU Citizenship Rights of UK Nationals and the Court of Justice', *UK Constitutional Law Blog*, 8 February 2018, available at https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/.

34 Lenaerts, K. (2015), 'EU citizenship and the European Court of Justice's 'stone-by-stone' approach', *International Comparative Jurisprudence* 1(1): 1–10.

35 See above n.26.

these are the human rights obligations of the member states in the absence of a withdrawal agreement on the rights of EU citizens.

And yet we are led ineluctably back to the question of how far the constitutionalising effects of EU citizenship already go, and how much further they might stretch in the future. The referring judge in the Dutch case discussed above relied in his brief judgment on *Rottmann* and *Lounes*, building his reflections on the back of the classic dictum – no longer so frequently invoked by the Court of Justice and notably missing from the reasoning in *Lounes* – that EU citizenship is destined to be the fundamental status of the nationals of the member states.[36] On that analysis, EU citizenship can be seen as an independent source of rights for citizens, and once granted cannot be taken away unless the measures adopted would pass the proportionality test. One might agree with Davies[37] that with *Rottmann* and now *Lounes* the CJEU has already travelled most of the way down the road towards the conclusion that member states cannot just deprive citizens of rights once granted. However, it will doubtless come under heavy pressure to accept that the implementation of the consequences of a referendum held in the UK represents a legitimate and powerful state interest that outweighs the interests of individuals, if it comes to the question of implementing a proportionality test. Yet the Dutch judge has something to say about this matter too, embellishing the argument with some important – if controversial – democratic principles:

> [5.22] the essence of a democratic constitutional state is that the rights and interests of minorities are protected as much as possible. The same applies to the functioning of the EU as a whole which forms a democratic community of (member) states governed by the rule of law.

What then, of the mythical 'people' so often invoked by the current UK government to justify pursuing a 'Brexit means Brexit' policy on the coat tails of a vote in which little more than 35 per cent of the overall registered voting population stated that the UK should 'leave the European Union' without being any more precise about how or with what consequences?[38] How can democracy be judged in such a contest between minorities and

---

[36] See https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605. For an unofficial summary of key sections of the judgment, see https://waitingfortax.com/2018/02/07/a-summary-in-english-of-the-decision-of-the-district-court-in-amsterdsm/.

[37] See above n.29.

[38] What if everyone had voted in the EU referendum?', *UK and EU Blog*, 28 July 2016, available at http://ukandeu.ac.uk/what-if-everyone-had-voted-in-the-eu-referendum/

majorities, and what might be the legitimate role of a Dutch court to set in train a series of events that might lead to a legally legitimate decision of the UK electorate being constrained in its effects?

The stage could be set, therefore, for a constitutional confrontation of the highest order before the CJEU, where the limits of the CJEU's capacity for judicial activism (or, as some might have it, legitimate protection of constitutional constraints on oppressive state action) will be tested. EU citizenship may remain very different to national citizenship, but it is possible that it has already acquired enough of its own distinctive 'sticky' qualities that it will come to haunt the Brexit negotiations in unexpected ways.

Part I: Should EU Citizens Living in Other Member States Vote There in National Elections?

Abstract

The core right of EU citizenship is freedom of movement within the territory of the Union. But EU citizens who live in a member state other than their homeland cannot vote in the national elections of that country unless they first acquire its citizenship through naturalisation. In several member states they also lose their right to vote in national elections of their country of origin when they have lived abroad for too long. A group of EU citizens has started a European Citizens' Initiative to propose that EU citizens should have the franchise to vote in national elections of their country of residence. This working paper collects all the contributions to a EUDO CITIZENSHIP forum debate on this proposal. While all authors agree that the loss of democratic participation rights due to the exercise of free movement rights is contrary to the spirit of EU citizenship, they disagree to a certain extent on what the right answer to this problem is: should EU citizens vote in their countries of origin, of residence, or be given a choice? Should third country nationals be included in a broader electoral reform? How will it be possible to convince a sufficient number of EU citizens of this initiative, given the disappointing turnout rates in European Parliament elections?

Keywords

EU citizenship; Voting rights; Democratic franchise; National elections; Free movement.

EU-Citizens Should Have the Right to Vote in National Elections

Philippe Cayla and Catriona Seth

Imagine being a law-abiding EU citizen, living in the EU, and having no right to vote for the government whose decisions will impact on your daily life. Does this sound like an Orwellian nightmare? Think again. It is the fate of large numbers of your neighbours or friends. Let us take the case of Alex, a British journalist living in France. He can vote for the local mayor in Paris and for members of the European parliament. He cannot, however, elect the president of France whose policies could influence his tax situation or decide whether a high-speed train station is located in his town. In the same way, Kirsten, who is a Danish teacher residing in Spain has no say in the election of a government whose decisions will impact on her retirement pension and on the educational system in which she works. Surely this is regrettable, to say the least. Should being European in Europe not entitle you to have a say in the way the part of Europe in which you live, work and pay taxes is governed? EU nationals have the right to vote in European and local elections, wherever they live within the EU. Should they not also be entitled to vote in national elections even if they reside in an EU nation other than their home country? Should their lack of a possibility to use the democratic process in order to influence policies by which they will be directly affected not be construed as a potential obstruction to mobility? Who wants to go and live in a country without being able to exercise full democratic rights? Surely it is time for the EU to extend EU citizens' voting rights to national elections: this form of residential right would help integration, encourage mobility and enhance the value of EU citizenship. We feel a European Citizens' Initiative might be a way to achieve this.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_2

Go to the Letmevote website (www.letmevote.eu) and to the official description of the 'Let me vote' ECI on the European Commission website.

Read the article by Philippe Cayla in Libération 8 December 2011[1] and his article written with Catherine Colonna in Le Monde 3 April 2012[2].

1 Cayla, P. (2012), 'Commençons par les Européens' [Let's start with the Europeans] *Libération*, 08/12/2011, available at http://www.liberation.fr/societe/2011/12/08/commencons-par-les-europeens_780280

2 Cayla, P. & C. Colonna (2012), 'Accordons le droit de vote aux Européens!' [Let's give Europeans the right to vote!] *Le Monde*, 02/04/2012, available at http://www.lemonde.fr/idees/article/2012/04/02/accordons-le-droit-de-vote-aux-europeens_1679092_3232.html#x0uiOs1t0XlQ03E7.99

EU Citizens Should Have Voting Rights in National Elections, But in Which Country?

Rainer Bauböck

I will be happy if Philippe Cayla's and Catriona Seth's proposal for a European Citizens' Initiative (ECI) on national voting rights for EU citizens is successful. But I will not sign it myself. I agree that there is a serious democratic deficit in the current regulation of voting rights. It is contrary to the spirit of EU law if EU citizens who take up residence in another member state lose fundamental rights as a consequence of exercising their right of free movement. And it seems particularly perverse that they retain their rights to vote in local and European Parliament elections but can lose the more significant franchise in national elections. The question is: which country should be responsible for letting them vote and under which conditions?

Philippe Cayla and Catriona Seth argue that this should be the country of residence, where citizens pay their taxes and are most comprehensively affected by political decisions. I agree that all long-term residents, and not only EU migrants, should have access to the franchise for these reasons. However, it is not unfair to ask immigrants to apply for their host country's citizenship if they want to fully participate. This will not only provide them with all democratic rights but will also send a signal to the sedentary native citizens that these immigrants have a long-term commitment to their country of residence. After all, national parliaments make laws that affect not only current residents but also future generations. Of course, neither native citizens nor immigrants can be forced to stay for the rest of their lives. But citizenship is generally a life-long status that is neither automatically acquired nor automatically lost when moving to another country. And therefore, acquiring it through a public declaration of consent sends a signal of long-term commitment that residence alone cannot convey.

Let me emphasize that this is not an argument for citizenship tests that punish the less educated immigrants, nor an argument that immigrants must show exclusive loyalties towards their host country by abandoning their citizenship of origin. All immigrants should be offered opportunities to naturalise after they have become long-term residents – which in the EU means after five years – and dual citizenship should be broadly tolerated. Under

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_3

such conditions, why could EU citizens still claim national voting rights without applying first for citizenship?

One could object to my proposal that it is not realistic that European states will reform their citizenship laws along these lines. But is it really more realistic that they will waive the condition of naturalisation for one large group of migrants altogether? And what if they were forced to do so by some daring judgment of the Court of Justice of the European Union? Would member states then not react by raising even higher the hurdles for naturalisation, which would in turn mean that fewer migrants get access to EU citizenship in the first place?

If for these normative and pragmatic reasons voting rights in countries of immigration remain attached to citizenship status, what can we then do about the democratic deficit? The obvious answer is: make sure that EU citizens who move to another member state do not lose their voting rights in national elections in their countries of origin. In fact, most EU states do allow their expatriates to vote in national elections. The regulations are, however, very different. Ireland still does not grant an external franchise. The Greek constitution guarantees voting rights to Greeks living abroad, but the Greek parliament has never adopted the implementing legislation. Britain withdraws voting rights after fifteen years of residence outside the country. Italy allows those born abroad who have inherited their citizenship from Italian ancestors to vote in Italian elections but not those who have kept their residence in Italy and are merely temporarily absent on election day. Conversely, Denmark has a residence requirement for voting, but has successively extended the franchise to state employees, employees of private Danish companies, Danes working for international organisations, Danish students and others living abroad for health reasons as well as to their Danish spouses, as long as they are presumed to be only temporarily absent. By contrast, Belgium has mandatory voting and applies this duty even to Belgium citizens living abroad, although they are not forced to register as voters.

In its judgement in the 2010 Rottmann case[1] the Court of Justice of the EU has asserted that member states have to take EU law into account when a decision to withdraw nationality implies a loss of EU citizenship. Should

[1] See the EUDO CITIZENSHIP Forum Debate: Shaw, J. (ed.) (2011), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?', *Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory Working Paper 2011/62*, Florence: European University Institute, available at http://cadmus.eui.eu/handle/1814/19654.

the same logic not also apply to a withdrawal of national voting rights in case of exercise of free movement rights?

The promoters of the 'Let me vote' ECI will object that long-term residents abroad are more strongly affected by the laws of their host country than by those of the state whose citizens they are. But voting rights cannot be determined by a principle of affected interests alone, or else the whole world should have a right to vote in the next US presidential election. We need instead a criterion of genuine ties between voters and the political community where they cast their vote. Migrants often maintain genuine ties to their country of origin while developing at the same time such ties to their country of residence. If they want to fully participate in the latter, they should be able to do so by applying for naturalisation. And if they no longer care about participating in the former, they should be free not to vote in homeland elections or also to renounce their citizenship.

Although there is a strong global trend to grant voting rights to expatriates, I do not think that all citizens who live abroad should have a right to vote. If we care about genuine ties, then those who have inherited their citizenship by birth abroad should not have a say in decisions about the future of a country where they have never lived and are unlikely to ever live. And the current Hungarian government's policy to offer first dual citizenship and now also voting rights in national elections to ethnic Hungarian citizens of neighbouring countries is a clear example how external voting rights can be abused by nationalists in power.[2] However, second and third generations of immigrant origin as well as native ethnic minorities with neighbouring kin states can be excluded by limiting the external franchise to first generation migrants.

The case for external voting rights is particularly strong in the EU for three reasons. First, because it can be linked to the core of EU citizenship, which is the right of free movement; second, because it respects the principle that EU citizenship is derived from member state nationality rather than from residence; and third because it secures that free movers will not lose their indirect representation in EU legislation through the vote of their national government in the Council.

---

[2] See the EUDO CITIZENSHIP forum debate: Bauböck, R. (ed.) (2010), 'Dual citizenship for transborder minorities? How to respond to the Hungarian-Slovak tit-for-tat', *Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory Working Paper 2010/75*, Florence: European University Institute, available at http://cadmus.eui.eu/handle/1814/14625

I would therefore make a case for common European standards of access to national and EU citizenship for all immigrants as well as for common standards of external voting rights of EU citizens.

Why will I still be happy if the 'Let me vote' initiative succeeds in collecting 1 million signatures for national voting rights derived from residence? Because this would finally provide the Commission with a reason to address a serious democratic deficit and to open the debate on how to overcome it.

A European or a National Solution to the Democratic Deficit?

Alain Brun

I agree with Rainer Bauböck on his starting point. It is indeed contrary to EU law if EU citizens who take up residence in another member State lose fundamental rights as a consequence of exercising their right of free movement.

But I fully disagree both with his argumentation and his proposed conclusion which are, in my views, rather disproportionate with the problem to solve.

There are the two ways to solve the problem, the European and the national ones.

As shown by Rainer Bauböck's comments, the national way would lead towards difficult and tricky considerations, like acquisition and loss of nationality by EU citizens. I agree that those topics will probably have to be considered at EU level sooner or later. I also agree with Rainer Bauböck that all immigrants should be offered opportunities to naturalise after they have become long-term residents, at least if they so wish. Nevertheless for the time being and since the conclusions of the Edinburgh European Council of December 1992, such topics are explicitly considered as outside the EU's competences and no legal basis can be found for them in the present Treaties. I have strong doubts that the case law of the European Court could by itself reverse this consensus and the taboo.

The European way suggested by the 'Let me vote' initiative offers a much lighter solution, much more in line with what European citizenship really is.

I leave the interpretation of the somewhat abstract definition given by the Treaty to lawyers. For me, as a European citizen, I understand European citizenship as the right to be considered as a national by any member state other than the one whose nationality I hold, as soon as I am in relation with its authorities, in one way or another. If, as a German, I drive through the Belgian territory by car at a speed exceeding Belgian limitations, I can of course be fined, but under the same conditions as the nationals of Belgium;

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_4

if, as a Dane, I reside in France, I have to have the same rights as French nationals and this from the first day of my stay. Even outside the EU, any member state has to give me consular protection, under the same conditions as those applied to its nationals. And, if I receive the rights to vote in municipal and European elections, it is always under the same conditions as the nationals of the state where I reside.

Being considered as if I were a national in my country of residence, where is the need for asking for the nationality of that country, as long as the EU respects diversity? One of my obligations as an EU citizen is to respect my host country and to participate fairly in its social and political life. But why should I ask for its nationality, if I still feel French, German or Polish?

Of course, there is a well-known limited number of exceptions to this national treatment and some discriminations remain.

The purpose of the 'Let me vote' initiative is to abolish one of them.

It is ambitious in its scope, by covering all 'political' elections, regional, legislative, referenda, presidential, etc. Due to the diversity of elections in member states, it would of course not be possible to enter into a precise enumeration. I understand also that the initiative suggests giving the rights to all EU residents, not only to long-term or permanent ones. This is in line with existing rights to vote in municipal and European elections.

Nevertheless, it can be useful to recall that the number of citizens concerned is rather limited. In official documents from the European Commission, the figure of 12 million people is frequently quoted to measure the total number of EU citizens residing in a member state other than their own.

Granting the right to vote to EU citizens will therefore hardly modify the political landscape in any member state, while it will contribute to the respect of EU citizens' fundamental rights, in particular the right to participate in regular elections in the country where they reside as laid down in Article 3 of the First Protocol to the European Convention on Human Rights. It will also contribute to reducing the so-called 'democratic deficit' by fully guaranteeing their representation in EU legislation through the vote of their host country government in the Council and the position taken by national parliaments in EU procedures according to the rules laid down by the Treaty.

Obviously, this representation is not guaranteed in the situation mentioned by Rainer Bauböck where EU citizens lose their voting rights in national elections in their countries of origin.

In the same vein as for the European elections, EU citizens should be given the choice to vote either in their host country or in their member state of origin if such a right exists in that last country.

The idea proposed by the 'Let me vote' initiative is not a new one. It has already been discussed in many forums and was even flagged by the European Commission in its 5th Report on European Citizenship in 2004.

It is clear that, in the light of developments sustained in fields like the areas of freedom, justice and security, the representation in EU legislation through the Council, as well as through the European Parliament, has to be fully ensured if the Union is to be a democracy.

EU Accession to the ECHR Requires Ensuring the Franchise for EU Citizens in National Elections

Andrew Duff

As rapporteur of the European Parliament on electoral reform, I strongly support the launching of this ECI, and will sign it.

Another hopeful event is the prospect of the EU signing up to the ECHR (and its First Protocol). This will, in my view, allow disenfranchised citizens to seek a remedy at the European Court of Justice at Luxembourg and/or the European Court of Human Rights at Strasbourg by demanding that the EU now has a duty to act to guarantee 'conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

With that in mind, I recently asked a written question of the European Commission as follows:

> 'All member states have adopted the first Protocol to the European Convention on Human Rights (ECHR), Article 3 of which states that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".
>
> 'In view of the imminent likely accession of the European Union to the ECHR and to its first Protocol, what does the Commission intend to do about member states who disenfranchise their own nationals who choose to live in another EU state for an extended period?
>
> 'Likewise, what does it intend to do to encourage EU states to extend the right to vote in national elections to their long-term resident EU citizens of another nationality?
>
> 'Does the Commission agree that it is unacceptable that a very large number of EU citizens are deprived of their basic civic right to choose the legislature either of the state in which they live or in their original state?
>
> 'Will the Commission be ready to take action to ensure that all EU states comply with the provisions of the ECHR which guarantee the right to vote?'

The answer of Commission Vice-President Reding (E-9269/2011, 2 February 2011) was somewhat disappointing. Here it is:

> 'As already highlighted in its reply to written question E-7910/2010 by Mr. Jim Higgins and E-8488/2011 by Mr. Morten Løkkegaard, the Commission is aware that national provisions in a number of member states disenfranchise

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_5

> their nationals due to their residence abroad. Consequently, EU citizens of the member states concerned cannot participate in any national elections.
>
> 'The Commission announced in the EU Citizenship report 2010 report (COM (2010)603) that it would launch a discussion to identify political options to prevent EU citizens from losing their political rights, and namely the right to vote in national elections, as a consequence of exercising their right to free movement. The Commission has recently contacted the concerned member states to launch this debate and to explore the possible political solutions.
>
> 'The Commission has raised at this occasion that, while organisation of national elections falls within the responsibilities of member states, if citizens cannot participate in electing member states government, nor in their member state of origin or the member state of residence, and thus are not represented in the Council of Ministers, these citizens cannot fully participate in the democratic life of the Union.
>
> 'The Commission would like to inform that the accession to the ECHR will not extend the European Union competences as defined in the Treaties. In particular, the accession to the First Protocol of the Convention neither will extend the right to vote of EU citizens residing outside their member state to national parliamentary elections, nor enable Commission to take actions against Member states' violations of Article 3 of this Protocol.'

The point about citizens not being able to 'vote' for their representatives in the Council of Ministers is interesting enough. Furthermore, although the Commission is bound to stick to the letter of the law, the fact is that once the EU signs up to the ECHR the rights prescribed in Articles 39 and 40 of the EU Charter of Fundamental Rights concerning voting and standing in local and European elections will not be as comprehensive as the citizen rightly demands. So wider legal and political action will surely be necessary at the EU level. And changes to both the primary and secondary law of the EU cannot be obstructed forever.

How to Enfranchise Second Country Nationals? Test the Options for Best Fit, Easiest Adoption and Lowest Costs

David Owen

The proposal of this ECI by Philippe Cayla and Catriona Seth is a welcome initiative addressing a problem that has already been highlighted by the European Commission[1], namely, that some 'second country nationals' (SCNs) lose their entitlement to vote in the national elections of their state of nationality without having acquired the right to vote at this level in their state of residence. This is a democratic wrong since it is not democratically legitimate that a person lawfully exercising a civil right shall in virtue of such exercise be deprived of a political right. The democratic harm that results is, given the political constitution of the EU, not simply that the disenfranchised individual has no say in who represents them in the national legislature or executive but also, consequently, that they have no say in relation to who represents them at the Council of Ministers. While I share Andrew Duff's view that 'the rights prescribed in Articles 39 and 40 of the EU Charter of Fundamental Rights concerning voting and standing in local and European elections' are not 'as comprehensive as the citizen rightly demands', I see little reason to think that this situation will change with the EU's signing up to the ECHR, not least since 'the people' is one of the more complex and contested terms in the legal and political lexicon.

How, then, is this *demos* problem best addressed? Four simple general rules are available as options for resolving the legitimacy deficit that characterises the status quo:

1. All SCNs have national voting rights in the state of residence.
2. All SCNs have national voting rights in the state of nationality.
3. All SCNs have the choice between (1) and (2).
4. All SCNs have a time-differentiated combination of (1) and (2) which starts with (2) and, after a period of residence, switches to (1).

It is notable that (2)–(4) can be, more or less, combined in a more complex rule:

[1] European Commission (2010), *EU Citizenship Report 2010: Dismantling the obstacles to EU citizen's rights*, COM(2010) 603 final.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_6

5. All SCNs shall have a fair opportunity of acquiring nationality in the member state of residence and all SCNs who do not have nationality in their member state of residence shall be eligible to vote in national elections of their member state of nationality.

Any of these five general rules would suffice to address the democratic wrong but which is the best choice? Or, to tie our discussion back to the proposed ECI, why ought we privilege (1)? There are three dimensions to the issue of which is the *best* choice. First, which rule offers the best fit with the institutional structure of the EU? Second, which rule is easiest to adopt and implement? Third, what are the likely costs and side-effects of the different rules?

On the first score, the ECI proposal does not do well because it misconstrues the current composition of the EU as a polity. This claim can be elucidated by contrasting the EU with purely intergovernmental and fully federalised systems that are also committed to free movement within the territorial area that they cover. In the case of a purely intergovernmental structure, the norm of free movement is grounded on a joint commitment to a shared aim or purpose such as, for example, a European market. In terms of the national citizenship of the states involved in this intergovernmental project, the context remains largely equivalent to that of independent states who are not engaged in such a project, but not wholly since the shared purpose brings into play the principle that the partners to this project should not act to frustrate this joint enterprise and should, where compatible with their distinct national contexts and projects, aim to facilitate it. Such a principle could be expressed by, for example, offering preferential treatment to the citizens of partner states for access to membership rights and for dual citizenship.

In the contrasting case of a fully federalised system, free movement may serve instrumental purposes but fundamentally expresses a basic liberty of citizens as federal citizens which requires that anyone exercising their right to cross state borders must not be disadvantaged at any level of the franchise within the federal structure. An obvious way to respect this democratic commitment is to adopt a residence-based rule for voting rights in the states that comprise the federal union. But the EU is neither a purely intergovernmental nor a fully federalised body. Because it isn't simply intergovernmental it is a democratic wrong for EU citizens who move across state borders to lose national voting rights; because it isn't simply federal the ECI proposal of a residence-based voting rule isn't an ideal fit as a way of ensuring political equality for EU citizens. Option (5), rather than option (1), looks like the

best rule here because it aligns responsibility for political rights of nationals in the right way, that is, to the member states through which EU citizenship is acquired.

Option (5) does less well though on the second dimension. As Alain Brun rightly observes, it is likely to be 'tricky' and 'difficult' to get all member states of the EU to coordinate their national legislation in this way (particularly if they have constitutional provisions against expatriate voting). Here Brun's suggestion of adopting option (3) and the ECI proposal of option (1) both look more straightforward and exhibit greater continuity with existing EU practices. This matters because it is relevant to ask not just what fits best but how long it will take to remove the democratic wrong and harms at stake here.

On the third dimension, option (1) has both strong positives and negatives. On the positive side, it provides political representation in an SCN's immediate context of governance and it would also resolve the quite radical disparities between the implementation of the EU rule on local voting rights (consider the comparison of France and the UK, for example, where in France local voting rights are restricted to the level of the commune, while it the UK they include not only local and county council elections but also extend to voting in devolved assembly elections in Scotland, Wales and Northern Ireland) since it would remove any constraints that pertain to the linkage of local and national representation (as occur, for example, in France where members of the Senate are chosen through an electoral college comprised on locally-elected officials). On the negative side, option (1) completely severs the *political* relationship between citizen and their state of nationality and also breaks the widely held link between citizenship of the state and voting rights (although this link does not hold universally even between EU member states, as the mutual granting of voting rights between the Republic of Ireland and the UK illustrates). Option (3) is, arguably, worst here since it provides the choice of *either* political representation in the immediate context of national rule *or* maintaining a political link with one's state of nationality without resolving disparities in relation to local voting and while breaking the citizenship-franchise link at national level. Option (5) delivers neither the strong positives nor the negatives of option (1). It maintains the linkage between national citizenship and suffrage at national level, and is likely to support a general easing of access to nationality of the state of residence for third country nationals in the same way that EU rules on local voting have supported their extension to third country nationals in a number of states.

So which option is best? Although I share Rainer Bauböck's preference for option (5), I think that there is still a strong case for option (1) – and for this reason I would sign the ECI.

What's in a People? Social Facts, Individual Choice, and the European Union

Dimitry Kochenov

Joining the majority of other contributors to this forum I fully support the useful and timely initiative for national voting rights for EU citizens, which has been overdue.

My argument builds around well-known but much ignored effects of the European integration project on the member states and their societies which require adjusting our understanding of who is a foreigner in today's Europe, *i.e.* what is a 'people' in the context of the European project. Given the wording of Article 25 TFEU, which allows the Commission to propose additional rights of EU citizenship but requires unanimity in the Council and approval by the member states, the change will not be easy. However, this would be a bad reason for not trying.

Should it not be up to the individual to decide who will participate in political life rather than up to the state with its random naturalisation procedures and nonsensical tests created to divide societies instead of uniting them?[1] Hailing from a totalitarian regime myself I cannot overstate the value of being left alone, free from the state's critique, endorsements, or ideas about 'good life'. The criterion of genuine ties that Bauböck preaches in his contribution to the present debate starts from the presumption of people's inability to take responsible decisions for themselves whether they have such ties or not, superimposing thus their judgement with a state-mandated one. Given that those who do not have any interest in the state of residence are highly unlikely to participate in political life there, Bauböck's contribution struggles hard with a non-existent problem. He does his best to justify the state-mandated selection of those who 'have the ties' profoundly mistrusting those who actually feel sufficiently affected to demonstrate that politically. As if the ties depended on state-mandated blessings! It seems that only the 'official' certificates are meaningful, not the actual reality they are summoned to certify,

[1] See Kochenov, D. (2011), 'Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice', *Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory Working Paper 2011/06*, Florence: European University Institute, available at http://cadmus.eui.eu/handle/1814/15774.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_7

reminding me of the absurd official documents issued to a pityful little man struck by devilish magic by the cat Behemoth in Bulgakov's *The Master and Margarita* in testimony of attendance of a witches' shabash in a pig form as a means of aereal transportation. Differently from Bulgakov's hellish world of Stalinist Moscow, the EU has been built specifically to curtail states' ability to improve 'their' peoples' lives at the expense of those across the border. Questions such as 'Should a Polish worker be deported from the UK to free a place for a Scot?' have been answered with the interests of *all* in mind, *against* state thinking or nationalist visions.

I.

From the very first steps of European integration it was clear that the consequences of the European project for the states participating in it will be far-reaching. Whether we like it or not, supranationalism and the voluntary conferral of competences by member states to the EU have led to profound changes of the legal-political landscape in Europe. Even if the references to *la fédération européenne* in the 1950 Schuman Declaration are ignored, the initial goals of the project are undisputed. They included a trade off in which some sovereign powers were exchanged for closer interconnectedness and peace. At the heart of the project lay the idea of putting a limit to what states can do.

While this logic is probably uncontroversial in the areas where competences have been expressly conferred on the Union, such as the customs union, the same rationale also affects areas which are not under the control of the supranational institutions. This is as natural as it was predictable from the very beginning, since the core of the notion of the Internal Market on which the contemporary Union is built is teleological in nature. The supranational institutional structure was put in place to enable the achievement of the Union's goals, thus putting the teleological rationale at the core of the whole construct, as Judge Pescatore has explained forty years ago[2]. A duty to help and not to hinder supranational integration made its way into the text in the form of the principle of Union loyalty. Consequently, any national law at any level, no matter whether it is generally within the exclusive competence of the member states or not, can be squashed, should it stand in the way of achievement of the goals of the Union interpreted teleologically.

II.

To expect that profound self-imposed limitations which the member states took up when designing and ratifying the Treaties would not have any consequences outside of the legal field is naïve as much as short-sighted. Legal

[2] Miscellanea W.J. Ganshof van der Meersch (1972), Vol. 2, 325. Brussels: Bruylant.

change is responsible for social change. That the two are connected is hardly surprising. In fact, this is a testimony to the success of the legal-political endeavour in the first place.

The fact that French men and women cannot imagine a war with Germany is a great sign of the EU's achievements. This is just the tip of the iceberg of change that the EU has brought into state behaviour, which has direct consequences for what is expected of states in Europe today. According to Philip Allott[3], we have witnessed a shift from diplomacy (using all the available means to promote the states' 'own people's' well-being in interaction with others) to democracy (taking the interests of all into account) in inter-state relations in Europe. In other words, selfishness and inward-looking construction of the state at the expense of others, putting the interests of states' 'own people' above everything, gave way to the awareness of the interests and expectations of others. For concrete people the effects of these developments are as important as they are for the states these people inhabit. The fundamental shift from diplomacy to democracy means that favouring 'your own' is prohibited in the majority of cases: a Scot is not and cannot be better in the eyes of the British government than a Slovak. While implementation problems are well-known, the starting point is nevertheless clear. In the words of Gareth Davies[4], Article 18 TFEU prohibiting discrimination on grounds of nationality between EU citizens has largely abolished the nationalities of the member states within the scope of application of EU law. Even more, by granting EU citizens free movement rights, the Treaties *de facto* and also *de jure* made it largely impossible for the member states to have any 'immigration' policy concerning EU citizens. In other words, modern EU states cannot give preference to their own nationals compared with other EU citizens and are not entitled to stand in the way of EU citizens exercising their Treaty rights. This means that from container societies of destiny (which is a synonym for the lack of individual choice) the member states have turned into spaces for the expression of free will. EU law grants the majority of EU citizens a right to be welcomed where they think they will feel at home and the Court of Justice of the European Union is ready to step in to protect such rights by defending EU citizens in their supranational capacity against member states' claims. This is a bitter pill for nationalists to swallow. Their nationality, however much glorified in primary school education, means much less in the EU context than it would in a world where there is no Union in Europe. This is one of EU's main achievements.

---

3 Allott, P. (1991), 'The European Community Is not the True European Community', *The Yale Law Journal* 100 (8): 2485.

4 Davies, G. (2005), '"Any Place I Hang My Hat?" or: Residence is the New Nationality', *European Law Journal* 11 (1): 55.

III.

The fusion of legal and social dynamics described above is responsible for the peculiarities of European states today, compared with other nations around the world. Although no one would dispute the sovereignty of EU member states, it is abundantly clear that their practical functioning in all the fields they could possibly aspire to influence is profoundly affected by the new socio-legal reality of European integration. This is best illustrated by the interrelation between European states and their 'peoples'. EU member states have been transformed from units of destiny into units of choice and are obliged by law to respect all those willing to leave forever and move to a different member state. Many harbour now large numbers of individuals who, although they do not possess the local nationality, cannot be stopped at the border, sent away, or treated worse than the locals. These are the EU citizens, *i.e.* the non-nationals who are non-foreigners.

The developments described above are fundamental. Once destiny stops obscuring the view, responsibility and freedom come into sight. This responsibility and this freedom affect the essence of what the 'peoples' of the member states are. Crucially, unlike the absolute majority of states outside the EU, member states of the EU cannot shape social facts related to EU citizens' movements. In other words, from the shapers and custodians of 'their' societies, as in Micronesia where those who are not 'ethnic Micronesians' are not entitled to anything, or in Quebec where those who speak French are more welcome, the member states have become mere observes of how EU citizens use EU law and their free will when crossing the ephemeral borders in order to organise their lives as they see fit. The strongest appeal of EU member states in the eyes of mobile EU citizens is their relative invisibility – they do not intrude into the lives of EU citizens choosing to settle outside their member state of nationality.

Why is this transformation important? It seems that it has profound implications for the moral reasons of accepting or rejecting social facts in framing policy and law. States actively involved in shaping immigration policy not only help the societies they serve. They also *shape* these societies by not letting some people in or mistreating others. Consequently, once it is known that they have this capacity, legitimate pretexts can be listed for not including some permanent residents into the notion of the 'people', such as 'illegal' Latinos in the US or, until very recently, aboriginals in Australia. Does the same hold for the states which are merely entitled to *observe* as those who chose them come and go? Once the ability to shape the society is lost thanks to the freedom guaranteed by supranational law invocable against the member states, the member states are bound to face substantial difficulties

in defining the 'people' convincingly, should they have restrictions in mind. This goes far beyond municipal or EP elections, which the EU Treaties open up for all EU citizens. It goes to the very core of the relationship between the people and the state. The state sanction is not required for any EU citizen to belong *de facto*, and in many respects also *de jure*, to the people of a member state.

Alongside with a handful of exceptions from the main non-discrimination rule, which are irrelevant for the absolute majority of EU citizens, national elections fall outside the realm of EU law. This is impossible to justify in the light of the developments described above. Once the member states, acting via the EU, have effectively transformed themselves from the shapers of society into the observers of how EU citizens use their rights, the exclusion of EU citizens without a local nationality from national elections becomes unjustifiable, as this boils down to ignoring social facts beyond the states' control. This is exactly why Bauböck's position is unfounded. It adopts a national model in ignoring social facts as a starting point. Since member state nationalities are in the absolute majority of cases legally inconsequential for EU citizens travelling around the EU, connecting democratic participation with naturalisation amounts to artificially inflating the importance of an 'abolished' status.

While it is always easier to argue for not changing anything, in this particular case change is definitely required. Although practically speaking the impact of the initiative, should it be successful, is likely to be very limited, symbolically its significance will be huge.

Testing the Bonds of Solidarity in Europe's Common Citizenship Area

Jo Shaw

The European Citizens' Initiative proposing the extension of voting rights for resident non-national EU citizens to all elections in the host state is an important and timely initiative. It is to be hoped that it will bring the key question about the normative and practical consequences of the development of the EU as a 'common citizenship area' to the centre of attention. As David Owen's contribution makes clear, the EU struggles with the challenges posed by the question of 'who should vote in which election where' because it is nestled – as a type of special purpose vehicle for the varied projects clustered under the heading of European integration – somewhere between the 'truly' federalised polity and the 'purely' intergovernmental association. The creation of EU citizenship and the remodelling of the treaties according to the 'Lisbon' schema do not provide a definitive normative answer to the question of how voting rights should be organised within this mixed polity in which the states remain significant actors. At the same time clearly the practical consequences of the exercise of free movement demand some sort of response – from the EU institutions and from the member states – to the 'democratic wrong' (as Owen puts it) that arises because many of those who exercise their right to free movement end up, in one way or another, being disenfranchised in relation to all of the elections not covered by Article 22 TFEU, unless they choose the often costly and cumbersome route of acquiring the citizenship of the host state or are lucky enough to have the citizenship of one of the member states which impose no conditions upon the exercise of external voting rights.

Accordingly, I'm instinctively sympathetic to the ECI proposal, and will be happy to sign it, because it seems to me that this would be one of the most effective ways in which this important issue could finally receive the attention it deserves.

Somehow, despite its centrality as the core foundation stone of EU citizenship (even if EU citizenship has a broader constitutional and political potential that has yet to be realised), free movement still tends to be marginalised as a topic within popular and political debate in the member states.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_8

The European Commission attests to this when it draws attention to the increasing number of complaints that it hears about via the SOLVIT and the Your Europe Advice systems from aggrieved citizens deprived of the rights that they are currently accorded (e.g. in local or European parliamentary elections), or unable to comprehend why the existing system does not protect them in respect of what is still regarded as the 'gold standard' of political participation, namely the right to vote in national elections. It is indeed reasonable to ask, as does Andrew Duff, why – if persons are mobile – they suddenly seem, as regards national elections, to come out from under the protective umbrella provided by Article 3 of Protocol 1 of the ECHR governing the obligations of states to organise free and fair elections for legislatures on the basis of universal suffrage.

But for years, the issues of free movement and the rights to which it does, or does not, give rise have rarely been discussed in the media or in popular political discourse. And now that free movement does receive more attention, it is not always welcome. Many host member state governments are too quick to say that free movers can get access to too many rights because apparently they have an unimaginable propensity for 'benefit tourism'. It does seem reasonable to suggest that if the host state's political community were balanced by the presence of socially, politically and economically integrated free moving tax-payers these types of arguments might gain a little less traction within the body politic. It has been clear since 2004 that for some member states the consequences of the free movement of labour are now more closely aligned to mainstream debates about immigration than to debates about the meaning of EU citizenship and the about the constitutionalisation process of the European Union.

But generally speaking, the member states take depressingly little care to ensure that within the 'common citizenship area' the citizenship experience is good for either their own citizens who are mobile or for the citizens of other member states who are resident (or in some other way subject to the jurisdiction of the host state). For over the life course, the incidence of mobility is actually much higher than is the case when we count only those who reside in another member state at any given time. Much larger numbers of persons are thus affected directly or indirectly than tends to be assumed. So, in a way, it is good to reinforce the point that solving this particular democratic problem in the EU and its member states is going to require concerted action at both the EU and the member state levels. It cannot be solved at one level, without thinking about the implications at the other

level. And no solution is simple. All have significant practical consequences or *caveats*.

Certainly, it is impossible to think about the issue of voting rights for EU citizens without considering its implications in relation to national citizenship. Rainer Bauböck thinks that the proper democratic approach is to make national citizenship much more open to all long term residents who lack it, but who would like to make a sufficient commitment to be entitled to vote. He sees the two things as going hand in hand. But Bauböck also wants to ensure that national citizenship is equally open to EU citizens and to third country nationals. Given the current trend in many states to heap more and more conditions on those acquiring citizenship by naturalisation, unfortunately his wish to use this route towards democratic equality is as far away from political reality as the desire to see EU citizenship rights extended by treaty amendment to include the right to participate in host state national elections. Perhaps more realistic could be a push towards a more generalised acceptance of external voting within the EU, but while this route could potentially offer an avenue for all to participate in one set of elections, it does not necessarily let them participate in the one that they would choose. In other words, from a truly *European* perspective, both of those routes, which prioritise national solutions over supranational ones, do seem suboptimal.

Moreover, they might also seem suboptimal because they assume that the only way of ensuring that democratic participation is not undermined by the use of free movement rights involves direct attempts to persuade the member states either to change their national laws on citizenship and/or external voting in a coordinated way, or to agree – as 'masters' of the treaties – to change the terms of EU citizenship itself. In fact, if member states recognised more readily their responsibilities in respect of the common citizenship experience for both *outgoing* and *incoming* EU migrants, they might be readier to change their national laws autonomously, or perhaps in concert with other states which provide reciprocity of rights, in order to build a more substantial common electoral area akin to the one that already exists in part between the UK and Ireland. One could then even imagine the circumstances in which the states could agree, with the assistance of the EU institutions, on a facilitative convention structuring these types of reciprocal citizenship relationships.

But the member states should not be the sole focus of attention. It seems to me that the debate about the character of the common citizenship area

should be held in conjunction with wider public deliberation about how, and whether, the EU should generate the types of closer bonds of solidarity that seem necessary for the purposes of solving the euro crisis or facing down environmental challenges in the future. In that respect, the ECI should be seen as one strategy alongside others, such as political campaigns at the national level and strategic litigation testing out the potential limits of EU citizenship or the effects of the ECHR. All of these steps are needed to raise awareness of this very important issue.

‘An Ever Closer Union Among the Peoples of Europe’: Union Citizenship, Democracy, Rights and the Enfranchisement of Second Country Nationals

Richard Bellamy

This Initiative is to be welcomed if only for opening up the debate and prompting the discussion here – which I have found most instructive. This is an important issue that - with certain honourable exceptions, among them the earlier participants in this useful dialogue - has hitherto not received much academic or political attention, yet resonates with many EU citizens. To give just one anecdotal example, last year UCL conducted two focus groups among EU citizens from other member states resident in London and the issue of national voting rights proved to be of far more concern to them than votes for the European Parliament. Though not a scientific survey, it expresses in certain respects a key feature of the very idea of Union citizenship which, as a political scientist, I find can be lost in the predominantly legal analysis of this topic: namely, the reliance of citizenship rights, including those associated with Union citizenship, on politics in general and the state – in this case the member states – in particular. It is this political context that makes voting rights such an essential part of citizenship, yet one, given the complexities and peculiarities of the EU’s political system, that raises a number of difficulties in the European context.

There is a growing tendency to see citizenship as simply the artefact of legal rights. This trend is especially prevalent in accounts of Union citizenship, where the key actor has been the Court of Justice of the European Union (CJEU) and the majority of analyses come from legal scholars. Yet, any legal system has to be understood within the context of the wider political system of which it forms a part and on which it ultimately depends. Not only are laws both the product of and administered and made reality through political processes, but also courts belong to that political apparatus and are themselves political actors, whose mode of adjudication and the degree to which their judgements will be followed reflect the character and capacity of the political institutions within which they are embedded. To the extent that we wish the law and those responsible for its administration to have essential

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_9

democratic qualities – not least in treating all subject to them as political equals, whose interests deserve to be given equal consideration, with the laws applying equally to all –it is important that the law and the rights it embodies should be part and parcel of a democratic polity. It is for this reason that political rights are the defining attribute of citizenship. They form the 'right of rights' since they provide the means whereby citizens can ultimately enact and uphold – both directly and indirectly – all their other rights and assure they have the democratic virtues of showing them equal concern and respect with other citizens. In sum, the very features associated with the rule of law arise from the process of democratization and its accompanying effects on the legal system. It will be objected that rights serve as constraints on democracy and 'majority tyranny'. However, this slogan proves empirically mistaken and overlooks the obvious fact that the main danger to rights comes from minority rule. Democracy has been instrumentally promotive of rights precisely because it obliges rulers to be responsive to as many of the ruled as possible. In so doing, it forces politicians to appeal as far as possible to interests and ideals that are equally and widely shared rather than simply to the narrow sectional interests and ideals of privileged minorities. At the same time, the democratic process engages citizens in reciprocal relations with each other. By endorsing the public polices needed to promote rights –such as a criminal and penal system, health care, schools, pensions, social security and so on – they also sign up to the correlative duties needed to sustain these policies, such as paying taxes.

This argument might seem to lead inexorably to support for the Initiative. Yet, that moves too fast. For, as I noted, the EU political system is notoriously complex and renders the relationship between citizenship and political rights more complicated as a result. European citizenship is accessed through national citizenship which, as the Treaty notes, it is designed to be 'additional to' rather than to 'replace'. This position is consistent with the EU's declared ambition to promote 'an ever closer union among the peoples of Europe' rather than to create a 'European people'. Accordingly, Union citizenship does not so much create access to EU level goods and services as ensure that its possessors are not discriminated against on grounds of nationality when they move to another member state. So conceived, Union citizenship serves to promote mutual respect between the citizens of the different member states by making them all potential citizens or dual citizens of all the other member states should they move to any one of them, at least so far as the four freedoms that are central to the EU are concerned. However, for this mutual respect to operate, it is important that Union citizenship does not undermine the democratic systems of the member states on which

it is parasitic, and which are needed to deliver those rights agreed upon between them at the EU level. Moreover, two of the main channels of political representation within the EU’s own political system – namely, national parliaments and the European Council – are explicitly based on member state citizenship, while even the supposedly direct channel of the European Parliament is based on constituencies designed to give adequate representation to each member state, with elections largely reflecting domestic concerns. So it is important that citizens should be represented through these channels, but not be doubly represented and only to the extent they can commit their representatives to pursuing sustainable policies that show equal recognition to the peoples of Europe.

Two concerns need to be addressed as a result of this multilevel arrangement, therefore, when considering the acquisition of national voting rights in another member state. It must be consistent with:

1). those exercising these rights regarding the national laws as applying equally to all and undertaking the reciprocal obligations needed to sustain the public policies on which the continued enjoyment of rights by all citizens within the member state depend, and
2). the mutual recognition of the citizenship regimes of all member states and their consequent equal representation within the EU’s political system.

David Owen’s fifth option in his contribution more or less meets these conditions, if read alongside the caveats noted by Rainer Bauböck in his intervention. Thus, all ‘second country nationals’ (SCNs) should have a fair opportunity of acquiring nationality and hence voting rights in another member state after a minimal period of residence, while all SCNs who do not have nationality in their member state of residence should be eligible to vote in national elections of their member state of nationality. Meanwhile, though dual citizenship should be possible, its holders should only be able to exercise national voting rights in one country. This formula does constrain to some degree member state autonomy over citizenship rules, but only to a minimal degree in ways that in many respects preserve its integrity. On the one hand, it seeks to ensure that those who do vote in national elections are committed to the obligations needed to promote rights equally for all, on the other hand it ensures that there is no double voting for elections that impact on EU policies, so that all are treated equally. It might be argued that naturalisation should not be necessary. Certainly, I can see a case for those within the European sphere to be exempted from citizenship tests, with naturalisation automatic should they so choose. But the choice needs to

be a considered one that involves a commitment to the long term interests of the polity if voters are not to engage in rent seeking or free-riding behaviour of a kind that would undermine rights.

In remarking that 'Union citizenship is destined to be the fundamental status of nationals of the member states' the CJEU has made it sound as if this new legal status represents the 'right of rights', and at least one contributor to this debate – Dimity Kochenov – has read it in this way. But this judicial hyperbole ignores the extent to which these very rights rest on the underlying obligations that follow from the exercise of democratic citizenship within the member states. As such, national citizenship necessarily continues to provide the fundamental status of Union citizens. However, as the Court's rhetorical formula continues, Union citizenship does have a key role in 'enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to the exceptions as are expressly provided for.' What I have suggested above is that the 'same treatment' must respect reciprocity between citizens within and between the member states, and that the proposed limits on access to and the exercise of national voting rights are among those exceptions that should be 'expressly provided for' within a political organisation committed to the 'ever closer Union of (democratic) peoples'. As such, the Initiative raises a key issue but proposes a misguided solution, at odds with the very nature of the EU.

Five Pragmatic Reasons for a Dialogue with and Between Member States on Free Movement and Voting Rights

Kees Groenendijk

My first article on political rights of non-citizens immigrants was written together with my late colleague Bert Swart in 1978 for a journal in Rome. Since then my ideas and publications on this issue were guided by three principles: (a) no taxation without representation, (b) the longer an immigrant is resident in a country, the harder it is to justify his exclusion from political rights only on the basis of his nationality, and (c) once voting rights have been granted to non-citizens for municipal elections there are no serious principled arguments against extension to parliamentary elections. The second principle qualifies the first principle. Tourists and seasonal workers pay VAT, but that does not necessarily qualify them for voting rights. They should, however, have at least some other political rights, such as the right to demonstrate or the right to strike.

This being said, I do not support the campaign for extending voting rights of EU nationals to national elections in the member state of residence. Five pragmatic arguments in my view outweigh the three principles mentioned above.

(1) I sincerely doubt whether being unable to vote in parliamentary elections in the 'host' member state in real life is a barrier to free movement. Of course, it may be construed as a legal obstacle to free movement. But did many Union citizens decide not to use their right to migrate to another member state or to return permanently to the member state of their nationality, only because they wanted to vote in parliamentary elections in that state? Of course, the unequal treatment has to be justified. And yes, there is the problem of who belongs to the demos or the people(s) of the member state(s). The German Bundesverfassungsgericht in 1989 gave the most restrictive definition of people: only nationals of the country. The Court of Justice in Eman & Sevinger stressed that the definitions of the concept 'peoples' vary considerably between member states[1]. I suggest that using the right to free

[1] Judgment of 12.9.2006, C-300/04, point 44.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_10

movement brings certain advantages and certain disadvantages. Not having a guarantee that you can vote in national elections in the other member state unless you acquire its nationality is one of the disadvantages. Empirical data indicate that the participation of EU migrants in the municipal elections in the 'host' member state is relatively low and that a considerable part of EU migrants hide their migration to another member state from authorities of the member state of their nationality. Moreover, 23 of the 28 Member States allow their nationals living abroad to vote in parliamentary elections. Cyprus, Denmark, Greece, Ireland and Malta appear to be the exceptions to the rule.

(2) Current Union law is clear. Both the TFEU and the Charter guarantee participation of EU migrants only for the EP elections and the municipal elections in the 'host' member state. The right to participate in political parties is only guaranteed at 'Union level', not at national level. This was a clear choice of member states during the negotiations on those treaties. The legislator considered that voting at the national level was not within the scope of the Treaty as stipulated in Article 18 TFEU. Only very weighty reason could justify an advice to the Court of Justice to overrule that clear choice of the legislator.

(3) The national legislation of member states on the voting rights of non-citizens and on the right of nationals abroad to vote in the parliamentary elections at home varies a lot. The differences are due to historical, political or other reasons. It is unwise to disregard those differences. The TFEU specifies that the Union shall respect cultural diversity. Differences in political culture are part of that diversity. I would plea to respect this diversity and to learn from the hot political debates, often going on already for decades on the extension of voting rights to long-term resident third-country nationals (also human beings) in Belgium, France, Germany, Italy and Spain. There appears to be a difference in approach to this issue between the Southern and the Northern member states. I would expect that in 'new' member states there could be more sympathy for the 'restrictive' Southern approach than for the more 'open' Northern approach. In several member states the debate on extending voting rights to non-citizens or extension of that right to parliamentary elections has been explicitly linked to facilitation of naturalisation of immigrants, e.g. in Belgium, Germany and the Netherlands.

(4) Granting voting rights for elections on the national level will require either amending the TFEU or using the procedure of Article 25 TFEU. In both cases unanimity of all member states is required. Moreover, in many member states it would require amending the constitution and thus broad political consensus. That consensus simply is not available at present in most member states on this issue. The constitutional amendments necessary to introduce voting rights for nationals of other member states in municipal

elections were agreed because this issue was one minor point in a large package of changes contained in the Maastricht Treaty. Presenting the extension of voting rights to the national level as an isolated issue to be realised by binding Union law probably will create a lot of opposition and negative publicity for the Union generally.

(5) This proposal will certainly raise the issue of extending voting rights to the national level for long-term resident third-country nationals. Why would a Polish or Portuguese national be allowed to participate in national elections after ten weeks or months of residence in France and a Swiss or a Turkish national be excluded even after ten years of lawful residence in that country?

My first conclusion is: Do not raise this issue in isolation but together with other relevant issues concerning political rights of EU migrants, such as voting rights in national elections for expatriates living in another member state, the right of Union citizens to be a member of or establish a political party in the member state where he lives and the possibility of facilitated naturalisation after having acquired the permanent resident right in another member state (after a minimum of five years of residence).

My second conclusion is: Do not propose binding Union law on this issue or try to make the Court of Justice impose a binding solution for this problem. Rather apply the open method of coordination by starting a structured dialogue with and between member states, possibly combined with the issue of the limits set by free movement law to nationality legislation of member states. We may learn from the experience of the Nordic Union in dealing with the issue of extending voting rights to non-citizen residents, both of the Nordic countries and other countries, during the 1970s and 1980s by structured discussions rather than imposing a common rule from above. With this in mind I would support the fifth option in David Owen's contribution to this debate.

Don't Start with Europeans First. An Initiative for Extending Voting Rights Should also Promote Access to Citizenship for Third Country Nationals

Hannes Swoboda

I am grateful to Philippe Cayla and Catriona Seth for kicking off this debate on the future of EU citizenship and the extension of voting rights in national elections for all EU citizens residing in a second member state.

I believe that the future of EU citizenship, its extension in scope and in nature, is now much more than in the past an essential element of the debate on the future of Europe itself.

The introduction of an EU citizenship – albeit as a complement to nationality of a member state and in a context where nation states remain the main actors – has been an extraordinary symbolic step defining the European Union as a community of values and rights.

The right to vote in local and European elections in the country of residence remains the core of this process, together with the right to move freely across borders. The exercise – albeit imperfect – of these rights has had an enormous symbolic impact on the concept of European identity, leading gradually to the acknowledgement of citizens that moving and residing in a second member state means bringing with you in a big bag almost all the freedoms and rights you enjoy at national level, including the right to participate fully in a community's social, economic and political life.

The whole objective of making the Union an area of freedom, security and justice stems from a dynamic interpretation of the concept of EU citizenship. The now binding Charter of Fundamental Rights embodies the idea that not only EU citizens, but all persons and their rights must be and must remain the core of the European construction.

If persons and their rights have to remain the core of the European construction, then European citizenship must not only be fully exercised but extended in scope.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_11

In this respect – unrealistic as it may seem in times when the Schengen system has polarised the political discourse and nationality has featured prominently in populist electoral programs – I do think that the necessary evolution of EU citizenship leads to a gradually growing relevance of residence as defining criterion for the exercise of related rights.

For this reason I would support the idea of a citizens' initiative proposing the extension to EU citizens of the right to vote in national elections in the member state of residence. I do not underestimate the complexity of the institutional and constitutional issues that this option would raise, but I am convinced that the initiative would trigger a necessary debate leading possibly to the gradual, temporary, conditional extension of this right in the medium run.

At the same time I do not share the view that we should 'start with the Europeans first'. Although I am convinced that this could have a spill-over effect on the extension of citizenship rights to third country nationals at national level, I believe that EU policy makers should take up the political responsibility to accompany the initiative for the extension of EU citizens' rights with a strong political initiative at EU level encouraging Member states to facilitate access to national citizenship for third country nationals who are long term residents in a member state, gradually leading to uniform approaches and criteria.

I consider it particularly urgent to address the situation of second and third generations of third country nationals, i.e. children and youngsters often born and/or raised in a member state, for whom access to citizenship in that member state is often rendered very complicated or even impossible.

I am perfectly aware that rules governing EU competences differ considerably when we address EU citizenship and the extension of citizenship related rights to third country nationals. However I believe that from a political perspective these two processes have to be closely interlinked, in a possibly virtuous dynamic.

Voting Rights and Beyond…

Martin Wilhelm

Last week, national elections in France and Greece received unprecedented attention at the European level. At least in Germany, the media have almost obsessively stressed the impact of these elections on domestic politics and European Union policy-making. Some front page authors have wondered why Germans should not have, for example, one fifth of a vote in the Greek and French elections and vice versa in order to live up to the principles of democracy.[1] Against the background of such reflections and demands, Catriona Seth's and Philippe Cayla's proposal does not seem all that revolutionary, affecting a rather small minority.

However, those who favour the proposed ECI have more in mind than just granting mobile EU citizens additional voting rights. Their underlying question is what kind of European Union polity they envision, and their underlying motivation is to push towards an ever closer union among a European people. In that sense, we fully support this ECI, but not without emphasising that, in the long-term, the European people must become a post-national and inclusive concept, overcoming the exclusion of third-country nationals.

Many sound legal and political arguments have been put forward in this forum. As an activist NGO, we have limited capacity to conduct scientific research. Inspiring debates as in this forum build the theoretical backbone of our activities, nourish our visions of an inclusive Europe and help justify our projects and campaigns in the field of citizenship, migration and political participation in Europe. That said, because we work 'on the ground', we are in a position to conduct reality checks; that is, we can detect the practical limitations of theoretical constructs and where they clash with the daily concerns of citizens. It is from this point of view, an activist's point of view, that I want to contribute to this debate.

An ECI is a very resource intensive undertaking. International partnerships need to be built. Language barriers need to be overcome. A communication strategy and hundreds of volunteers are needed to mobilise citizens. There is also the financial burden that NGOs will face, and the technical

[1] Bernd Ulrich: Die Merkel-Wahlen, *Die Zeit*, 2012, No 19.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_12

challenges involved when registering the ECI or its online collection system for signatures. Additionally, an ECI has a high legal uncertainty concerning its content (admissibility) and a small probability of turning into legislation. (However, its potential for indirect impact through the creation of a European public debate should not be underestimated and is perhaps the true value of the ECI.) The proposed ECI demanding national voting rights for mobile EU citizens is especially challenging.

Authors in this forum have already discussed the ECI's legal uncertainty; whether or not the ECI on residential voting rights will be accepted by the European Commission for further procedure; and the possibility of its legal implementation (unanimity in the council). Another challenge is this one: Statistically speaking, every twelfth citizen who would benefit from the ECI would need to sign it. More dramatically, every single second country national in Romania would need to sign it, if Romania were to be one of the seven countries (one million signatures, minimum seven countries, variable minimum of signatures per country). Hence, the ECI would already fail to collect one million signatures if it only addressed the mobile elite. The initiators and we as NGOs need to address the public at large and construct an ECI narrative that concerns all European citizens in three ways. First, because voting rights are not as mobilising as genetically modified food or nuclear power, the ECI narrative needs to go beyond the mere possibility of casting a vote in national elections. It needs to convey the European vision and state why this ECI can effectively realise the vision. Second, the narrative needs to include positive spill-over effects for third-country nationals to counter the argument that this ECI would further discriminate non-EU citizens and enlarge the emotional and legal gap between them and EU nationals. The case has already been made that the ECI proposed by Catriona Seth and Philippe Cayla would affect a rather small number of citizens compared to the many millions of third-country nationals deprived of many more, and in some member states all, political rights. Third, the ECI narrative needs to be designed in a way that does not trigger nationalistic or anti-EU resentments based on fears of loss of political control at the domestic level. It needs to address the ECI's importance for the future of the EU and at the same time emphasise its marginal impact on domestic politics (for Luxembourg, with 37 per cent second-country nationals, this would of course be difficult). These are pretty tough conditions.

Besides public support, political support is crucial, especially among national parliamentarians, as they are ultimately affected. Strategically speaking, one could sketch out which candidates and parties are most likely to benefit from the new constituency and win their support by relying on

their notorious quest to keep their seats. In cities, districts and regions with large ratios of second-country nationals, candidates for the national parliaments are likely to be responsive. From running campaigns on electoral rights, we know that politicians are most responsive and even get seduced to go beyond their party lines. National parliamentarians may play also a crucial role in generating support for the ECI in the EU Council. However, their influence on the government as well as the respective minister sent to the council varies strongly. The way in which European parliamentarians could act as multipliers to support the policy process depends on the role of the European Parliament in areas where the council decides unanimously. Yet the ECI narrative should include substantial arguments that would win them over, too.

The above points are of course not all-encompassing. They are meant to be a guide to the initiators and to complement the academic debate. We have already taken steps to support the ECI by developing the online tool www.vote-exchange.org, which allows for cross border debates on domestic policies among second-country nationals and their indirect participation in national elections in their country of residence. A French citizen residing in Germany votes for her or his German counterpart living in France, and vice versa. It is a tool to trigger the public debate and more than a playground for all who already want to live up to the goal of creating a European people today.

One Cannot Promote Free Movement of EU Citizens and Restrict Their Political Participation

Dora Kostakopoulou

The contributions to the EUDO debate on whether EU citizens should have voting rights in national elections in the country of their residence are both enlightening and thoughtful. They have provided a number of valuable reflections on matters of principle, policy, strategy, and tactics in the light of contemporary political developments at both European Union and domestic levels. By clarifying matters of principle as well as issues of politics, they have outlined several trajectories and shed ample light onto the pros and cons of the European Citizens' Initiative.

Given the horizon of possibilities open to us, we are now obliged to exercise our liberty to decide whether we would support the proposal for a European Citizens' Initiative on national voting rights. Let me state at the outset that I fully support it; after all, since the mid-1990s my work has consistently defended the grant of electoral rights in national elections to European Union citizens in the member state of residence. Believing that circumstances do not decide (and should not decide) and that deciding not to decide is not a credible option, the above line of decision has been prompted by the following four considerations.

1) The weight of principles

The contradiction between belonging fully to a polity as a contributor, collaborator, and burden-sharer and at the same time being deemed as not fully belonging to it with respect to the enjoyment of certain benefits, including national voting rights, is unsustainable form a democratic point of view. Robert Dahl and Carlos Santiago Nino have convincingly pointed out that democracy requires inclusion and, most certainly, the inclusion of all those who have a long-term interest in a country and its institutions. In this respect, the full enfranchisement of Union citizens in the member state of their residence is the only corrective to the existing 'democratic wrong', as Owen has put it.

True, some might argue, here, that admission of Union citizens to the 'national community' of citizens would undermine the distinction between

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_13

nationals and aliens and dilute the national character of parliamentary elections. Others might be quick to point out here that such a reform might undermine national interests. Although such objections are reasonable from the standpoint of liberal nationalism, they need reassessment in light of the current state of European integration and the fundamental status of European Union citizenship. For in the eyes of European as well as national laws, Community nationals are neither 'aliens' nor 'strangers'; they are, instead, Union citizens endowed with a number of rights that the member states must affirm. The Citizenship Directive (2004/38) has recognised this and has strengthened Union citizenship by establishing an unconditional right of permanent residence for Union citizens and their families who have resided in a host member state for a continuous period of five years. Accordingly, limiting the political rights of permanent resident Union citizens, who are already members of the demos at the local level and permanent members of the community, hinders democratic participation by depriving them of an effective voice in the legislative arena.

In addition, as the American philosopher John Dewey has pointed out, 'democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience'[1]. And this experience becomes dwarfed when national voting rights become a good reserved for co-nationals while EU citizens who are long-term residents are relegated to the status of the subject. They look at their everyday lives and the levels of the contribution, the homes they have created and the homes they have abandoned in the member state of origin and cannot understand why they should be viewed as 'guests' or foreigners' in the community they call 'their own' and the country they have 'chosen' to make the hub of their lives. With the passage of time, their voices, initially inarticulate and gentle, are bound to become more noisy as they see their taxes diverted into policy choices for which they have had not even a simple invitation to express an opinion for.

Once the weight of principles is appraised, the space of ordinary experience and expectation is surveyed and measured and the rationale of European integration of creating true associates by making the tag of nationality irrelevant when decisions about how people should be treated are made is given the importance it deserves, then the proposed idea of extending political rights to national parliamentary elections in the member state of residence does not give rise to a difficult dilemma.

---

[1] Dewey, J. (1964[1916]), *Democracy and Education*. New York: Macmillan, 87.

2) Tackling the democratic deficit without the methodological privileging of the state

Once the democratic deficit is acknowledged, questions of how best to correct it come into play. These questions, and their answers, have been discussed very eloquently by the contributors to this debate. The options on the table include the horizontal opening of national citizenship or the extension of Union citizenship. By opting for the former, we implicitly recognise (i) that it is the member states' business to correct the wrong; (ii) the national character of domestic citizenship should be preserved, and iii) that naturalisation should be the means of full participation in the national as well as European demoi. All three assumptions, however, clearly privilege the state and, by so doing, conceal the fact that the national state is called upon to resolve a wrong that its own constituent organising ideas have created in the first place. All three assumptions also superimpose two different logics and realities; namely, the logic of non-discrimination on the grounds of nationality and thus equalisation (full equality of treatment irrespective of nationality throughout the EU) (the logic of equality) and the national statist logic of turning aliens into nationals via naturalisation along with the underpinning rationale of cultural homogenisation in some form or another (the nationcentric logic). However, these logics are very different and must be kept apart. Certainly, European integration has been premised on non-discrimination and to assume that the state and its (national) ways should be given a theoretical and methodological priority with respect to the future development of EU citizenship denotes an ideological point of view. After all, why should not the citizens' everyday lives, lived encounters and expectations matter as much as states' interests in perpetuating the national citizenship narratives? And why should not the fundamental status of European Union citizenship place itself inside states' political domain and affirm its right to existence?

True, electorates in the member states may not welcome the extension of EU citizenship to national parliamentary elections. They may react negatively and right-wing extremism might capitalise on it in order to mobilise people against the governing political elites and the EU. But this is something that can happen anyway with respect to any real or imagined policy reform. Can political imagination and socio-political change remain captive of conservative interests which seem to fix their gaze firmly on the past and on the artificial commonalities of race, ethnicity, language and national culture thereby underscoring not only commonalities of interests, commitment to a shared institutional framework and of shared collective practices, but also the boundary crossings that preceded all the above commonalities,

both real and imagined, and the crossings that take place continuously around us? Can we afford to become the subterfuge of a historical process that robs us of judgment?

3) The road travelled thus far

Having to decide which trajectory to follow with respect to voting rights in national elections and to reflect on the concerns outlined by the contributors to this debate is not without precedent. It is important to remember that in the 1970s and 1980s the same debate took place with respect the so-called 'special rights', which included the right of Community nationals to vote and to stand as a candidate in local elections in the member state of residence. 'Equal treatment of Union citizens in the political field', 'strengthening the feeling of belonging to one legal community', 'complete assimilation with nationals as regards political rights', 'creating a people's Europe' and 'responding the expectations of Community nationals' were the rationales underpinning the grant of local electoral rights to EU citizens without a prior activation of national naturalisation procedures. Brave thinking at that time captured the dilemmas, weighed member states' concerns and, following such reflections and negotiations, the option that was favoured was 'special rights' rather than naturalisation because it was important that Community nationals were treated in host member states as if they were citizens of those states. Promoting greater equality with nationals was more beneficial than the opening up of the naturalisation gates because 'the emphasis should remain on residence rather than nationality.'[2]

And in the mid-1970s, national electorates' opposition to such an idea was considered, too. As the Commission stated at that time, 'equal treatment of foreigners in the economic and social fields is accepted by public opinion, since this has long been a subject for frequent negotiation between States, the same does not apply to equal treatment of foreigners in the political field. This is a new idea and the public will have to be given an opportunity to get used to it.'[3]

Additionally, when the Treaty on European Union entered into force, several MS continued to resist the implementation of what was then Article 8b(EC). In fact, by January 1997 of the fifteen member states only eight had made the grant of local electoral rights for EU citizens a reality. Fears of

---

2 Commission of the European Communities (1975), *Towards European Citizenship*, Bull. EC, Supplement 7, 32.

3 Commission of the European Communities (1975), *Towards European Citizenship*, 30

diluting local elections, fears of challenging the primacy of national citizenship, fears of making the European Union a tangible reality and thus contributing to the sidelining of member states were expressed frequently in the public domain, but none of these fears really materialised.

The memory of what has taken place and of the institutional choices on offer in the 1970s, 1980s, and early 1990s is thus a decisive one at this moment. For if turn our gaze from the current initiative toward the past, we can easily gain a glimpse of the solution. I would argue that this solution has created a path dependence which would make any other policy choice with respect to national electoral franchise a deviation and thus requiring a clear justification. The proposed Citizens' initiative thus creates a turning point as far as the maturation of EU citizenship is concerned. The questioning of the idea that political domains should be reserved for states' own nationals is unfolding. And in the same way that the European Community was not afraid to open local political spaces to non-national citizens of other member states in the past, the time has come for the completion of this process and the realisation of equality of treatment by fully enfranchising EU citizens automatically in the member state of their residence.

4) Free movement and EU citizenship are not only about spacing; they are also about timing

It is true that in both the literature on free movement of persons and the relevant case law spatial matters relating to cross-border are the main focus. Changes of location, border crossings and settlement in another member states activate most (albeit not all) of the advantages that EU law offers to EU citizens. What is completely disregarded in all these 'travelogues' is that exercising EU citizenship rights is also a temporal movement: a movement of 'before' crossing a border and 'after'; a shift from one collective imaginary and personal world to another collective imaginary and new personal world to be constructed; a change in perspective, viewpoint and system of beliefs; and the enjoyment of a sense of freedom and the daring opening of oneself to different rhythms of individual history and social surroundings. In this temporal movement change unavoidably takes concrete manifestation in the form of the appearance of new interpretations of the social environment, a new frame of mind, new questions, new dilemmas and eventually new answers. Member states cannot afford to bracket this temporal movement that shapes the lives of their new residents and their 'mutating' individuality either by continuing to subsume them under the fixed categories of home nationalities or by placing them into static and unchanging statuses. For the meanings, interpretations, ideas, interests, expectations and

meaningful relations that surround the life of EU citizens are not merely embodied in space; they also unfold in time.

Domestic political domains thus need to acknowledge that a new predicament brings about a receding past, decaying relations and entanglements in the light of new experiences, a new sense of worldliness, new entanglements, new personal journeys, new meaningful relations, new events and new political exigencies requiring responses. The temporal movement characterising settlement in a new environment is not only a process, but is also a variation, that is, change. Accordingly, democratic public spheres must be open to new participants and should be engagement promoters. Similarly, European Union institutions cannot afford to disregard this temporal movement, for they have been instrumental in lifting EU citizens from the imaginary of rooted publics and imparting onto them a sense of freedom and the consciousness of being treated with dignity and equality wherever they go in the territory of the Union. After all, this is what European integration was hoped to be able to accomplish since its early stages.

Arguably, it would be a fundamental contradiction, if, one the one hand, EU citizens were encouraged to move, cultivate new allegiances, form new orientations, have a European consciousness, create new realities, to be part of the fabric of the host societies and be treated as equal collaborators and participants, while European institutions, including the Council of the EU, refused to accept the full consequences, which include that EU citizens would feel themselves as active collaborators and participants in society and politics, on the other. Shutting the gate of political participation in national elections and frustrating the legitimate democratic aspirations of all those who for one reason or another partook of the European project and became valued members of the community of their residence would be tantamount to condemning one of the biggest achievements of the European integration project and making the proclamation to encourage participation in the democratic life of the Union empty rhetoric.

Legal norms should reflect social practices and EU citizens' lived encounters

Legal norms cannot afford to disregard both principles and social practices. If they do, they will eventually lose credibility. The partial franchise of EU citizens is clearly not adequate. Nor does it provide a frank solution for the future. Its extension to national parliamentary elections is thus necessary and this can only be done by resisting the temptation to shut ourselves up in the present and apply the 'available', that is, some stretching or opening up

of national citizenship, but by deciding a clear announcement of the future, that is, by removing the existing restrictions in the application of the principle of equal treatment and by making national electoral participation available to all those EU citizens who are enmeshed in the member states of their residence and have been sharing their burdens without any complaints for so many years.

Second Country EU Citizens Voting in National Elections Is an Important Step, but Other Steps Should Be Taken First

Ángel Rodríguez

History demonstrates that the extension of participation rights is a process. Not only is this true for national populations, who only gained universal suffrage after a struggle in which the percentage of those entitled to this right was growing over many years before reaching universal inclusion. It is also true for voting rights of non-nationals, rights which were extended to foreign residents only step by step, first to a selected group (for instance, those coming from former colonies) which was later on enlarged; or first to those who complied with conditions (for example, years of residence) which were subsequently lightened; or which included first merely the right to vote and only later the right to be stand as a candidate, etc.

Similar processes can be observed with regard to the type of election in which non-nationals have been entitled to participate. From this perspective, granting the right to vote in national elections for second country EU citizens is certainly a test on the bonds of solidarity among EU citizens, as Jo Shaw put it. But it also poses the question of whether, after twenty years of recognition in the EU of the right to vote and be elected for a selected group of non-nationals (European citizens) in selected elections (local and European ones), time has come to include also the right to vote at the national level. In my opinion, we could be still missing some steps that should not be skipped before trying to reach that objective; steps that are of a practical as well as a legal nature.

First of all, if we think that voting in local and EP elections are not the only participation rights we would like to see associated with European citizenship, and if, therefore, the idea is to go further, then the next step should be regional elections, rather than moving on directly to national ones. Certainly, regional elections do not play the same role in all member states, and there are some in which they do not even exist. But they are, nevertheless, quite relevant in those states with a federal or quasi federal territorial organisation. In some of them domestic law actually permits, in one way or another, the participation of foreign residents, so a future EU legislation

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_14

transforming this into a European fundamental right for EU residents would not have to fill a complete vacuum. After all, EU citizens can already vote in elections for regional assemblies in Scotland, Wales and Northern Ireland. In addition, this right would probably not conflict with domestic constitutional law as much as the participation in general elections would, since general elections, either legislative or presidential, are intimately linked with the core idea of 'national sovereignty' (or whatever is left of it). Both political and legal arguments would therefore suggest putting regional elections as the next goal for European citizenship all over the Union.

However, even before embarking on any extension of voting rights for EU citizens, much could be done in order to ensure that existing rights, that is, participation in local and EP elections, can be fully exercised without practical obstacles. The low percentage of second nationals EU citizens who vote in those elections in the state where they reside may have different reasons, but surely the lack of accurate information and, in some cases, the intricacies of the procedure play an important role. Take, for instance, the case of Spain: EU residents must enrol in the electoral census in order to vote, inscription in the municipal registry being insufficient. This is not only is a crucial difference with national voters (who are automatically included in the electoral census once they are registered in a municipality) but implies a number of practical problems, from linguistic ones to the incorrect, but common, belief that an EU citizen can only vote in local elections in Spain after a declaration that he or she will not to do so in a municipality of his country of origin. That declaration is neither an exigency of Directive 94/80/EC nor of Spanish law, but it exists nevertheless in the form that EU citizens have to fill in to be included in the Spanish electoral census. The reason is that, according to Directive 93/109/EC, a declaration by a second country national that he or she will refrain from voting in the state of origin is a requirement for voting in EP elections in the state of residence. Since in Spain the procedure for EU citizens to vote is the same for EP and local elections, potential EU voters – and, what is worse, the Spanish electoral board as well – think that the declaration to refrain from double voting applies to both. There is a significant number of EU 'gerontoinmigrants' who reside in Spain on a permanent basis but generally spend the summer months in their countries of origin and may be legitimately interested in voting both in host and origin countries' local elections).

As the last Report from the Commission on the application of the Directive 94/80/EC[1] shows, practical problems like this one may be found

[1] European Commission (2012), *Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the*

in a number of member states, revealing that much can still be done in order to increase the percentage of second country nationals who actually exercise their right to participate in local elections. A similar conclusion may be drawn from the Commission Report on the application of the Directive 93/109/EC regulating EP elections, the modification of which is currently under discussion although unfortunately the debate in the EU institutions has not yet reached the consensus necessary to make it possible.

The question of what to do with third country nationals, as posed by Rainer Bauböck's and Hannes Swoboda's contributions, also deserves much attention. Non-EU citizens who are permanent residents in a member state should be entitled by EU law to the right to vote in local elections before granting EU citizens additional rights to participate in national or even regional ones. The fact that this right is a part of EU soft law (as an ingredient of the idea of a civic citizenship) and that it is, subject to conditions, actually recognised by domestic law in a majority of member states would surely facilitate the introduction of EU legislation regulating it in the near future.

Last, but not least, there is of course the problem of the lack of legal competence of the Union to establish the right of second country nationals to vote in national election in the state of residence. Given the practical impossibility that that right could be 'discovered' by judicial action – even once the EU has acceded to the European Convention on Human Rights, the European Court of Human Rights would hardly rule that such a right derives from the Convention – a modification of the Treaties and of the Charter of Fundamental Rights would be necessary. The political (and economic) state of the today's EU does not give rise to much hope that this idea could have any chance of finding its way into European politics, even applying the method of a cooperation among member states, as Kees Groenendijk's contribution suggests, instead of trying to produce legislation at the European level.

Of course, the expectation that the 'Let me vote' ECI promoted by Philippe Cayla and Catriona Seth is unlikely to be successful, or that practical or legal problems might arise if it were, are not strong enough arguments to justify refusing to support it, once you agree with the idea that European citizenship should in the medium term include the right to vote and stand in

---

right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM(2012) 99 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0099:FIN:EN:PDF.

national general elections. I would undoubtedly sign in. But the energy and efforts that the ECI needs to achieve its goals could probably be better focused helping to ensure better implementation of the stage at which we are now. This means trying to reach a significant level of participation of second country nationals at local or EP elections in the host country, or aiming at participation in regional elections as the next step in the process of strengthening European citizenship.

A More Comprehensive Reform Is Needed to Ensure That Mobile Citizens Can Vote

Sue Collard

This initiative is a timely exercise with the upcoming prospect of the European Year of Citizens in 2013, and it has stimulated an interesting and useful debate in which the various contributions have covered most of the key issues at stake in the proposal. There are however a few questions that I would like to raise to add to the discussion.

The first concerns the definitions of residence and mobility: it seems to me that all the contributors have assumed that intra-EU migration is pretty much limited to the movement of citizens from one Member-State to another where they establish residence and then remain there, hence the apparent suitability of Bauböck's proposal of the acquisition of dual nationality as being the optimum scenario for this category of individuals. Yet the reality of mobility for a growing number of EU citizens, especially younger adults, is more fluid and complex than this, often involving a chain of moves from one country to another, with more or less extended periods of residence according to circumstances. I am thinking for example of a German friend, who has lived in the UK for ten years, having lived previously in Spain and France for six years each. How would any of David Owen's options cater for this kind of situation? And what of the young student, already having dual nationality through his/her parents, who decides to settle after a successful Erasmus experience in a third EU country: should he/she be allowed to take a third (or more) nationality? As regards the definition of residence, here too, with the growth of lifestyle migration, the concept has become much more fluid: the circumstances of some of the British residents in France that I interviewed revealed in many cases a highly complex residential status and there was significant evidence of what Groenendijk refers to as 'hiding their migration', either from the host country or that of their nationality, usually for reasons relating to health care or tax issues. How should residence be defined and proven? Fiscal registration? Electoral registration? Medical registration? There is currently no minimum requirement in terms of length of residence for registration for local elections, but for national elections, the five year period would seem to be reasonable; however, ex-pats who typically work to five year contracts, often moving from one country to

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_15

another, would be constantly going back to square one. The idea of voting rights based on residence is less straightforward than it might appear.

My second question relates to the situation of EU citizens who migrate to non-EU countries of which they are not nationals: if national voting rights were guaranteed for EU citizens resident in other Member-States on the grounds that they should not be disenfranchised, would it then be acceptable for other EU citizens to lose their voting rights if they choose to migrate to a non-EU country, such as British citizens settling in the USA? Would this be their punishment for leaving the haven of the EU?

My third question is about third country nationals (TCNs), who are far more numerous than second country nationals (SCNs), as Wilhelm has pointed out: several contributors have made the point that legislation at EU level would be impossible, and that the diversity of Member-States' political and historical circumstances should in any case be respected, yet clearly the link between these two categories of migrants is fundamental to the EU's perception of itself as inclusive or exclusive. There are strong arguments in favour of giving voting rights at local elections to long term TCNs, as many Member-States already do, but this should not be at the price of increased xenophobic reactions. The dilemma is well illustrated by the French case: François Mitterrand's campaign manifesto in 1981 included a pledge to give the right to vote in local elections to all foreigners, but the opposition it aroused, articulated indirectly through the rise of the National Front, meant that this was never implemented. Indeed, France was one of the countries that for various reasons put up strongest resistance in the Maastricht debate to the voting rights enshrined in European Citizenship, but largely because many feared it would be the thin end of the wedge, opening the door to the same rights for TCNs. In spite of the electoral success of the National Front in the presidential elections, Socialist President François Hollande has indeed pledged to do just this, and we should watch closely to see if his government has the courage and political support in the new National Assembly to go through with it, in the face of claims by the mainstream Right as well as the National Front, of an implied 'drift towards communitarianism' and the spectre of Muslim-dominated local councils organising women only swimming sessions and banning all pork products from school canteens. The false premise on which this scaremongering is predicated (many Muslims already have French nationality and therefore the right to vote at all elections) is all the more unjustified when one considers the low

rates of registration and participation in local elections by non-national EU citizens in France, estimated at under 15 per cent. Indeed, all the evidence suggests that if given the right to vote in local elections, only a small percentage of TCNs would actually use it.

Which brings us to the fourth question of the low mobilising value of voting rights, as pointed out by Wilhelm. Cayla and Seth, ask 'Who wants to go and live in a country without being able to exercise full democratic rights?', implying that few would; but the reality is surely otherwise, and it is quite clear from my own research in France and the UK that the vast majority of EU migrants do not take up their right to vote in local elections. Rodriguez's contribution suggests a similar picture in Spain, and I agree that much more could be done to increase participation at this level before moving into demands for national voting rights. Yet many of the non-national EU citizens that I interviewed, both in France and the UK, were far more concerned by the national vote than the local, and felt it impacted more on the reality of their lives: 'Why can't I vote if I pay my taxes?' was a common complaint. Long term French ex-pats at least retain their right to vote in all elections in France, whereas the British lose all voting rights in the UK after 15 years, even if they continue to pay taxes there.

So what answers can be found to all these questions and what contribution could the proposed ECI make here? Clearly, it makes a mockery of the democratic credentials of the EU if the very mobility that it seeks to encourage, brings with it political disenfranchisement. Member-States should have to recognise this, through a process of concerted action between them and EU institutions, as advocated by Shaw, by adapting their national legislations as necessary: all countries should be encouraged to allow the possibility of dual nationality, and those like the UK and Ireland operating restrictive policies towards ex-pats (at least two cases are currently being taken through the European Court of Human Rights by British ex-pats living in Spain and Italy), should be urged to update their laws in line with the first Protocol to the European Convention on Human Rights. Within this more permissive legal framework, citizens should be allowed to choose, depending on their circumstances, whether to vote in their country of residence or of nationality, thereby signifying a voluntary act of consent, and in no circumstances should any EU citizen be disenfranchised.

How could these goals be achieved? It is clear that pressure needs to be exerted by citizens on both EU institutions and national governments to bring about the necessary changes, and in this respect the ECI has the great virtue of launching a debate, albeit so far within a very restricted circle of interested individuals. Whilst I do not think its draft objectives are sufficiently well defined or realistic to be successful as it stands, I would be prepared to sign the petition to get the ball rolling towards a wider audience.

Incremental Changes Are not Enough – Voting Rights Are a Matter of Democratic Principle

Tony Venables

It is encouraging to note that the 'Let me vote' European Citizens Initiative is attracting much support. As much has already been said and commented upon, I will limit my contribution to just a few additional points.

1. This initiative launched by Philippe Cayla has my full support and I will sign it. As many have already pointed out, it has been successful in opening a debate around an issue that has been overlooked for too long. More importantly however it has also encouraged the EU institutions to start thinking about citizenship as a developmental or evolutionary concept. So far, there has been an apparent reluctance to use Article 25 of the Treaty on the Functioning of the European Union, which allows introducing additional rights of EU citizens. The fact that this initiative has successfully been registered with the Commission on 1 June 2012 will push citizenship forward beyond the present confines of the Treaties.

2. Secondly, I believe that the right to vote is so fundamental to democracy that any arguments reflecting the difficulties of putting it into effect pale into insignificance. It is simply unacceptable that the 12 million citizens who make full use of their right to move freely around the EU should have to put up with not having their say in their host country. Moreover, an important percentage of these not only do not gain a right to vote, but also lose their voice in their country of origin (here it would be interesting to know just how many are in this situation). Therefore, if one accepts that democracy is based on fundamental principles, it is not possible to claim that the denial of voting rights does not hinder free movement of citizens. Past contributions in this forum have already identified the existing difficulties in gaining voting rights and have also outlined different approaches to solving this problem, which are not necessarily mutually exclusive. What is important is first of all to grant the right to vote to those citizens who have but a partial or no say at all in regional and national elections. Questions around how and when to do this are secondary issues. Indeed, some solutions as to how to make this change have already been proposed in this forum but there are many others. During several citizens' panels organised in the framework

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_16

of ECAS projects, it was argued that many European citizens would consider using an EU card which would – among other uses to facilitate free movement – allow them to vote in specific elections. This proposition of course raises many issues of data protection but shows that there is a strong desire to counter these practical difficulties.

3. Concerns around timing have been expressed, namely that it may be too early to implement such a change and that it would be rather more beneficial to concentrate on improving the implementation and exercise of existing rights. This is often a very valid argument as civil society organisations, politicians and the EU Institutions tend to create new rights and legislation for their own credit rather than enforcing present ones. Such considerations, however, do not apply here. Launching this debate for the individuals who have no right to vote in their host country will also draw attention to the fact that they have an underused right – that is the right to vote in local and EU elections. It is increasingly apparent that those who have no say at national level lose their interest in political involvement, as they feel sidelined. Indeed, it is perhaps too easily forgotten that an ECI such as this one must be seen, first and foremost, from the very basic perspective of the citizen entitled to sign it. Their lack of participation in European elections in particular has a detrimental effect on citizenship, which is not to be ignored at a time when citizens' attachment to the EU is in decline. According to Eurobarometer, the past couple of years have seen a noticeable 5 per cent decline of citizens who believe that membership of their country in the EU is a 'good thing'. An incremental approach to European citizenship can work, for example in the case of social rights and entitlements, but it is certainly more questionable in the area of political rights where the contradictions are too apparent and become disincentives.

4. The European Citizen Action Service (ECAS) has been much involved in supporting ECIs having set up several support systems, organised many awareness raising events and disseminated information to ECI initiators and organisers. Presently it is also working on setting up an Online Signature Collection system, which will meet the specified requirements of the European Commission and provide organisers with a secure server. Philippe Cayla has accepted a real challenge, as any ECI which deals with citizenship will by its very nature encounter many difficulties. Indeed, as this debate has shown, intra-EU migration is extremely complex both legislatively and pragmatically. One key obstacle will also arise during signature collection due to the scattered geographical distribution of those most likely to sign it. Increasing evidence here at ECAS has also shown that social media offer no

shortcut for this complex and bureaucratic procedure of collecting signatures. It will be no easy task, but given that the ECI will inevitably encounter considerable obstacles, we must do everything to ensure its success. Citizenship needs civil society.

Mobile Union Citizens Should Have Portable Voting Rights Within the EU

Roxana Barbulescu

The contributions to this forum have mixed two arguments that share some common concerns but do not fully overlap. The first one has to do with Union citizenship and its associated rights, the role of Union citizens for the political project of the European Union and the boundaries of a 'Eurodemos'. It is therefore, broadly speaking, an argument about the status of Union citizenship and a particular group of people: the nationals of other EU member states.

The second argument is more encompassing and concerns non-citizens who otherwise obey laws and pay taxes but have no voting rights. One way to enfranchise these people is for member states and the EU to grant residents voting rights and this is what the European Citizenship Initiative 'Let me vote' proposes. The other way to achieve this result is by naturalisation – an option for which Rainer Bauböck, David Owen and Kees Groenendijk have argued convincingly. It is important to point out that naturalisation is an individual method of enfranchisement not a collective one. What both these methods seek to accomplish is to transform these persons from subjects into active citizens and thus to redress what Owen calls the democratic wrong. In other words, this argument is primarily about democratic deficit and the tensions and ills it causes in liberal democracies where not all their people have the right to vote.

This is a general argument and it applies not only to Union citizens but to all disenfranchised persons including non-EU migrants. Furthermore, this argument applies not only to EU member states but to all liberal democracies. If political rights need to be extended in order to fix the democratic deficit, then all residents and not only Union citizens should acquire these rights. But doing so one has to be aware that, as Dimitry Kochenov warns, that this exercise would only lead to another problem: the 'who are the people' question.

The matter at hands is, however, not about the general democratic deficit in societies of immigration, but about European integration and the pivotal role Union citizenship plays for the European Union project. I propose therefore an argument for portable political rights for mobile Union citizens.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_17

Political rights for mobile Union citizens

Compared with their fellow citizens, mobile Union citizens lose their political rights in the home country and most of the times they do not regain them at destination. This situation produces a cleavage between the mobile and the stationary Union citizens in the member state of origin as well as in the member state of residence. In this context, mobile Union citizens have only limited voting rights at the local level and in elections for the European Parliament while stationary Union citizens enjoy full political rights.

So far my argument is in line with Bauböck's: mobile Union citizens should not be penalised for exercising free movement right. However, we differ on the solution: voting rights in national elections should be portable across the EU and linked with (legal) residence. This mechanism is not new. It has guided the implementation of the EU rights Union citizens enjoy today: social contributions and pensions, medical insurance, local voting rights, etc.

In this scenario, Union citizens would be the ones deciding where they want to exercise their voting rights. They could register their residence in the destination country and transfer these rights there or they could 'hide' their change of residency from their country of origin and continue to enjoy political rights there. Sociological studies on the lifestyle of mobile Union citizens show that they skilfully combine rights they have 'at home' with rights they have in their new homes. Where Union citizens would choose to vote if they had the opportunity to do it either in their country of origin or of residence remains an open question and for most people, social ties and political loyalties will change with the passing of time.

Why naturalisation solves too little too late

When foreigners naturalise, they become citizens with full citizenship rights. They gain not only political rights but also access to a set of privileges reserved to nationals. The most common reserved privileges are public sector employment, service in the army, access to non-contributory social benefits and, of course, the right to vote in national election. It seems that a naturalisation option might actually solve the problem of disenfranchisement. And, it would do so not only for mobile Union citizens but also for their children and children's children. Why then is naturalisation not the most appropriate solution for Union citizens?

First of all, changing the rules of acquisition of their citizenship in 27 countries in order to make it easier for Union citizens to naturalise will take

a lot of time. And, second, even if this happens nationality policies alone would not enfranchise Union citizens with political rights. At best, it would bring stronger incentives for this group of people to acquire citizenship and, with it, voting rights.

What this means is that the democratic deficit would persist until all Union citizens naturalise. This process might again take many decades because the decision to naturalise is ultimately an individual and personal one. Furthermore, judging from the low naturalisation rate amongst Union citizens, this moment might not arrive ever for the first generation of Union citizens.

A common EU directive granting Union citizens such rights directly achieves more and faster than naturalisation. Once implemented, this directive would automatically and simultaneously enfranchise all Union citizens.

Secondly, most contributions in this forum have presented enfranchisement by naturalisation and by voting rights as mutually exclusive alternatives. In fact, the two options tend to go hand in hand with each other. For instance, those member states that have a more open access to citizenship also give long-term residents the right to vote in local elections (the Scandinavian countries and the Netherlands as opposed to Spain, Italy, Greece and most new EU member states).

Thirdly, given that these are Union citizens we are talking about, it seems to me disproportionate to ask them to naturalise, and often also to renounce their original citizenship, in order to gain political rights. It is disproportionate for non-EU migrants but even more so for Union citizens.

Why that? Is there anything special about Union citizens who live in the European Union? Are they different from other foreign nationals living in a country other than their own somewhere else on the globe? I believe the answer to this question is yes. Member states and their citizens are partners in a shared European project with a common market, common economy and freedom of movement. Because of the specificity of the situation, alternative ways of political inclusion are preferable to naturalisation.

In addition, supporters of enfranchisement through naturalisation should also consider that by becoming a citizen in the country of residence a naturalised Union citizen would lose some of the substantive EU rights which she would otherwise enjoy as a Union citizen who resides in another member state. A naturalised Union citizen would thus be less a Union citizen than a new national citizen.

Political rights for Union citizens reloaded?

Since political rights at the local level have already been agreed upon and implemented by the member states (many of which had to change their constitutions to allow non-nationals to vote or stand for office) then why is there still a debate on whether or not to enfranchise Union citizens?

Dora Kostakopoulou rightly point out in her contribution that many of the arguments made in this forum had been put forward when these rights were first introduced only two decades ago. This is a road we have walked before. This time, however, it is not a matter of starting afresh but rather a matter of extending the existing political rights to national elections.

If the European Citizens Initiative 'Let me vote' proves successful, it would do much good for the development and understanding of Union citizenship. Critics have long argued and for good reasons that this form of citizenship is little more than a legal status that developed in a piecemeal fashion largely through decisions the Court of Justice of the European Union. Nonetheless, a success of the ECI would demonstrate that there are real people, with names and surnames, who support it and claim more rights.

In conclusion, the main question this forum has asked is whether Union citizens should gain voting rights in national elections. While there is some disagreement on the method by which they should achieve these rights – via naturalisation or direct enfranchisement – it is important to highlight that all contributors have argued in favour of full political enfranchisement of Union citizens. None of the contributions considers satisfactory the status quo which limits the voting rights Union citizens have to local and EP elections.

Concluding Remarks: Righting Democratic Wrongs

Philippe Cayla and Catriona Seth

In the space of a couple of months in 2012, France has held four elections, two for the Presidency, two for the National Assembly. One of us voted on all four occasions. The other on none. We are both law-abiding, tax-paying citizens in full-time employment. We are both of voting age. The difference is that one of us is a Frenchman living in France and that the other lives and works in France, thanks to free circulation which is at the heart of the European union, but holds British nationality and can therefore not vote in the country in which she resides, works and pays taxes. It is in order both to foster a true spirit of European nationhood and to correct such lacunae that we launched our 'Let me vote' ECI and the EUDO forum debate. Though neither of us is competent to comment on the finer points of EU and constitutional law, we have both been impressed by the wide-ranging and challenging proposals and demonstrations set out by the different participants and would like to express our deep gratitude to those who have taken the time to make their feelings and ideas known, whether they ultimately come out totally or partially in favour of or against our initiative. We can only agree with Dora Kostakopoulou's opening remarks, when she notes that the different contributions to the forum 'have provided a number of valuable reflections on matters of principle, policy, strategy, and tactics in the light of contemporary political developments at both European Union and domestic levels.' She adds: 'By clarifying matters of principle as well as issues of politics, they have outlined several trajectories and shed ample light onto the pros and cons of the European Citizens' Initiative.' The variety and depth of the comments tend to confirm that, as Jo Shaw states, the ECI is a timely initiative on an important question.

We would like to start by stressing a point which the eminent specialists who have expressed their ideas have perhaps not always taken fully into account, i.e. the limits which the very procedure of ECIs imposes. Our ECI's object has been analysed, but not its starting point: a valiant but fragile citizens' committee. We are neither an institution within the Union, nor a political party, a trades-union or even a powerful lobby. We are a small group of well-meaning citizens, strong believers in the European cause, but with no means other than those afforded by the ECI's procedure. The procedure

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_18

itself is very restrictive: it only allows us to make suggestions which can lead the European Commission to propose legislative measures within the framework of existing treaties. There is no possibility therefore for us to encourage actions in the field of nationality, for instance, or with regard to the rights attributed to third-country nationals, as some contributors like Ángel Rodríguez seem to suggest. We feel strongly that such questions are outside our scope. In addition, it must be noted that the requirement of collecting a million signatures within a year is a very tough one and that the only chance of meeting it is for an ECI to have a simple, clear and ambitious object.

Our contention is that there is a case to be made for Europeans to be granted a form of super-citizenship, in the tradition of the *civis romanus* who was a citizen of Rome without losing his own statehood. We believe that at a time when Europe is increasingly seen as a bureaucratic and costly system with no positive impact on everyday life, a form of European citizenship which would allow one to vote in all elections of one's country of residence when within the EU, could only enhance our feelings towards the Union and serve to foster increased implication in its development. It would be a concrete way of recognising that we share a common culture and that our future lies in a common destiny. David Bellamy can reassure those who see mobile EU citizens as benefits tourists. On the whole, those who are interested in an initiative such as our ECI are quite the opposite: dedicated professionals, open to European cultures and languages, conscious of a shared heritage, desirous to contribute to a peaceful and prosperous future for the EU.

What are our ECI's fundamental objectives? There are three of them:

1) **To give European citizenship its full meaning by making it grant access to all fundamental rights, including the right to vote, whatever one's country of residence. It is a principle of equality for Europeans.**

Dimitry Kochenov makes a very useful point with his question: 'Who is a foreigner?' Surely an EU national within the EU, whether in his or her home state or elsewhere, is not a foreigner and must not be treated as such. Dora Kostakopoulou adds that it is unsustainable in a democracy to ask people to contribute fully but only to treat them as *de facto* second-class citizens.

2) **To give mobility (i.e. the principle of free movement within Europe) its full scope.**

There is general agreement amongst the authors that the current situation entails a serious democratic deficit and that it is absurd that this should

derive from the exercise of one of the EU's core rights: free movement. As David Owen points out: 'This is a democratic wrong since it is not democratically legitimate that a person lawfully exercising a civil right shall in virtue of such exercise be deprived of a political right.' Is this dysfunction of democracy, as Rainer Bauböck suggests, only the case for those who, like Britons or Danes, do not keep home voting rights permanently wherever they live? Is it not, rather, the case for anyone who is integrated in their country of residence in every respect (working, speaking the language, paying tax etc.) but deprived of the democratic rights granted to those who were born there (or whose parents were born there), but who may, in the most extreme of cases, never go there. When you move from Perpignan to Calais or from Aberdeen to Exeter, you vote for the mayor of the town in which you live. You do not forever cast your vote in the ward in which you were born. In the same way, would it not be logical to consider that you take your voting rights with you when you move overseas but stay within the EU? In a true European Union, living in Vienna or in Seville should be of no more consequence than moving from Genoa to Milan: you should not be disenfranchised because you have chosen to exercise your right to mobility – Roxana Barbulescu's analogy with the portability of pensions or medical insurance across national borders within the European Union is a demonstration of the fact that rights acquired in one EU State can be enjoyed in another. As a matter of consequence, we do not believe that simply ensuring that all EU citizens maintain a permanent right to vote in their home nations is the appropriate solution: we are most directly affected by what happens in the land in which we live and work – if income tax is to increase in Greece, this is less likely to have instant consequences on the everyday existence of Greeks living and working in Brussels, than if it goes up in Belgium. Martin Wilhelm's vote exchange system implicitly recognises that citizens can feel more immediately concerned by the political situation of the state in which they reside than by elections in their home country.

3) Finally, to give the democratic principle, 'No taxation without representation' its full meaning. This is a consequence of applying the principle of solidarity to all residents.

This principle, which launched the American Revolution, is already recognised locally, as Kees Groenendijk stresses. It must be extended at regional and national levels too: Europeans resident in the EU pay income tax as well as local taxes. Currently, we are being taxed and some of us, like the pigs in *Animal Farm*, are more equal than others. Even the Commission has to agree that this is the case, as Andrew Duff's recent exchange about the European Convention on Human Rights shows.

In this context, let us take another look at some of the objections set out by certain contributors.

1) The main objection is that a European citizen who resides in another member state must take out its nationality if s/he wants to vote there.

Answer: clearly, if the principle of free circulation is to apply, any European has to be able to move to another EU country whenever s/he wants to – why not every year if the labour market makes this desirable? One can recall here that Olivier Blanchard, the IMF Chief Economist had imagined in 1998 that the Euro zone could fail because of lack of fluidity in the European labour market. Asking EU nationals to acquire another EU nationality in order to be able to vote does not seem to offer an apposite answer: in these changing times, many of us will live and study in several EU states within our lifetime – Sue Collard helpfully gives a couple of examples of people concerned by such moves. Does this mean that each time we take up residence in a country we should pick up the nationality, thanks to simplified procedures? Or would this not debase the concept, were we to end up, routinely, with three, four or five passports? As Rainer Bauböck suggests, citizenship should be seen as a lifelong status. Unlike him we feel that, as a result, one EU passport should be enough for anyone: citizenship of any EU nation should make one an EU citizen, wherever one lives. This is not to preclude anyone from holding a second EU citizenship or to deny anyone dual nationality. Acquiring a country's passport should not, however, be a prerequisite in order to vote in its national elections if one is already an EU citizen within the Union. As Alain Brun puts it in a nutshell: 'I understand European citizenship as the right to be considered as a national by any member state other than the one whose nationality I hold, as soon as I am in relation with its authorities, in one way or another.' Or, to echo Dimitry Kochenov's words: 'Since member state nationalities are in the absolute majority of cases legally inconsequential for EU citizens travelling around the EU, connecting democratic participation with naturalisation amounts to artificially inflating the importance of an *abolished* status.' In addition, Roxana Barbulescu makes a very interesting comment when she opposes the *individual* solution of naturalisation and the *collective* process of enfranchisement of EU citizens.

Obviously, no one is going to change nationalities every year. In addition, on a legal level, questions of nationality are outside an ECI's scope.

2) Second objection: it is more urgent to improve the current situation, viz access to and participation in municipal and European elections, and prudent to limit the demand for new rights for Europeans to regional elections.

Answer: be that as it may, such a proposal would never be attractive enough to collect a million signatures. We fail, in addition, to see the legitimacy of giving limited voting rights to EU citizens. Why should it be all right for them to elect their mayor, but not the member of a legislative assembly or a president? A collateral advantage of our ECI is that granting EU citizens full voting rights in their host country would probably increase general awareness of – and interest in – European elections. This would in turn almost certainly boost the turnout and the visibility of such polls. A bold and supranational step, such as the one we propose, would also give Europe a more definite structure, *de facto*, rather than leaving it stuck in a halfway house between a confederation and an association.

3) Further amendment: conditions of residence and the question of whether one could potentially vote in two countries need to be envisaged.

Obviously such issues will have to be dealt with, but they are not within our remit.

4) Last objection: dealing with third-country nationals is paramount.

Should they acquire EU citizenship, third-country nationals would of course benefit from our ECI, but their rights are outside its scope.

There are clearly political, philosophical and legal aspects to take into account – there would also be economic consequences to any change in the *status quo*. Debates about EU citizenship are, more than ever, debates about the future of Europe itself – and thus carry huge symbolic value too. Hannes Swoboda rightly affirms that 'the necessary evolution of EU citizenship leads to a gradually growing relevance of residence as [the] defining criterion for the exercise of related rights.' As in clothes shops where 'one size fits all' generally means nothing will be a perfect fit for anyone, our ECI falls short of some people's ideal scenario. The five options David Owen sets out offer unequal advantages, though he stresses that the ECI ticks a number of boxes. Obviously we are aware that obtaining and implementing voting rights for EU nationals in their country of residence (or allowing them to choose between voting in their home country and their state of residence) will be an uphill struggle. However, Tony Venables hits the nail on the head when he states that 'the right to vote is so fundamental to democracy that any arguments reflecting the difficulties of putting it into effect pale into insignificance'.

The different cases made for and against our ECI in the EUDO forum debate have but strengthened our resolve. There is broad consensus that the current situation is untenable. The idea that our proposal is 'timely' is men-

tioned several times and we can only see this as an encouragement, along with the fact that most contributors affirm that they will sign it. We are grateful to them for this. We believe, more than ever, that our case is a strong one. The fact that our ECI has been officially validated shows that our proposal does not fall outside the Commission's scope. Next year (2013) is the European year of citizens. Let us do all we can, together, to right democratic wrongs and endow European citizens with full voting rights wherever they choose to reside within the EU.

Part II: Freedom of Movement Under Attack: Is it Worth Defending as the Core of EU Citizenship?

Abstract

This forum debate discusses the link between Union citizenship and free movement. These concepts were long understood as progressive and fundamental mechanisms in drawing the citizen closer to the European integration project. Both concepts now appear in crisis. This is, of course, reflected in the run-up to, and outcome of the Brexit vote. But criticism on the link between Union citizenship and free movement must be understood in a wider context. It is the context within which welfare systems are perceived to struggle with the incorporation of migrant citizens; and within which the benefits linked to free movement are perceived to fall to specific groups or classes of citizens in society. This forum debate takes on this discussion in two different ways. One the one hand, it discusses whether free movement contributes to, or detracts from, the capacity of the EU to create a more just or legitimate relationship between its citizens. On the other hand, it discusses whether Union citizenship – a status that is fundamental to all nationals of the Member States, whether they move across borders or not – should be centred on free movement, or whether we need to rethink the premise of what it means to be a European citizen.

Keywords

Free movement; EU citizenship; Migration; Mobility; Brexit; Welfare.

Freedom of Movement Needs to Be Defended as the Core of EU Citizenship

Floris De Witte

Freedom of movement is under attack from different sides. It is under attack *politically* in different Member States due to its alleged effect on the sustainability of the welfare state; it is under attack *legally* by the CJEU's retrenchment of the rights of the poorest of Europe's citizens; and it is under attack *conceptually* by those scholars and politicians who wish to understand EU citizenship to be primarily about the connection between *all* Member State nationals and the EU rather than focusing on the rights of *mobile* citizens alone. In all these accounts, the main fault line that seems to be emerging is that between mobile and immobile citizens in the EU – a fault line that the EU struggles to internalise politically and that can be traced back directly to the right to free movement.

Is there any reason to defend free movement as the core of EU citizenship? I think that there is more than one. Below, I will argue that EU citizenship *should* be primarily about free movement as a) it emancipates the individual from the nation state; b) it serves to recalibrate questions of justice and democracy in a more appropriate manner; and c) it lacks the ties to a homogenous political 'community of fate' that perpetuate significant exclusionary practices. For these reasons, free movement is *the* central thing that EU citizenship should be about: it is what makes EU citizenship distinctive from, and genuinely supplementary to, national citizenship.

Free movement as emancipation

Free movement is often understood in terms of its economic costs and benefits to the Member States of the EU. But we see something very different when we change the lens through which we look at free movement from one that is preoccupied with its effect on *states* to one that looks at its effect on the *individual*. From the latter perspective, freedom of movement is primarily about exactly that: the *freedom to move* out of one's own state and to choose a different type of life in a different type of place. Thus understood, free movement is an emancipatory force. It allows individuals to live their lives unencumbered by the limits that their place of birth imposes on them,

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_19

and freedom of movement allows them to understand themselves (and the possible realisations of that self) in much more authentic terms.

This freedom of movement allows an LGBT+ couple that lives in a country in which the legal, political, cultural or social conditions do not allow for meaningful recognition of their love to move to a more permissive environment. It allows a retired teacher from Middlesbrough to enjoy her pension in sunny Lanzarote, and it allows a Romanian IT-consultant to move to Lille to live with his Hungarian girlfriend who works as a nurse in Belgium. Freedom of movement allows Europe's citizens to move for love, work, family, language, social or cultural reasons, or simply to be somewhere 'else'. It is about liberating the individual from the possibilities, opportunities, prejudices, cultural and social norms or convention (or even weather) that exists in their 'own' country, and about making available realisations of life in other states that might much more closely fit with the individual's own preferences. To turn this around, it also means limiting the capacity of states to force the individual to live her life in a particular fashion.

This emancipatory potential of free movement is not only realized through actual movement. It also has a reflexive virtue: it orients the individual's visions of self-realisation and self-understanding outwards. The possibility of free movement allows for many different realisations and understandings of the self that may have been unavailable but for free movement. Freedom of movement, in other words, liberates not only the body but also the mind from the normative structures of the state.

Free movement, as such, is to be defended normatively as it problematizes the domination that the nation state exerts over our choices, self-understanding and images of self-realisation. To put it as bluntly as possible, the nation state's mode of social integration reduces the incredibly complex individual to a one-dimensional being: a national. We all have many meaningful relationships and ties of identification with different groups in society, based on our profession, sexual orientation, ethnicity, religion, residence, language group, hobbies, or sharing of certain social or cultural preferences (a football team, a mode of transport, a type of music, cuisine or mode of living). The nation state, however, essentially tells us that while those relationships and patterns of identification may matter to us *privately*, the only one that matters for us as *public* individuals is that of nationality. It is with nationals, after all, that we have to share our resources and that we have to discuss what is allowed or not in society. And it is the nation-state that can coerce us into (not) taking particular actions, that can criminalise certain behaviours, that can trivialise certain needs or that can prevent certain aspirations. As Amartya Sen explains, this 'increasing tendency towards seeing

people in terms of one dominant "identity" (…) is not only an imposition of an external and arbitrary priority, but also the denial of an important liberty of a person who can decide on their respective loyalties to different groups'.[1]

The first reason why freedom of movement ought to be defended as the core of EU citizenship, then, is that it enhances our capacity to understand ourselves and realise ourselves in a more authentic and genuine fashion.

Free movement as a recalibration of justice and democracy

The second reason why free movement ought to be defended as the core of the relationship between the individual and the EU is because it makes us sensitive to practices of exclusion. The construction of EU citizenship, in particularly within the context of the rights to free movement and non-discrimination, has the potential to lead to more inclusive ways of thinking about what freedom, justice, equality and participation should mean in the EU. It also has, however, the potential to lead to more practices of exclusion. The fact that EU citizenship and free movement are not embedded in a sufficiently sophisticated, responsive and democratic institutional structure makes it very difficult for the EU to mediate the social conflict that practices of inclusion and exclusion produce, and to legitimise the choices made.[2]

There are many different ways to approach and address these issues. In very general terms, the right to free movement and non-discrimination attached to EU citizenship can be understood to correct instances of injustice and promote the inclusion of outsiders: it makes national distributive systems sensitive to the need to incorporate EU migrants who contribute to the host state in an economic and social way. The Court's case law, and its criteria of 'a certain degree of integration' or 'real link to the host state society' can be understood as mechanisms that serve to identify which migrants should have a right to access redistributive practices in the host state on account of the fact that they meet the conditions of reciprocity the sustain those welfare benefits.

I will not here discuss precisely how EU law attempts to balance the incorporation of outsiders in domestic practices of sharing with the need to sustain the reciprocal or solidaristic nature of those practices (which presume that access is bounded). The wider point that I am trying to make is that free movement makes us sensitive to the structural processes of

---

1 Sen, A. (2010), *The Idea of Justice.* London: Penguin, 247.

2 See, generally, Witte, F. (2015), *Justice in the EU: The Emergence of Transnational Solidarity*. Oxford: OUP, 22–37.

exclusion that the nation state perpetuates, and serves as an instrument to problematize these processes. Here, instead, I will touch very briefly on two of the most topical ways in which contemporary understandings of free movement and EU citizenship can be understood to *produce* instances of exclusion – which suggest that there is a need to *defend* free movement as the heart of EU citizenship.

The first example is the 'emergency brake' that the UK has managed to secure in its renegotiation on the terms of its EU membership.[3] This should eventually allow for the exclusion of EU migrant workers from in-work benefits for (at most) the first four years of their presence in the UK. In the UK, this has been presented as an exercise in *justice*: it ought to create more opportunities for nationals on the job market, and to prevent payments *from* the public purse to individuals who have not sufficiently contributed *to* that same public purse. This argument has been accepted by the heads of state of the other Member States and the Commission despite the absence of empirical corroboration. In fact, the most elaborate studies suggest that the fiscal effects of free movement on the UK are probably positive, and certainly neutral at worst.[4] What we see here, then, is the problem if we understand freedom of movement as a luxury rather than an individual right at the heart of EU citizenship: it is prone to scapegoating and politicking, which are the exact forces that it is meant to combat. This is not to say that free movement cannot create pressures that produce exclusionary effects for national citizens (and which EU law ought to be sensitive to). It seems to me, however, first, that those pressures are primarily infrastructural (which cannot be scaled up sufficiently quick to accommodate access for all) and not of a financial nature, and second, that EU law's understanding of the limits to free movement and non-discrimination offer sufficient guarantees to prevent such practices. The compatibility of the 'emergency brake' with the right of free movement is likely to be tested if the UK votes to remain in the EU, and we could place our fate in the Court to protect free movement and non-discrimination as being at the heart of the relationship between the individual and the EU.

Unfortunately, it appears that the Court itself is not convinced of this. The recent *Dano* case offers a good example of how the Court is increasingly turning its back on understanding free movement to be a right attached to the 'fundamental status' of every EU citizen. In that case, the Court

---

3 See European Council Conclusions (EUCO 1/16) 19-24, 34.

4 Dustmann, C. & T. Frattini (2014),'The Fiscal Effects of Immigration to the UK', *Economic Journal*, 124 (563): F593–F643.

suggested that the right to basic social assistance mechanisms (as a corollary of the right to equal treatment tied to residence in a host state) is unavailable for those citizens who do not have 'sufficient resources' to take care of themselves. In a ruling that comes quite close to depicting Ms Dano in racist terms as a citizen whose presence in Germany is of no functional use to German society, the Court changes the category of EU citizens that can realistically make use of the promise of free movement. In simple terms, *Dano* suggests that free movement is not for all Europeans. It is not a right attached to the 'fundamental status of all EU citizens', but rather a privilege that European playboys are allowed to make use of. Again, this judgment was celebrated throughout Europe as bringing about *justice*; as defending the welfare systems against the parasite that is the poor (or poorly-educated) fellow European. Instead, I would argue that it is about the perpetuation of exclusion of vulnerable citizens from the processes that serve to remedy those very vulnerabilities. It is a judgment that legally mandates the creation of a European underclass of vulnerable citizens who, *because of their exercise of free movement*, are neither politically represented nor materially protected from the most egregious forms of exclusion. This case shows why we need to defend free movement as a right at the core of EU citizenship: something that ought to be available under similar conditions for *all* nationals of the Member States, and not only for the privileged ones.

Free movement as separating 'the nation' from 'the state'

The third and final reason why we ought to defend free movement at the core of EU citizenship is because of the latter's idiosyncratic structure. Unlike national forms of citizenship, EU citizenship is not linked to a 'community of fate' that reflects certain ethno-cultural ideas of a homogenous community, forged on the basis of a shared language, history, myths and ethnicity, and solidified through boundary closure, narrowly-defined membership groups and exclusion of outsiders. EU citizenship, instead, is a 'stateless' or 'anchorless' idea of belonging and community: it suggests that its subjects are part of something that is incipient, ill-defined, and diverse. Often, this is understood as the main weakness or source of illegitimacy of EU citizenship. I would argue that it is exactly its strength.

The absence of a link between the institutional idea of EU citizenship and a specified 'ethnos' or the idea of a 'nation' is exactly what makes EU citizenship normatively appealing. Accounts of the 'long history' of European integration suggest that the inter-war experience and the Second World War identified the problems with parliamentary or national sovereignty. Very simply put: democracies premised on these ideals appeared not

to be very good at remaining democratic. On this account, the creation of the EU was deliberately meant to *constrain* democratic externalities,[5] and particularly the capacity of states to enforce practices of internal exclusion or external aggression. In other words, EU law serves to foreclose the capacity of domestic democratic actors to commit democratic suicide. Usefully, this narrative proved appealing for Member States that acceded to the EU in the aftermath of periods of totalitarianism. This project of depoliticisation was massively helped by the role of law in the integration process. The scholarship on 'integration through law' suggests that law is both the agent and object of integration, and is used to push through the objectives of integration even in the presence of political objection on the national or supranational level.

What has all of this to do with free movement and EU citizenship, though? Free movement is at the core of the objective of constrained democracy. The legally enforceable right to enter and exit spaces of state authority and the legally enforceable right to equal consideration in whichever space an individual finds him or herself, go a long way towards limiting the power of the state to internally exclude certain groups or antagonise their neighbours. It is free movement, in a sense, which disciplines the nation state, and ensures that its civic institutional structure does not fall in the traps of the ethnos within which it historically grew. In that sense, our 'anchorless' EU citizenship is the perfect institutional container for a new – less ethnic – way of thinking about the role of the individual in the EU.[6] And free movement is how this virtue is implemented. The third and final argument in defence of understanding free movement to be at the conceptual heart of EU citizenship, then, is that free movement is the perfect *instrument* for the implementation of the core normative promise of EU citizenship.

Conclusion

The Treaty suggests that EU citizenship is to be 'additional to' national citizenship. This contribution has argued that the added value that EU citizenship can offer primarily lies in its connection to freedom of movement. Freedom of movement, on this view, is an instrument that liberates the individual's mind and body from the domination that the nation state exerts over it; that reorients domestic processes of justice and democracy towards more

---

5 The most recent contribution is Muller, J.W. (2011), *Contesting Democracy*. Yale: Yale University Press.

6 See, generally, Azoulai, L., E. Pataut & S. Barbou des Places (eds.) (2016), *Ideas of the Person and Personhood in European Union Law*. London: Hart.

inclusive practices; and that institutionalises an idea of civic belonging on a continent that has been plagued for a century by the consequences of ethnic ideas of belonging. For these reasons, free movement must be celebrated and defended as the core of EU citizenship, as a right that is available for all 500 million EU citizens, and as an idea that benefits all those citizens – whether they make use of it or not.

The Failure of Union Citizenship Beyond the Single Market

Daniel Thym

Floris de Witte's defence of free movement presents us with a decidedly non-economic vision of cross-border mobility. It is this normative dimension which connects his argument to broader debates on Union citizenship whose 'core' he considers to be free movement. His thinking builds upon the rich tradition of institutional practices and academic reconstruction that has highlighted the non-economic value of the original market freedoms ever since the late 1960s – the period when the EU legislature opted for generous implementing legislation on the basis of which the ECJ later advanced citizens' rights in cases with purely corollary economic aspects.

I accept this normative starting point and yet will highlight its limited reach nonetheless. De Witte concentrates on the potential of free movement in correcting outcomes at national level without connecting the evolution of citizens' rights to constitutional trends at European level. However, such a broader outlook could help explain the volatile state of Union citizenship at this juncture. I will argue that restrictive tendencies appear as epitaphs of a Union losing self-confidence as a supranational polity, emphasising instead the continued significance of solidary political communities at national level. If we want Union citizenship to thrive, we have to move beyond a minimalist reading.

Correcting the nation-state

I subscribe to De Witte's defence of free movement as emancipation without hesitation, but want to ask: is that all? Much of the liberty he associates with intra-European mobility is guaranteed as a matter of domestic or international human rights law anyway, which, together with changing self-perceptions of Western societies, considerably extended the degree of private and public choice in recent decades. Gays and lesbians may move to the big cities in their home state to find (relative) freedom – and German pensioners can settle in my current hometown of Konstanz or other

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_20

domestic cities known for their quality of life instead of relocating to Spain. To be sure, European rules *extend* our freedom geographically and in substance, but the surplus remains gradual instead of categorical.

The same can be said about his third contention on separating 'the nation' from 'the state'. Here he subscribes to an essentially corrective vision of supranational citizenship. Again, I do not take issue with his analysis as a matter of principle, but wonder about the degree of normative value involved. Arguably, the separation between the nation and the state defended by De Witte is no longer a novelty for most (Western) European societies. Nationality law is a perfect prism to highlight changing self-perceptions: two decades ago, ethno-cultural foundations of national identity were pertinent in many Member States. Immigrants obtained certain rights, but their status could be described as a form of 'denizenship', which stopped short of full membership through the formal acquisition of nationality and equal participation in the public realm.[1] Today, the picture looks different: some Member States moved towards *ius soli* and essentialist definitions of national identity are being supplanted by various degrees of civic-pluralistic identities.[2]

To be sure, European integration may have been instrumental in bringing about this adjustment through more than its rules on free movement. Such change also remains an ongoing challenge characterised by ups and downs and occasional backlashes. While it is well advanced across Western Europe (notwithstanding the surge of populist movements whose success can be rationalised, in part at least, as a reaction to social change), some countries in Central and Eastern Europe are still in need of similar metamorphoses, in which the corrective potential of European rules described by De Witte may play a beneficial role (as recent developments in Poland and Hungary illustrate). But this does not unmake the move towards inclusionary nationality laws and civic-pluralistic identities. If that is correct, the emancipatory dimension of transnational mobility remains limited. It may reinforce a trend whose dynamism, however, is not intrinsically linked to Union citizenship.

---

1 See Hammar, T. (1990), *Democracy and the Nation-State. Aliens, Denizens and Citizens in a World of International Migration*. Aldershot: Avebury.

2 See Joppke, C. (2010), *Citizenship and Immigration*. Cambridge: Polity Press, chs 2, 4.

Moreover, broader societal debates on the impact of immigration across Europe illustrate that the corrective reading of transnational mobility defended by De Witte remains mostly negative. It invites European societies to abandon essentialist self-perceptions, but does not contribute much to how the normative foundations of social cohesion should be construed instead. The EU's vision of 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' (Article 2 TEU) or the ECHR's standard invocation of 'pluralism, tolerance and broadmindedness' as hallmarks of a democratic society which are supposed to structure the proportionality assessment often remain hollow. That is why De Witte's vision of free movement reinforcing emancipation at national level remains a thin normative account.

Access to social benefits as a test case

Equal access to social benefits has received much attention in scholarly treatises on Union citizenship over the years, but only recently has it caused widespread political frictions. One reason for the limited impact of the original equal treatment guarantee may have been that it concerned those who were engaged in some sort of economic activity. For such scenarios, the Court extended the range and vigour of equal treatment against restrictive national laws, but the principle itself was uncontroversial, since most Member States had embraced territoriality as the door-opener for work-related social benefits anyway. Moreover, free movement did not substitute national policy preferences with a supranational vision of social justice. Britain and Sweden had to treat equally Union citizens who were economically active, but this did not affect the distinct structure of their welfare state.[3] Again, free movement rules reinforced a trend which took place anyway.

Against this background, the central novelty of the original free movement provisions was not equal treatment of those engaged in economic activities, but access to the labour market. To this date, the central difference between a Polish and a Ukrainian national who wants to work in Amsterdam

[3] See Thym, D. (2013), 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits', in: M. Adams et al. (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice,* 155–174. Oxford: Hart.

is not equal treatment once they have taken up work. The added value of Union citizenship is the right to be admitted to the labour market – a distinction fortified by Article 15 of the Charter of Fundamental Rights which guarantees equal working conditions to everyone, but reserves the right to seek employment in any Member State to Union citizens.

That right to be economically active across the Union is firmly inscribed into the DNA of the European project, since it presents itself as one of the pillars of the single market. We may question the outer limits of corresponding equal treatment, such as in-work benefits for part-time workers or the level of child benefits for children living in another Member State, which feature prominently in the new deal the British government promotes in the run-up to the Brexit referendum. But such disputes about the fringes should not distract from the essentially economic rationale of equal treatment for those who are economically active, which De Witte himself proposed to reconstructed as an expression of a Durkheimian organic solidarity.[4] The internal market provides the frame for this arrangement. Its pan-European reach remains largely uncontested.

In relation to citizens like Ms Dano the picture looks different. Their status transcends the single market and emanates directly from the rights attached to Union citizenship. Their reach had never been subject to a principled political consensus – as the emphasis on 'limitations and conditions' (Article 21.1 TFEU) in primary law illustrates in the same way as the compromise formulae enshrined in the Citizenship Directive 2004/38/EC.[5] That is not to say that the Court was right to flatly deny equal treatment to citizens like Ms Dano: a different position could have been defended.[6] All I say is that we cannot expect the single market case law to be extended to non-economic activities indefinitely, since the constitutional frame of reference differs. It builds upon the (vague) idea of political union of which generic free movement rights for the economically inactive were always an integral part.[7] Arguably, it is this connection to political union, which explains the failure of citizens' rights beyond the single market.

---

4 Cf. de Witte, F. (2015), *Justice in the EU. The Emergence of Transnational Solidarity*. Oxford: OUP.

5 See Hailbronner, K. (2015), 'Union Citizenship and Access to Social Benefits', *Common Market Law Review* 42 (5): 1245 (1258–1264).

6 See Thym, D. (2015), 'The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens', *Common Market Law Review* 52 (1): 17–50.

7 See Wiener, A. (1998), *Building Institutions. The Developing Practice of European Citizenship*. Boulder, CO: Westview Press.

Connecting to the Union as a whole

Twenty years ago, the European Union could reasonably be considered a political union in the making. Union citizenship could be perceived, like direct elections to the European Parliament or the ill-fated Constitutional Treaty, as a building block of the EU constituting itself as a supranational political community based upon meaningful public discourse and a functioning 'representative democracy' (Article 10.1 TEU). The famous dictum of the Court that citizenship was 'destined' to be a fundamental status arguably hinted at this forward-looking aspiration. A vision of social justice embracing the fight against social exclusion, whose absence in the Dano judgment De Witte criticises, would undoubtedly have been an integral part of such supranational polity (see Article 34 Charter of Fundamental Rights).

We all know that the state of the EU is a different one at this juncture. The confidence that some sort of political union would be forthcoming was seriously damaged after the failure of the Constitutional Treaty, as a result of the eurocrisis and regarding the surge of anti-European populism. That is why a continuation of the trend towards ever more citizens' rights was no forgone conclusion. Indeed, the Dano judgment is not the only example in which the ECJ refrained from developing its vision of social justice: not assessing austerity measures in light of the Charter is another example.[8] By deciding not to engage in such debates, the Court signalled that it would not develop a thick reading of citizens' rights. This hands the initiative back into the domestic arena. National constitutional courts or the ECHR will ultimately have to decide the fate of Ms Dano.[9] The ECJ abdicated responsibility in the same way as it handed questions of family unity in purely domestic situations back to national courts and the ECHR.[10]

---

[8] See José Menéndez, A. (2014), 'Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship', *German Law Journal* 15 (907): 928–931.

[9] After the German Federal Social Court had granted Ms Dano (and some other Union citizens who are economically inactive) a right to social benefits on the basis of statutory rules, the Merkel government announced a change in the law, which would ultimately require the German Constitutional Court to decide whether Union citizens can be expected to return to their home state to obtain social benefits.

[10] Cf. ECJ, *Dereci u.a.*, C-256/11, EU:C:2011:734, paras 70–74.

This leaves us with the overall conclusion that any fortification of citizens' rights beyond the single market remains linked to broader constitutional trends. If we want the Court to employ citizens' rights to foster a supranational vision of social justice, we arguably have to move beyond a minimalist reading of free movement as correcting unwelcome outcomes at national levels. What would be required, instead, is a vision of social justice for the Union as a whole, not only for those moving to other Member States.

State Citizenship, EU Citizenship and Freedom of Movement

Richard Bellamy

Introduction

I agree with the two key premises of Floris de Witte's 'kick off': namely, that 1) freedom of movement lies at the core of EU citizenship and is worth defending as such, and 2) that many of the attacks on it are at best misinformed, misguided and mistaken, at worst malign, mendacious, and motivated by prejudice and xenophobia.

However, I disagree with much of what he says in support of these positions. I think he confuses the moral case for some form of cosmopolitanism and the empirical reinforcement this gets in an interdependent world, on the one hand, with an argument for a fully fledged political and legal cosmopolitanism that looks to the ultimate demise of nation states as a necessary condition for justice, on the other. The first may offer normative and empirical support for a supranational Union of states along the lines of the EU, in which there is a status such as Union citizenship that offers free movement between the component polities. However, that need not imply a version of the second involving a teleological account of the EU's development, such as de Witte offers, whereby individuals must cease to be members of nation states; democracy becomes in some way constrained by, or even substitutable by, a given conception of justice; and we need no longer conceive ourselves as members of a community of fate. What I want to suggest in this comment is that one can accept a broadly cosmopolitan moral and empirical case for free movement within the EU as both normatively compelling and of practical benefit, while disputing all three of his arguments for this position and maintaining the very statist perspective on each of the three issues that he seeks to challenge.

Let me start by briefly setting out (space constraints mean I cannot here defend, though I have attempted to do so elsewhere[1]) what might be called

[1] Among other pieces, see Bellamy, R. (2013), 'An Ever Closer Union of Peoples: Republican Intergovernmentalism, Demoi-cracy and Representation in the EU', *Journal of European Integration* 35 (5): 499–516; (2015),

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_21

a cosmopolitan statist perspective on the EU. I shall then deploy this perspective to comment on Floris de Witte's three arguments, noting in each case how free movement can be defended while stopping short of the view he advocates.

Cosmopolitan statism, EU citizenship and freedom of movement

On the account I adopt, the most normatively appealing and empirically plausible way of conceiving the EU is as a republic of democratic nation states. The argument is broadly Kantian, tweaked to accommodate contemporary concerns and conditions. It is both statist and cosmopolitan, and orientated around the value of non-domination. It is statist in arguing that to institute justice among individuals who reasonably disagree about its nature and application requires the establishment of a sovereign authority to govern the relations of those who share a social space. Yet if that authority is to be non-dominating and not itself a source of injustice, it must be under the equal influence and control of those to whom it applies. Therefore, justice implies the establishment of both a state and a democratic regime within it. Just relations can only pertain among citizens. However, in an interconnected world it becomes possible not only for states and their citizens to dominate other states and their citizens, both directly and indirectly, but also for various non-state agents and agencies, such as corporations and terrorist groups, to do so. That possibility increases when not all states operate democratically, with such non-democratic states not only dominating their own citizens, but also more likely to seek to dominate the citizens of other states too and to provide a haven for non-state agents and agencies to do so as well. Meanwhile, citizens of all states have various reasons to move freely between states– some to escape dominating or failing regimes, others to trade, find employment and for leisure, among other motives. As a result, states have good cause to cooperate and establish supranational legal and political structures to prevent their mutual domination, help them support non-dominating regimes in states where they do not as yet exist or are under threat, tackle domination from other non-state sources, and to facilitate the free movement of citizens between these states in ways that avoid

---

'Between Cosmopolis and Community: Justice and Legitimacy in A European Union of Peoples', in S. Tierney (ed.), *Nationalism and Globalisation: New Settings, New Challenges*, 207–232. Oxford: Hart; and (2016) (with S. Kröger), 'Beyond a Constraining Dissensus: The Role of National Parliaments in Domesticating and Normalising the Politicization of European Integration', *Comparative European Politics* 14 (2): 131–153.

discrimination or domination, either of or by them. My claim is that the EU can be regarded as the closest we have to such a republican system of states at present.

Of course, I am not suggesting either that the EU perfectly meets the criteria of such a structure or that all the actors involved by any means conceive it in these terms.[2] I merely contend that it is a plausible way of conceiving it and one that has normative appeal as a guide to how it should and could develop. On this view, a commitment to the role of democratic states as offering a context for non-dominating relations among citizens requires as a matter of consistency that states act towards other states and their citizens on the basis of certain cosmopolitan norms, not least through establishing structures such as the Council of Europe and the EU that seek to reduce non-domination between, within and across states in the various ways mentioned above. In this regard, the current support of certain Conservative politicians in Britain for Brexit and/or withdrawal from the ECHR must be regarded as either incoherent – at odds with their professed desire to defend the very idea of democratic statehood, or insincere – either done for political advantage or because they are not that attached to democracy in the first place.

I make these points to indicate how one can be opposed to the populist nationalist rhetoric of those critical of the very idea of the EU and of free movement within it, without necessarily being opposed to the idea of democratic statehood. On the contrary, one can regard the EU as existing to support democratic statehood in a variety of ways rather than as supplanting and substituting for it. From this perspective, the linkage of Union citizenship to member state citizenship is not a transitionary feature destined to whither away but inherent to its very nature. Its purpose is not to supplant but to supplement member state citizenship in two main ways: first, it allows free movement between states in ways that involve showing equal concern and respect to the citizenship regimes of both the host state and that state of origin; second, it gives citizens a direct say in the supranational structures to ensure they show them equal concern and respect as citizens of distinct member states. As we shall see, this is very different to the characterisation that Floris de Witte offers.

---

[2] For a critique of current EU economic and monetary policies from this perspective, see Bellamy, R. & A. Weale (2015), 'Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-Level Games', *Journal of European Public Policy* 22 (2): 257–274.

De Witte's three arguments

De Witte's first argument favouring free movement is that it emancipates the individual from the nation state. He offers rather different instances of this emancipation. One of his examples, that of an LGBT couple denied recognition in their country of birth, concerns a denial of human rights within a given state. The others, such as the retired teacher from Middlesbrough seeking to enjoy her pension in Lanzarote, relate to various personal choices that will be facilitated through freedom of movement between states, some involving more significant interests than others. He claims that emphasis on nationality only provides public recognition to individuals on the basis of a single dimension that ignores or even suppresses the other dimensions of people's lives – as he puts it, in a statement I find extraordinary, 'the nation state's mode of social integration reduces the incredibly complex individual to a one-dimensional being.' This hyperbole grossly mischaracterises the role of nationality within the public cultures of the member states, all of which are constitutional democracies. It is not as if the retired teacher is obliged by UK law to only spend her pension on holidaying in an approved British seaside resort with suitably grey weather and wearing a hat displaying the Union Jack. The legal systems of most member states uphold rights to as diverse a range of life style choices as are to be found across the EU, even if all states fall short in certain respects, some more egregiously than others. Yet all these rights require a political infrastructure to determine and enforce them. This infrastructure involves citizens of any polity in a complex set of mutual obligations, that in the case of securing many rights – such as pensions – require a degree of solidarity among them. Emancipation from these sorts of bonds constitutes a form of free-riding that is ultimately self-defeating for all but a privileged few. For these very bonds make the rights individuals claim possible in the first place.[3] The retired teacher would not wish to go to Lanzarote if such an infrastructure was not in place that ensured a system of property rights sufficient to allow her holiday home to be built and uphold her civil rights to personal security once there, and would not have a pension enabling her to do so in the first place if she had not worked under a similar regime in the UK. Any system of free movement, therefore, has to be such that it respects and upholds the two systems of citizenship rights that make her movement from one to the other possible in the first place.

---

[3] I have criticised a somewhat similar argument to de Witte's by Dimitry Kochenov in Bellamy, R. (2015), 'A Duty Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights', *European Law Review* 21 (4): 558–565.

His second argument for free movement, as a recalibration of justice and democracy, is in this respect more nuanced in that it appears, initially at least, to recognize that there is a need for reciprocity both between citizenship regimes and among those who participate within any one of them. As it happens, I agree with him that there is no evidence that the UK would be justified in applying an 'emergency brake'. But none of what he says here seems to justify the statement that freedom of movement serves 'to recalibrate questions of justice and democracy in a more appropriate manner', a position that is hardly addressed at all. At best, it suggests that appropriate mechanisms do not exist for a constructive democratic dialogue that allows for a clear discussion of how we might balance reciprocity between citizenship regimes and reciprocity within them in an equitable and sustainable way. So far that has been a matter for the CJEU looking at particular cases, on the one hand, and intergovernmental agreements, on the other. Yet both seem somewhat *ad hoc* and insufficiently connected to citizens as a body, which perhaps explains the general alienation from the decisions of both bodies.[4]

His third argument restates the first in a neo-Habermasian manner as separating 'nation' and 'state', because EU citizenship 'lacks the ties to a homogenous political 'community of fate' that perpetuate significant exclusionary practices'. Again the element of truth in this statement gets lost through exaggeration. Floris de Witte suggests that national citizenship within the member states 'is linked to a 'community of fate' that reflects certain ethno-cultural ideas of a homogenous community'. As I observed above, though, what Habermas called 'constitutional patriotism' forms the norm across the EU. All the member states have citizenship regimes involving elements of 'ius soli' as well as 'ius sanguinis' and most have citizenries with considerable cultural diversity and mixed blood. Sadly, and worryingly, there are parties of the extreme right everywhere that are motivated by 'ethno-cultural ideas of a homogenous community', and in a very few countries these parties are in government. But such sentiments are not intrinsic to the very idea of a nation state. EU citizenship has no tie to any notion of nationality because that is not its function. It exists to facilitate internationality and to some degree multi-nationality, but not the demise of any sense of nationality whatsoever. As I noted, a sense of political solidarity is important for the upholding of rights that we can only possess as members

[4] On the 'democratic disconnect' in EU policy making, see Bellamy, R. & S. Kröger (2016), 'The Politicization of European Integration: National Parliaments and the Democratic Disconnect', *Comparative European Politics* 14 (2): 125–130.

of a political community. The role that EU citizenship and free movement should play is in heightening our awareness of and respect for such solidarity within all the states of the Union.

Conclusion

As I said at the beginning, I fully agree with Floris de Witte's concern at the attacks on the EU currently coming from the populist right, a challenge epitomized by, but unfortunately not restricted to, the Brexit campaign in the UK. However, I doubt that the best way to answer their misleading rhetoric is to make rhetorical counter-claims that are the mirror image of theirs. Rather, it is to show that their views are largely without foundation and that far from undermining national citizenship, EU citizenship and free movement defend it in the context of the normative and empirical challenges of an inter-dependent world.

Free Movement as a Means of Subject-Formation: Defending a More Relational Approach to EU Citizenship

Päivi Johanna Neuvonen

Should EU citizenship 'be primarily about free movement'? According to Floris de Witte, free movement as the core of EU citizenship can contribute to emancipation, justice, and the distinction between the 'nation' and the 'state' within the EU. I share his view that these objectives ought to be important to European integration in general and to EU citizenship in particular. But I am not fully convinced that free movement as 'the central thing that EU citizenship should be about' will automatically result in more just and emancipated relations between EU citizens.

Floris de Witte suggests that free movement as an 'emancipatory force' can make the citizens of the European Union more 'sensitive to the structural process of exclusion that the nation state perpetuates'. For him, free movement can be seen as 'an instrument to problematize these processes'. It nevertheless seems important to consider *on what basis* free movement would problematize the potentially exclusionary practices within the nation state. Although I am positive about the suggestion that free movement 'orients the individual's visions of self-realisation and self-understanding outwards', I have some reservations about the scope and nature of this emancipatory re-orientation through free movement.

The interesting question is what the term 'outwards' means in the context of EU citizens' free movement. Does the idea of transnational 'self-realisation' recognise citizenship as an inherently relational form of human interaction and agency, or does it primarily advance an 'atomistic' or 'unencumbered' view of the self? In so far as the normative ideal of free movement is based on the mere objective of individual self-realisation, the danger is that it will foster a narrow and individualistic view of subjectivity for the purposes of European integration. The 'subject' that emerges from the exercise of free movement may easily appear as self-centred, rather than as capable of encountering the 'Other' as part of its own emancipation.[1]

[1] For further discussion, see Neuvonen, P.J. (2016), *Equal Citizenship and Its Limits in EU Law: We the Burden.* Oxford: Hart.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_22

According to Floris de Witte, free movement can advance a 'more inclusive way of thinking about what freedom, justice, equality and participation should mean in the EU'. He also writes that free movement as the core of EU citizenship 'benefits all those citizens – whether they make use of it or not'. Here we encounter the question of whether all EU citizens are *able* to enjoy the right to free movement. I agree with Daniel Thym's point that, if we take seriously the argument that free movement 'ought to be available under similar conditions for all nationals of the Member States', a more comprehensive account of social justice is still needed for the EU.[2] The idea of free movement may indeed be central to actualising the principles of transnational justice. But it will then be seen as a tool for justice, rather than as an end of EU citizenship.

It seems difficult to justify the non-economic right to free movement and residence without first accepting a more independent equality objective for EU citizenship. Any reference to EU citizenship as an equal status nevertheless raises a set of difficult questions about belonging and solidarity. According to Richard Bellamy, EU citizenship must not bring about the demise of the 'political infrastructure' that advances the degree of solidarity that is arguably required for securing many rights within the Member States. Bellamy's account holds that just relations between citizens can be understood as 'relations of those who share a social space'. But his statist conclusion becomes less self-evident if we assume that 'a social space' can also be constructed transnationally. If equality is understood as a 'normative ideal of human relations'[3], the important question for EU citizenship, as well as for the existence of the EU as an 'emergent polity'[4], is whether it is possible to construct meaningful relations for the purposes of equal treatment outside the context of *ex ante* belonging.

It seems to me that the argument of self-realisation through free movement does not yet adequately take into account the relational potential of EU citizenship. In his contribution, Floris de Witte refers to 'a 'stateless' or 'anchorless' idea of belonging and community' as the 'strength' of EU citizenship. Although his argument of free movement as an 'emancipatory force' seeks to challenge 'communitarian ties', I hope it would also say more about whether those relationships that constitute a meaningful 'social

---

2 For further discussion see e.g. Kochenov, D., G. de Búrca & A. Williams (eds.) (2015), *Europe's Justice Deficit.* Oxford: Hart.

3 E.g. Scheffler, S. (2007), *Equality and Tradition: Questions of Value in Moral and Political Theory*. Oxford: OUP, 234.

4 E.g. Wiener, A. & V. Della Sala (1997), 'Constitution-making and Citizenship Practice – Bridging the Democracy Gap in the EU?' *Journal of Common Market Studies* 35 (4): 595, 596.

space' can be transformed and redefined through European integration – without just replicating the exclusionary 'community of fate' transnationally? If this question can only be answered in the negative, those authors who are concerned about the harmful implications of EU citizenship for political and social emancipation may have an important point to make.[5] However, I have argued elsewhere that EU citizens' equal treatment is closely connected to the gradual process of transnational subjectification, the outcome of which may ultimately justify a more positive answer to the above question of meaningful relations.[6]

In sum, free movement can have a central role in constructing a transnational political and legal subject. But I see it as one method of advancing more just and equal relations between EU citizens, rather than as the only objective of EU citizenship. Floris de Witte suggests that 'the added value that EU citizenship can offer primarily lies in its connection to free movement'. However, if the added value of EU citizenship is ultimately connected to how we respond to *otherness* within the EU, free movement is not the only context in which EU citizens can express their subjectivity as EU citizens in a meaningful way. At the end of his forum post, de Witte, too, seems to come close to this view when he writes that free movement is how the 'virtue' of 'a new – less ethnic – way of thinking about the role of the individual in the EU' is 'implemented'.

5 E.g. Somek, A. (2014), *The Cosmopolitan Constitution.* Oxford: OUP, 160–161.

6 Neuvonen, P.J. (2016), *Equal Citizenship and Its Limits in EU Law: We the Burden*. Oxford: Hart.

Free Movement Emancipates, but What Freedom Is This?

Vesco Paskalev

I must start my response to Floris de Witte with a personal note – I am a Bulgarian national, living and working in Britain. As such, I am strongly attracted by his argument that sees free movement as the core of EU citizenship aimed at extending individual liberties. Indeed, my moving away from Bulgaria was an act of emancipation from the perennially corrupt and increasingly fascist country where I was born. Contrary to what Daniel Thym and Richard Bellamy argue, the Member States, while nominally democratic, do differ in their respect for fundamental rights of their citizens, and the professed ambitions of the current Hungarian prime minister to build an illiberal state does not seem to suggest that convergence towards the highest democratic standards is forthcoming.

Indeed, freedom of movement is emancipatory in a number of senses. On a conceptual level, EU citizenship liberates *everyone*: for centuries contractarian theories have claimed that people who do not leave their country of residence can be seen as consenting to its authority. While until recently the exit option has been only putative, now EU citizenship allows us to conceive those who stay as accepting state authority voluntarily. Certainly, EU citizenship should be the dream of libertarians – in a marketplace of governments you can shop around and chose the one which is freer, or perhaps the one which is best tailored to your personal taste. EU citizenship is emancipatory also in pragmatic terms (one may call this argument neoliberal) – the fear of possible mass exit of citizens (a.k.a. workforce, taxpayers, electorate) may deter governments from abusing them. All in all, if we equate freedom with individual pursuit of happiness in a social context that is taken for granted, it is difficult to argue against De Witte. However, it is not so on a more robust, Arendtian understanding of freedom as equal participation in a self-governing community, which free movement tends to erode.

Certainly, De Witte (and all of the previous contributors) do not understand freedom negatively. Indeed free movement may promote certain positive aspects of freedom. For example, De Witte correctly argues that free movement 'liberates not only the body but also the mind from the normative

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_23

structures of the state.' The Brexit referendum provides a wonderful empirical confirmation of this point. Opinion polls suggest that while older Britons are clinging on antiquated ideas about sovereignty, the younger generation – born as EU citizens and in conditions of widespread mobility – are very much at ease with joint decision-making and are more likely to see the Union as empowering rather than crippling their own country.[1] There is no similar evidence for the attitudes of older Britons living in Europe, but it is plausible to expect some similarity between the views of the people who actually move and of those who are born with the right to.[2] There is 'reflexive virtue' to be gained from free movement indeed.

Such collateral benefits of free movement notwithstanding, civic virtue is ill served by free movement and it is hardly surprising that Richard Bellamy disagrees with De Witte. On republican accounts citizenship is relational and European mobility by definition loosens the link between citizens and their state. Even in the age of Ryanair and Skype the opportunities of the external citizens to participate in the democratic life of their home state are significantly reduced. Indeed, in most cases they retain the right to vote, and its exercise abroad is often – but not always – facilitated by postal, proxy and e-voting. But democracy is so much more than the ballot box! Citizens who do not move can go on rallies, volunteer for various causes, join political organisations, speak in public or engage in community initiatives. One need not subscribe to Pierre Rosanvallon's concept of counter-democracy[3] to agree that all this is part and parcel of any democracy. Thus, on the more robust understanding of freedom, which encompasses equal opportunity for participation in the collective system of governance, free movement inevitably reduces freedom. The fact that the mobile citizens have moved out freely may satisfy contractarians but not civic republicans. As long as the link with the home state is not broken completely – which may happen eventually – the freedom of the external citizens is limited in this sense.

---

1 A YouGov poll found that the intergenerational gap is immense '73 per cent of those aged between 18–29 want to remain in the EU, while 63 per cent of those aged over 60 want to leave', *The Telegraph*, 12 May 2016, available at http://www.telegraph.co.uk/news/2016/03/21/eu-referendum-who-in-britain-wants-to-leave-and-who-wants-to-rem/.

2 Some anecdotal evidence available in *Paxman goes to Brussels: Who really rules us?* BBC Documentary, first shown 19 May 2016, available at http://www.bbc.co.uk/iplayer/episode/b07c6n58/paxman-in-brussels-who-really-rules-us.

3 Rosanvallon, P. (2008), *Counter-Democracy: Politics in an Age of Distrust*. Cambridge: Cambridge University Press.

Now, this attenuated freedom might be normatively satisfactory as the stake of the external citizens in their country of origin is decreased, too.[4] And of course, along with the freedom to move, the EU citizens now have – uniquely – extensive rights to participate in the democratic governance of the EU itself, which remain unaffected by their movement. Further to this, from day one EU citizens have enjoyed significant rights to participate in the political process of the host state. Apart from the electoral franchise, the rights of participation they have there, albeit limited, roughly correspond to the rights which are difficult to exercise from a distance in the home state. It might appear that freedom – even republican freedom – lost equals freedom gained. The problem is that in practice the external citizens are far less likely to exercise the rights they have in the host state than they would exercise equivalent rights in their state of origin. While your ability to attend a rally ceases on the day you have left the country, it is highly unlikely that you would participate in another rally on the day you arrived in your new country of residence. Notwithstanding the legal rights the Treaties will give, there is an inevitable lag before a mobile citizen integrates in the political process of the host state to the degree he or she was integrated in the home state. For this period – and it can be very long – the mobile citizens are losing a significant aspect of their freedom due to their movement.

This may all appear trivial. Indeed, reality rarely conforms fully to our normative expectations; even in the simplest case of national voting not every single citizen has effective and equal opportunity to vote and we are still satisfied when the overwhelming majority does. As long as only about 15 (out of 508) million EU citizens[5] have actually moved one may be right not to lose much sleep over the impact on democracy in the EU. The problem is one of aggregation. Republican freedom, and democracy in general, depend on a critical number of citizens who do participate actively in the political process. When fewer people participate – in voting and in the informal modes of contestation – the robustness of freedom decreases *for all*. Indeed, one of the main reasons for the democratic deficit of the EU is alleged to be the low turnout in elections for the European Parliament. This

---

4 For a discussion see Bauböck, R. (2007), 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', *Fordham L. Rev.* 75 (5): 393–447.

5 Eurostat, see data available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

is the darker side of free movement. Notwithstanding its apparent emancipatory effect for the individual citizens – which may well outweigh what is lost in terms of non-participation – it tends to decrease, rather than increase republican freedom in Europe.

Free Movement and EU Citizenship from the Perspective of Intra-European Mobility

Saara Koikkalainen

In his kick-off text, Floris de Witte argues that the value of free movement lies in its capacity to emancipate the individual from the nation state, to recalibrate questions of justice and democracy, and to sever ties to a homogenous political 'community of fate'. My contribution builds on empirical research on intra-European mobility and elaborates on his first claim on emancipation. I offer two factors to support my interpretation of the strong link between free movement and EU citizenship: 1) the development of the very concept of European citizenship is at least partly the result of a longer history of free movement and 2) the concrete advantages of EU citizenship are strongly linked to free movement. I finish with the conclusion that free movement makes the EU *real* also for those Europeans who have not exercised their right to move. As de Witte says: 'Freedom of movement, in other words, liberates not only the body but also the mind from the normative structures of the state.'

The history of free movement and EU citizenship

The foundations of free movement date back to the 1950s and the Treaty establishing the European Coal and Steel Community (ECSC), where the cross-border movement of *coal and steel industry workers* was to be eased to aid the growing post-war economies. The EEC-Treaty extended free movement rights to *workers in other industries*, with the exception of the public sector, and these rights were codified in 1968 for the workers from the six original Member States. Since the 1970s, the European Court of Justice has played a fundamental role in widening the scope of free movement, as ordinary Europeans have been active in testing its boundaries in court, thus gradually extending the right of free movement to *persons*. The process culminated with the introduction of European citizenship in the Maastricht Treaty in 1992 where the right was extended to *citizens*.[1]

[1] e.g. Koikkalainen, S. (2011), *Free movement in Europe: Past and Present. Migration Information Source*. Washington, DC: Migration Policy Institute, available at www.migrationinformation.org/Feature/display.cfm?ID=836.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_24

While free movement was originally based on an economic rationale and the desire to provide a flexible workforce for the industry, it has developed into a civic right that might have been impossible to envision without the preceding decades of mobility. The right is also highly valued by the Europeans themselves: in the Eurobarometer surveys,[2] freedom of movement consistently ranks high among the things that Europeans value in the EU. In the autumn of 2015, 78 per cent of the respondents supported free movement, even though differences among countries were significant (94 per cent support in Latvia and 92 per cent in Estonia, while only 64 per cent in the UK and 66 per cent in Austria). Free movement is also routinely listed as the most positive or the second most positive result of the EU along with 'peace among the EU member states'. Therefore, while issues such as access to social security and transferability of pensions across borders are still problematic, it is clear that free movement is, according to the Europeans themselves, at the core of European citizenship.

The value of EU citizenship is linked with free movement

Europeans take advantage of free movement as students, trainees, professionals, family members, retirees, and workers of different skills and educational backgrounds. Not all are moving for life, as many choose to live abroad temporarily or seasonally or engage in various cross-border activities.[3] In response to de Witte, Daniel Thym writes that while he understands the value of free movement for the individual, he also sees the limitations of de Witte's argument: 'European rules extend our freedom geographically and in substance, but the surplus remains gradual instead of categorical.' Thym downplays the exceptionality of a situation where a German pensioner, for example, is free to settle in Spain, instead of just relocating to a more pleasant environment within Germany. However, along with others engaged in research in intra-European mobility, I argue that those who exercise their right to free movement are *pioneers of European integration*, whose lives and actions impact both the countries of origin and

[2] Standard Eurobarometer 84, 2015, EC, DG for Communication. First results (Autumn 2015).

[3] E.g. Favell, A. (2008), *Eurostars and Eurocities: Free Movement and Mobility in an Integrating Europe*. Oxford: Blackwell; King, R. (2002), 'Towards a new map of European migration', *International Journal of Population Geography* 8 (2): 89–106. DOI: 10.1002/ijpg.246; Recchi, E. (ed.) (2014), *The Europeanisation of Everyday Life: Cross-Border Practices and Transnational Identifications among EU and Third-Country Citizens – Final Report*. Available at http://nbn-resolving.de/urn:nbn:de:0168-ssoar-395269 .

destination as well as the socio-cultural construction of Europe in a multitude of different ways.[4]

In Richard Bellamy's view, EU citizenship does not undermine national citizenship but rather defends it in the 'context of the normative and empirical challenges of an inter-dependent world.' Yet when examining EU citizenship from the viewpoint of the intra-European migrant, I am tempted to agree with de Witte that it is 'distinct from, and genuinely supplementary to, national citizenship'. Namely, the extensive rights granted by EU citizenship have made adopting the (legal) citizenship of the country of destination largely unnecessary, and for Europeans the value of citizenship acquisition is clearly lower than for third-country nationals wishing to legally settle within the EU. In 2013, for example, in twelve EU member states at least nine out of ten persons who were granted citizenship were non-EU citizens while only in Hungary and Luxembourg EU-migrants were in the majority.[5] There is hardly any other circumstance where EU citizenship would have such a manifest impact on the lived experience of an individual than the possibility of being a legal, long-term resident of a country with minimal pressures to naturalisation.

Imaginary horizons and cognitive migration

Free movement is at the core of EU citizenship also because it opens horizons for Europeans who have not moved abroad, but may have seriously considered the matter, plan to do so in the future or see mobility as an option for their children. The imagination of a potential future involving international migration is a way of making Europe or the EU seem *real* in the mind of an individual.[6] It relies on a process we have called *cognitive migration* where the mind may travel multiple times before the actual bodily move takes place.[7] In the Flash Eurobarometer of spring 2016 four in five respondents were aware of their mobility rights as European citizens,[8] so the option

---

4 Recchi, E. and Favell, A. (eds.) (2009), *Pioneers of European integration. Citizenship and mobility in the EU.* Cheltenham: Edward Elgar.

5 Eurostat (2015), *Acquisition of citizenship statistics. Eurostat Statics Explained*. Available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Acquisition_of_citizenship_statistics

6 Castano, E. (2004), 'European identity: A social-psychological perspective', in R.K. Herrmann, T. Risse & M.B. Brewer (eds.), *Transnational identities: Becoming European in the EU*, 40–58. Oxford: Rowman & Littlefield.

7 Koikkalainen, S. & Kyle, D. (2015), 'Imagining Mobility: The Prospective Cognition Question in Migration Research', *Journal of Ethnic and Migration Studies* 42 (5): 759–776, doi: 10.1080/1369183X.2015.1111133.

8 Flash Eurobarometer 430 2016, EC, DG for Justice and Consumers & DG for Communication.

is widely known among ordinary Europeans. The impact of such a high share of individuals potentially imagining futures that transcend national borders should not be underestimated as a factor influencing what EU citizenship currently is and what it will be in the future.

The New Cleavage Between Mobile and Immobile Europeans

Rainer Bauböck

The Brexit vote on 23 June 2016 has cast a long and dark shadow over our debate on free movement and the future of EU citizenship. At several points in the past, the European project has experienced periods of crisis or stagnation. But now is the first time that it seems to be going into reverse gear with two possible outcomes: the EU losing one of its largest member states or a process of disintegration that could affect the Union as a whole.

The Brexit referendum was not inevitable. It was a political gamble by David Cameron to overcome a split in the Tory Party. After the vote the attitude of political irresponsibility that caused this mess in the first place has been spreading like a contagious disease across the political spectrum, with the most prominent Leave campaigners refusing to take responsibility for the disastrous consequences of their victory and the lukewarm Remainers like Jeremy Corbyn incapable of realizing the historic dimensions of their failure. Brexit was not thus British destiny but a contingent outcome triggered by an extraordinary lack of responsible political leadership. Yet this does not mean that there is no need for grasping the deeper forces that made this result possible and that are in no way uniquely British.

Floris de Witte's spirited defence of free movement focuses on its contribution to individual liberty, to cosmopolitan conceptions of justice and democracy and to overcoming exclusionary national communities of fate. I broadly agree. But there is something important missing in his story. What he does not speak about is the reactionary backlash against intra-EU mobility that threatens now to determine the outcome of votes not only in Britain and could sweep right wing populist parties into power in several continental member states. While the Remain campaign focused on the economic folly of Brexit, the Leavers won the battle by mobilising popular resistance against free movement rights of EU citizens.

Many post-referendum analyses agree that there is a new political cleavage in Europe that can no longer be reduced to the traditional divide between left and right and that is most strongly articulated through citizens' attitudes towards European integration. The social characteristics of populations on

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_25

either side of this divide are everywhere the same: young versus old, high versus low education, urban versus rural, and – less universally so – female versus male.[1] Yet there is one further characteristic that tends to be overlooked and that is causally connected with political stances on free movement. Mobile citizens tend to vote for pro-European parties or policies and immobile ones for anti-European ones. One of the most striking charts published by the Financial Times after the Brexit vote shows a very strong positive correlation between the percentage of local residents who did not hold a passport in 2014 – and thus were unlikely to have travelled abroad – and the share of the Brexit vote.[2] It seems we are witnessing a political revolt of immobile against mobile Europeans.

This may seem an odd diagnosis given that EUROSTAT data show less than 4 per cent of EU citizens currently residing in another member state for more than 12 months. But, as Saara Koikkalainen argues in her contribution and as Ettore Recchi and Justyna Salamonska show in a recent survey in seven EU countries, the numbers of mobile populations are much larger if one counts those with some lifetime experience of intra-EU mobility and includes transnational cognitive and network mobility. The EUCROSS study finds 13 per cent who have lived for more than 3 months in another European state and slightly more than 50 per cent who communicate regularly with family and friends across European borders, who have visited another European country in the last 24 months or who watch TV in a language other than their native one or the official one of their country of residence.[3] Theresa Kuhn has shown that such individual experiences of transnationalism shape positive attitudes towards European integration but that this effect is social stratified. Conversely, the absence of transnational activities is likely to lead to perceptions of negative externalities of intra-EU mobility and negative attitudes towards European integration.[4]

Traditional cleavages along class, religious or ethno-linguistic fault-lines divided the political spaces of nation-states into distinct segments who lived either in separate parts of the state territory or in separate life-worlds. These

---

1 The gender gap was especially dramatic in the recent Austrian presidential elections: On 22 May, 60 per cent of female voters cast their ballot for the left-liberal green candidate, while 60 per cent of males voted for the right wing populist one.

2 John Burn-Murdoch in *FT*, 24 June 2016 (based on data from 382 voting areas), available at https://www.ft.com/content/1ce1a720-ce94-3c32-a689-8d2356388a1f.

3 Recchi, E. & J. Salámonska (2014), 'Europe between mobility and sedentarism: Patterns of micro-transnationalism and their consequences for European integration'. Unpublished working paper.

4 Kuhn, T. (2015), *Experiencing European Integration: Transnational Lives and European Identity*. Oxford: Oxford University Press.

divides could be either bridged through consociational power-sharing between parties representing the different sections or eroded through fostering geographic and social mobility across the divides. The new European cleavage is different because of divergent political spaces and time horizons. Mobile citizens regard Europe as their emerging space of opportunity and increasingly also of identity, whereas the immobile ones look back to the time when closed nation-states provided comprehensive social protection.

Floris de Witte shares the diagnosis: 'The main fault line that seems to be emerging is that between mobile and immobile citizens in the EU'. But he is not interested in bridging the cleavage. Instead he criticises 'those scholars and politicians who wish to understand EU citizenship to be primarily about the connection between *all* Member State nationals and the EU rather than focusing on the rights of *mobile* citizens alone'. This is the wrong response to the crisis. As long as European citizenship is nearly exclusively about free movement, immobile Europeans will not perceive it as a value and as an important aspect of their identity. I agree with Daniel Thym that what is needed to win this battle is 'a vision of social justice for the Union as a whole, not only for those moving to other Member States'.

For de Witte, '[t]he scholarship on "integration through law" suggests that law is both the agent and object of integration, and is used to push through the objectives of integration even in the presence of political objection on the national or supranational level'. But today, this seems like the strategy of generals who always fight the last war. The battle for freedom of movement and European integration is no longer fought primarily in courts where individual rights can trump majority preferences; it is increasingly fought in polling stations, parliaments and the mass media. In order to survive, European integration through law will have to be complemented with integration through democracy, by winning the hearts and minds not only of mobile Europeans, but of immobile ones as well.

Whose Freedom of Movement Is Worth Defending?

Sarah Fine

'Should the UK remain a member of the European Union or leave the European Union?', the British government asked the electorate in a referendum on 23 June 2016. On 24 June, we awoke to the momentous news that a majority of voters had opted for 'LEAVE' (Brexit). Against this backdrop, the informative EUDO Citizenship debate on the relationship between EU citizenship and freedom of movement could hardly be more timely, and obviously has even greater poignancy following the historic Brexit decision.

Since the referendum question did not directly ask voters about migration, the Leave result itself cannot be interpreted straightforwardly as a rejection of EU freedom of movement. However, long before the votes were counted, commentators were connecting Brexit's popularity with widespread negative attitudes towards the free movement of EU citizens and net immigration figures (among many other factors, of course).[1] The dominant view was that Leave voters tended to be particularly swayed by concerns about immigration control, as distinct from Remain voters who tended to prioritise economic arguments.[2] As the Economist wrote several months ago, 'immigration is one subject on which Leave campaigners have a clear lead. The correlation between hostility to immigration and support for Brexit is high, so if they can turn the vote into one about migration, they will win'.[3] Though analysts are still collecting and examining important data about vot-

[1] 'EU referendum: Concern over immigration delivers a "significant" poll boost to the Leave campaign as voters react to claims over UK border control', *The Telegraph*, 31 May 2016, available at http://www.telegraph.co.uk/news/2016/05/30/concern-over-immigration-delivers-a-significant-poll-boost-to-th/.

[2] Hobolt, S. & Wratil, C. (2016), 'Which argument will win the referendum – immigration, or the economy?' *LSE BrexitVote blog*, available at http://blogs.lse.ac.uk/brexit/2016/06/21/which-argument-will-win-the-referendum-immigration-or-the-economy.

[3] 'Let them not come', *The Economist*, 2 April 2016, available at https://www.economist.com/news/britain/21695958-hostility-large-scale-european-union-migration-could-decide-referendum-let-them-not-come.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_26

ing patterns, and digesting the results, there is no doubt that migration was a pivotal issue in the national debate.[4] The Brexit side clearly considered free movement to be a central concern for the electorate. With their appealing tagline of 'take back control', the Leave campaign put migration at the heart of the argument in favour of withdrawing from the EU. On their official website, for example, they explained 'what would happen if we vote to leave the EU'. The second and third points (after the claim that 'we will be able to save £350 million a week'), were that 'we will be in charge of our own borders' and that 'we can be in charge of immigration'. They described immigration from the EU as 'out of control' and as a 'big strain on public services'. They also linked it with security concerns, stating that the 'EU Court' prevents Britain both from stopping 'violent convicted criminals coming here from Europe' and from 'deporting dangerous terror suspects'.[5] In short, the Leave side presented freedom of movement as one of the core features—if not *the* core feature—of EU membership, and they clearly considered that highlighting this connection would be a vote-winner for the Brexit camp. On the other side, the Remain campaign's website and materials made little or no mention of free movement as a feature of EU membership, a silence which itself speaks volumes about general perceptions of this topic's selling power.[6]

One of the most noteworthy issues discussed in the EUDO citizenship debate is the growing evidence that there is, as Rainer Bauböck explains in his contribution, a 'new political cleavage in Europe', which is 'most strongly articulated through citizens' attitudes towards European integration'. I think the emphasis on the differences between 'mobile' citizens, for whom freedom of movement represents exciting opportunities, and 'immobile' citizens, who associate free movement with serious costs to themselves and their communities, is especially illuminating for trying to interpret the various anti-EU developments across the continent, including the factors which have contributed to the Brexit result.

However, I want to focus on a crucial, related issue that was striking for its absence from Floris de Witte's kick-off contribution and the subsequent debate about the relationship between freedom of movement and EU citizenship—an issue which demands attention in any attempt to conceptualise the place of free movement in the European project. This issue is brought

4 See e.g. this interesting GQR poll conducted for the TUC, June 24–27, 2016, available at https://gqrr.app.box.com/s/xb5sfzo19btsn74vawnmu7mn033p1ary.

5 http://www.voteleavetakecontrol.org/why_vote_leave.html

6 http://www.strongerin.co.uk/#MtGy8b0VE9ZhD3UD.97

into stark relief by the on-going refugee crisis, the thousands of avoidable deaths so far this year in the Mediterranean, and the growing number of people stuck in makeshift camps in European countries.[7] It is the fact that, beyond the political, cultural and socio-economic cleavages between citizens within Europe, there is a far greater and growing divide between European citizens and the people they want to keep out. European policy-makers identify the refugee crisis and the 'heightened terrorist threat' as central challenges to the European free movement zone. It is not news that the free movement of European citizens is widely understood to rely on hard external European borders, and now also enhanced monitoring of movement between European states. But surely this has to factor into any response to Floris de Witte's question of whether there is 'any reason to defend free movement as the core of EU citizenship'.

Most importantly, the conspicuous refusal of the EU to respond humanely to refugees and other migrants seeking entry, as well as its collective failure to show solidarity with its own member states at the forefront of the crisis, cannot be neglected from this discussion. How can we try to defend free movement as the core of EU citizenship without considering what is happening right now at (and indeed within) the EU's own borders?[8]

Returning to the Brexit case, the refugee crisis and the EU's response to it featured prominently in the public debate about the costs and benefits of EU membership. The Brexiteers were accused of trying to stoke up anti-refugee and anti-migrant fears, particularly with Nigel Farage's now infamous 'Breaking Point' poster, which pictured people crossing the Croatia-Slovenia border.[9] But it is crucial to note that the Remain side raised the issue of refugees, too—we must not forget, for example, David Cameron's warnings that leaving the EU could mean that Calais-style camps move from France to the UK.[10] In effect, both sides were arguing, either

---

7 'Migrant crisis: Greek islands see rising numbers in camps', *BBC News*, 17 August 2016, available at http://www.bbc.com/news/world-europe-37099332.

8 'Greek refugee camp is "as bad as a Nazi concentration camp", says minister', *Independent*, 18 March 2016, available at http://www.independent.co.uk/news/world/europe/idomeni-refugee-dachau-nazi-concentration-camp-greek-minister-a6938826.html.

9 'Nigel Farage's anti-migrant poster reported to police', *The Guardian*, 16 June 2016, available at https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants.

10 'David Cameron says Calais refugee camps could move to Kent after EU exit', *Independent*, 8 February 2016, available at http://www.independent.co.uk/news/uk/politics/migrant-refugee-camp-calais-britain-brexit-eu-exit-david-cameron-kent-a6860466.html.

explicitly or implicitly, that their position offered the best prospects for keeping refugees and other unwanted migrants out of the UK. As long as the EU itself continues to present refugees as a problem to be kept at bay, with repeated promises to strengthen its borders against unwanted arrivals, those of us who wish to defend freedom of movement as a core component of EU citizenship have to ask ourselves not just about Europe's 'immobile' citizens who associate free movement with unpalatable costs, but about the people on the wrong side of Europe's territorial and civic borders who are paying the ultimate price.

The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?

Martijn van den Brink

Introduction

Floris de Witte makes the case for free movement as the core of EU citizenship and offers three reasons in support. I agree with these principles, at least in the abstract. De Witte's vision certainly is normatively more appealing than the one of scholars who have pushed for a decoupling of EU citizenship from free movement. In fact, it is hard to see how EU citizenship cannot revolve to a very large extent around the right to move freely within the EU and to choose the preferred Member State of settlement. But if that is the case, de Witte seems to be asking the wrong question. What he seems to address is not the question of whether free movement should be defended, but *how* that should be done; through which procedures free movement is to be given shape.

Free movement as the core of EU citizenship

De Witte is concerned about the *Dano* decision and sees it as an attack on free movement. No doubt, the decision is a departure from earlier case law and signifies a move away from the very extensive interpretation of the free movement principles present in certain earlier decisions. Still, de Witte's opinion of the case as well as the way he uses the decision to support his claim is remarkable and not fully persuasive.

First, let's for a moment think about the difference EU citizenship has made. If one would have claimed in the mid-1990s, shortly after the introduction of EU citizenship, that in 2016 many EU lawyers have serious misgivings about a decision that denies social assistance benefits to an economically inactive EU citizen with very weak links to the Member State of residence, many would have been quite surprised about such a claim. The transformation brought about by EU citizenship has in that sense been remarkable. But was free movement not the core of EU citizenship before the Court started developing this concept in its case law? Of course it was. In fact, that so many lawyers thought EU citizenship to be a meaningless

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_27

addition to the Treaties was precisely because it was largely premised on free movement.[1]

In other words, also post-*Dano* free movement remains the core of EU citizenship; it is simply that the precise contours of this right have changed somewhat. The real discussion thus is about the precise scope of the freedom to move and, relatedly, the principle of non-discrimination on grounds of nationality. The Treaty provisions on free movement are of course indeterminate and their meaning far from evident. Indeed, as de Witte suggests, the decision demonstrates that free movement is not unlimited, but whether this is a problem is something people will reasonably disagree about. This is also recognized by de Witte, who acknowledges that not everyone shares his belief that *Dano* is unjust.

Justice, free movement, disagreement, and authority

But it is at this point that the real issue arises, namely, how, in the face of disagreement about justice, such contestation is to be settled? Through which political procedures do we want to resolve such disagreements? What is necessary, in other words, is to 'complement one's theory of rights with a theory of authority'.[2] This issue has been largely ignored by most discussions of the recent social assistance case law.

While not addressed explicitly, for de Witte the authority to settle such disputes is clearly to be given to the Court. This might be, as Bellamy in his reply submits, because de Witte's argument 'suggests that appropriate mechanisms do not exist for a constructive democratic dialogue that allows for a clear discussion of how we might balance reciprocity between citizenship regimes and reciprocity within them in an equitable and sustainable way'. However, while far from perfect, the EU has in fact adopted decision-making procedures that to the extent possible allow for such a dialogue. This dialogue, of course, takes place when the different institutions involved in the EU's legislative process, in which the EU citizen is represented by the national governments as well as by the European Parliament, deliberate and decide. These institutions have also spoken on many of the questions under-

---

1 Everson, M. (1995), 'The Legacy of the Market Citizen', in J. Shaw & G. More (eds.), *New legal dynamics of European Union*, 73–90. Oxford: Clarendon Press.

2 Waldron, J. (1998), 'Participation: The Right of Rights', *Proceedings of the Aristotelian Society New Series* 98: 307, 322.

lying the social assistance case law. They did so when the Citizenship Directive was adopted, in which the eligibility criteria for social assistance benefits for the economically inactive are laid down. The basic rule is that the economically inactive, such as students and jobseekers, are not entitled under EU law to benefits before they have acquired permanent residence. In *Dano*, but also a number of subsequent decisions, the Court deferred to these criteria.

I am uncertain on the basis of which grounds precisely de Witte objects to *Dano*, but it appears as if he suggests that the Court should have ignored the Citizenship Directive. After all, would Member States be obliged to give EU citizens like those in the position of Ms Dano social assistance benefits, it becomes increasingly difficult to see in what situations benefits can be denied to mobile Union citizens. Of course, de Witte might think this is what principles of justice require, but why the Court is the preferred institution to settle these issues, in particular when the legislator has spoken, he does not address. It simply does not suffice to claim that *Dano* is unjust, because it is precisely because there is disagreement about principles of justice that we need to decide who is to be given the authority to decide on these matters. The argument, which one often finds in the literature, that the Court should ensure that secondary law complies with primary law is not persuasive either.[3] After all, the Treaty provisions are indeterminate, which raises the question why the Court's interpretation of them should be preferred over that of the legislator (also the Citizenship Directive is an interpretation of the relevant Treaty provisions). For de Witte's argument to work he would thus need to explain on what grounds he would want to leave those matters to the Court and not the legislator. In other words, if there is no obviously correct answer to the question of substance, to how the free movement provisions are to be interpreted, why should we, if we care about the law's democratic legitimacy, not answer the question of authority in favour of the legislator?

To put it differently, I am struggling to see how de Witte's Court-oriented perspective is compatible with his emphasis on the need 'to calibrate questions of justice and democracy in a more appropriate manner', because what he seems to suggest is that his preferred conception of justice is to be adopted by the Court against the wishes of the EU's legislator.

---

[3] O'Leary, S. (2009), 'Equal Treatment and EU Citizens: A New Chapter on Cross-Border Educational Mobility and Access to Student Financial Assistance', *European Law Review* 34 (4): 612, 622.

How to defend free movement

It is, for this reason, also that I think his suggestions might be counter-productive. To understand why, let's consider de Witte's objections against the 'emergency brake'. As a matter of principle I agree that this emergency brake is unnecessary and unjust. Whether the Court should also strike it down or interpret it away if it were ever adopted is a different matter. If de Witte believes that the boundaries of free movement set by the Citizenship Directive should have been ignored by the Court in *Dano*, he must also believe that the 'emergency brake' should be annulled. If, after all, the Member States should not be allowed to deny benefits to the economically inactive, he certainly must think that the Court should prevent benefits to be withheld from the economically active. Now, let's assume that the majority of the UK electorate had voted to remain part of the EU. Following the referendum, the Citizenship Directive would have been amended so as to include an emergency brake to give effect to the UK renegotiation. If the Court would decide to strike down these amendments large parts of the UK electorate would predictably be outraged and support for free movement would likely further erode.

The question thus also is how to defend free movement. If it is left to the Court alone to decide on the scope of the mobility rights of EU citizens, and certainly if that means disregarding legislative decisions, those who are hostile towards free movement are even less likely to support free movement. Problematically, absent support for free movement principles among EU citizens, this right will be difficult to sustain. I agree, therefore, with Rainer Bauböck's argument that the aim must be also to convince immobile Union citizens of EU citizenship's value.

Contrary to Bauböck, however, I am uncertain how this is to be achieved by working towards what Daniel Thym calls 'a vision of social justice for the Union as a whole'. Thym explains, correctly in my view, that 'free movement did not substitute national policy preferences with a supranational vision of social justice', but thinks that the Court should foster such a uniform supranational vision. With all respect, I think it would be highly problematic for the Court to do so, not only because such judicial behaviour is likely only to reinforce the backlash against the EU, but also because as Seyla Benhabib once explained with admirable clarity

> '[s]ocioeconomic justice and criteria by which to examine it cannot be identified independently of democratic freedom and self-determination … Precisely

> because there is no certainty on these matters even among experts, judgments as to who constitutes the "worst off" in society or in the world at large require complex democratic processes of opinion and will-formation'.[4]

On this issue Floris de Witte seems to agree.[5] But it is precisely because of his emphasis on the importance of deciding issues of great normative salience through democratic processes that I struggle to understand his Court-centred perspective when what is at stake is the question from what moment in time mobile EU citizens are to be given full equal treatment. The EU's legislative process might be far from perfect in this regard, but it is comparatively superior, democratically speaking, to the judicial process. I think, therefore, that a plausible case can be made for the *Dano* decision from this angle. Furthermore, if our concern is to persuade those who are hostile towards free movement – if not of its value, then at least of the reasons why it should be respected – then defining the limits of free movement through the legislative process seems preferable. This at least allows us to explain to those who are sceptical of free movement that the rules in place were adopted on the basis of procedures in which their national governments were involved.

Conclusion

All of this does not change that I agree with de Witte that EU citizenship scholars should value free movement more than they tend to do. EU citizenship is not about the centralisation of rights and about replacing the democratically legitimated substance of national laws by uniform European ones. Instead, the value of EU citizenship lies in the opportunity it offers to EU citizens to take up residence in another Member State to pursue their dreams and ambitions. But while this is so, we should not forget that its value is not uniformly accepted by all Union citizens. Neither should we ignore that free movement never was meant to be unlimited. One may deplore this and criticise the status quo for being unjust, but that alone is insufficient to claim that the Court should change the scope of the free

---

4 Benhabib, S. (2004), *The Rights of Others: Aliens, Residents and Citizens*. Cambridge: CUP, 110–111.

5 See, de Witte, F. (2015), *Justice in the EU: The Emergence of Transnational Solidarity. Oxford:* OUP, 54.

movement rights. To the contrary, if we want to defend the right to free movement and enlarge its support, respecting the legislative limitations might be the better way to go.

Reading Too Much and Too Little into the Matter? Latent Limits and Potentials of EU Freedom of Movement

Julija Sardelić

This EUDO-Citizenship debate has shown that EU freedom of movement is under attack. As Rainer Bauböck highlighted in his contribution, the outcome of the EU membership referendum in the UK casts a 'long and dark shadow' over any debate on EU freedom of movement. However, EU freedom of movement still has as many defenders as attackers on the legal, political and academic fronts, as well as in practical everyday contexts. As did Vesco Paskalev, I want to start this contribution with my own personal experience: I am a Slovenian citizen, who studied and worked in EU Member States other than my own, such as Hungary, Italy and the United Kingdom, where I currently reside. I have personally benefited from the rights granted to me under the EU Freedom of Movement Directive (2004/38/EC). This made it a lot easier to be mobile across the EU than it has been for my non-EU colleagues. And with the Brexit vote, I contemplate what my own position will be as a non-UK EU national living and working in the UK in the long run.

In this contribution I aim to show that both attackers and defenders of free movement share some presumptions in their arguments. In the debate on free movement both often read too much into the potential of freedom of movement and underestimate its limits. At the same time, they are not sufficiently aware of the potential injustice freedom of movement produces as a side effect. I will illustrate both of my claims by focusing on the position of marginalized minorities, who have often been in at the centre of public anxieties about EU freedom of movement.

Floris de Witte argues that EU freedom of movement is important not only from a state, but also from an individual perspective because it offers opportunities for emancipation as well as a 'recalibration of justice and democracy' beyond the state level. Both of his points are well illustrated by his example of an LGBT couple, who move from one EU Member State to another in order to get their union recognised and to lead a life with reduced risk of discrimination. In my view, this example shows how we can read too

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_28

much into the potential of free movement and underestimate its limits to deliver justice. First, the question is how many EU citizens have genuine access to this right. To give a banal example, it will be a lot easier for a middle-class educated and employed LGBT individual from Zagreb to access it than an impoverished lower-class lesbian or gay man from a rural area in southeast Poland. This is not simply a question of economic means, which De Witte already indicated, but also of the social and cultural capital individuals possess according to Pierre Bourdieu.[1] Having a right does not necessarily mean that you have a possibility to access it and that you will indeed do so. Second, I wonder whether freedom of movement can be the main instrument for overcoming inequalities and discrimination marginalized minorities face in the EU, if they are not tackled at the state level first. Is it in fact emancipation and recalibration of justice, when the only option for an LGBT couple is to 'flee' their own country to avoid discrimination?

Saara Koikkalainen investigates the development of EU freedom of movement from its inception within the European Coal and Steal Community, where it followed a strictly economic reasoning. It has only later developed as a fundamental right of all EU citizens. Still this fundamental right is not without restrictions, which are laid down in Directive 2004/38/EC. Article 14 in the Directive states that EU migrants should not represent 'an unreasonable burden on a social assistance system of the host Member State'. Strictly legally speaking, Martijn Van Den Brink is correct, that CJEU case *C-333/13 Elisabeta Dano v Jobcenter Leipzig* was in accordance with this article and did deliver justice. But the question is whether the consequences of such decision are just. De Witte and Bellamy both claimed the UK-EU 'emergency brake' has very little to do with justice but a lot to do with economic reasoning. I would add that it contributed to the prevalent belief that many EU migrants in the UK are in fact 'benefit tourists'. This belief goes beyond mere economic arguments and is based on sometimes latent and sometimes open xenophobia.

The debates on 'benefit tourism' are manifestly closely related to the question whether socio-economic disparities within the EU should be primarily addressed through freedom of movement. Are the member states responsible for flattening them or should they be targeted also at the EU level? Many researchers[2] showed how the debate about benefit tourism

---

1 Bourdieu, P. (1984), *Distinction*. Cambridge, Mass.: Harvard University Press.

2 Parker, O. (2012), 'Roma And The Politics Of EU Citizenship In France: Everyday Security And Resistance', *JCMS: Journal of Common Market Studies* 50 (3): 475-491; Sardelic, J. (2017), 'The Position And Agency Of The "Irregularized": Romani Migrants As European Semi-Citizens', *Politics* 37 (3): 332-346.

particularly highlighted the position of another marginalized minority in the EU: Romani migrants. Before 2014 British newspapers were implying that once the work restrictions for Romanian and Bulgarian citizens were been lifted, the UK would face an 'invasion of Roma'. Newspapers such as Daily Mail adopted a xenophobic stance toward Romani migrants with headlines such as 'Roma already "defecating at our doorsteps."'[3]

Such reporting reinforced a common misconception that Roma have a propensity to migrate from post-socialist EU Member States to the more prosperous ones, where they would become a burden on the social welfare systems. In accordance with the 1993 Copenhagen Criteria, the EU paid particular attention to the minority protection of Roma in the post-socialist countries, which had a candidate country status before joining the EU in 2004 and 2007 respectively. As some scholars argued,[4] this was not merely out of humanitarian concern for this marginalized population. Such emphasis on the position of Roma was also present because of the fear that once the EU free movement policy was coupled with perceived Romani nomadism and discrimination in their own states it would become a conglomerate of push and pull factors for 'Romani mass migration'.

However, this is another clear example of reading too much into the potential of EU freedom of movement. According to the very small number of available studies, such as the one by Elspeth Guild and Claude Cahn,[5] Romani migrants represent a miniscule proportion of all EU migrants. In addition, their migration cannot be explained simply by the theory of push and pull factors. It also does not clearly fit the presumption that EU freedom of movement is flattening socio-economic disparities between EU Member States especially for the poorest individuals. According to the study by Maria Pantea, Romani individuals who belong to the 'poorest of the poor' are among the most immobile EU citizens. Maria Pantea argued that Romani

---

3 'Roma already in Britain "are defecating on people's doorsteps" says top Tory council leader as she warns of burden that Romanian and Bulgarian immigrants will place on public services', *Mail Online*, 31 December 2013, available at http://www.dailymail.co.uk/news/article-2531793/Roma-Britain-defecating-peoples-doorsteps-says-Tory-council-leader-warns-burden-Romanian-Bulgarian-immigrants-place-public-services.html.

4 Kymlicka, W. (2007), *Multicultural Odysseys*. Oxford: Oxford University Press.

5 Cahn, C. & E. Guild (2010), 'Recent migration of Roma in Europe', 2nd edition, OSCE High Commissioner on National Minorities and Council of Europe Commissioner for Human Rights, available at: https://www.gfmd.org/recent-migration-roma-europe-claude-cahn-and-elspeth-guild.

EU migrants have certain economic resources, but even more importantly 'social ties at work'[6] and networks that make their mobilities possible. This is something immobile Romani EU citizens lack.

Considering the position of EU Romani migrants, we can see that in practice EU free movement does not necessarily address injustices produced by nation states. In fact, it can also result in new injustice that is not present on the nation-state level, as De Witte argued. The French *L'affaire des Roms* showed what measures the French authorities have taken to deport 'unwanted' EU Romani migrants. Among these was the collective demolition of their settlements. We read too little into the potential of EU freedom of movement if we only think of it as a source of 'recalibration of justice'. The official stance of EU freedom of movement is still to a certain extent connected to the economy, but Romani migrants can be deported in case they are also labelled as being a threat to public security and order. Here both opponents and proponents of freedom of movement are reading too little into the matter, if they think this is only a question of economy and if they downplay the sentiments based on xenophobia towards Roma. Although many Romani migrants are labelled as economically inactive, they are only inactive on the official labour market. According to the 2015 Eurobarometer on Discrimination[7] the stigmatization of Roma is so strong in virtually all EU Member States that most of them are not able to get work in the official economy and therefore find employment in unrecognized alternative economic niches. Some studies have shown that many EU Romani migrants end up as irregular workers without employment contracts or even in forced labour[8] as victims of human trafficking. While they are able to migrate because of the EU Directive on Freedom of Movement, they do not benefit from the EU Framework Directive (1989/391/EEC) on safety and health at work and face additional layers of inequality.

Despite the many objections listed above, I still concur with those who claim that EU free movement should be defended on a normative as well as practical level. But it is only so much that EU freedom of movement can deliver. We cannot expect that as a standalone policy it would 'recalibrate

---

6 Pantea, M. (2012), 'Social Ties At Work: Roma Migrants And The Community Dynamics', *Ethnic and Racial Studies* 36 (11): 1726-1744.

7 Available at http://ec.europa.eu/justice/fundamental-rights/files/factsheet_eurobarometer_fundamental_rights_2015.pdf.

8 Dwyer, P., H. Lewis, L. Scullion & L. Waite (2011), 'Forced labour and UK immigration policy: status matters?', *JRF programme paper: Forced labour*, avaialable at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/forced_labour_and_uk_immigration_policy._status_matters_1.pdf.

justice' for marginalized minorities in the EU, on the one hand. On the other hand, we should take into account that the EU free movement policy does not only belong within a strictly legal domain but has broader societal implications for questions of justice. The Brexit vote showed that EU freedom of movement should be constantly debated and renegotiated not only as a core of EU citizenship, but also beyond that core. This would not imply limiting it, but thinking about it from a global justice perspective. As Sarah Fine's contribution suggests, this perspective would ask us to consider whether EU citizens should be given a privilege of free movement over all other residents who did not draw the most favourable ticket in the citizenship birthright lottery.[9]

[9] Shachar, A. (2009), *The Birthright Lottery*. Cambridge, Mass.: Harvard University Press.

What to Say to Those Who Stay? Free Movement is a Human Right of Universal Value

Kieran Oberman

Free movement is under attack, both within Europe and at the frontier. Within Europe, we are witnessing Brexit, Swiss discontent with EU migration and the electoral rise of the far right. At the frontier, free movement has never fared well. The EU has always been something of a gated community, allowing insiders to move while keeping outsiders out. The only difference now, with wars in Syria, Afghanistan and elsewhere, is the higher numbers seeking entry and the higher numbers dying in the attempt. How has Europe responded? The current drive is to reinforce the borders, while calling on 'safe' third countries, such as a Turkey, to house refugees. Expect more deaths and more misery in the years to come.

It is a good time then to be raising Floris de Witte's question: is free movement worth defending? Like De Witte, I think the answer is definitely 'yes', but I offer a different line of argument. For De Witte, free movement is important in encouraging Europeans to change their values: to move away from a narrow concern with nations, membership and exclusion and towards a cosmopolitan regard for multiple identities and 'anchorless' belonging. While this a fascinating and original take on free movement, it seems unnecessarily complex and controversial. Not everyone will accept the cosmopolitan ideological stance it assumes and even those who do might question whether free movement is either necessary or effective at promoting this ideology. The argument I offer is simpler and, in one important sense, less controversial. It defends free movement not as means to change values but rather as an extension of the values we already hold. It also offers reasons for why those who stay in their country of origin should nevertheless value their freedom of movement.

The human right to immigrate

Democratic societies place significant emphasis on basic liberties. These basic liberties are protected in international law. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) lists rights to freedom of religion, expression,

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_29

association, marriage and occupation. These rights are essential to protecting people's personal and political liberty. In terms of personal liberty, they entitle people to make basic life decisions such as whom they marry, which (if any) religion they practice, with whom they associate, where they work and how they communicate. In terms of political liberty, they make it possible for people to engage in crucial political activities such as investigating the effects of government policies, debating solutions to social problems and campaigning for change.

Free movement is important because it is prerequisite to the exercise of these other basic liberties. People cannot worship, communicate, associate, marry and work freely unless they are able to move freely. Recognizing this fact, international law declares a right to free movement. Article 13 of the UDHR and Article 11 of the ICCPR proclaim a right to free movement within any country and a right to leave any country to go elsewhere.

There is one right, however, that is conspicuously absent: the right to immigrate. This is a problem since immigration restrictions, no less than emigration restrictions and internal restrictions, curtail personal and political liberty. When foreigners are prevented from entering a country, they are prevented from worshiping, communicating, associating, marrying and working within that country. Their freedom, as well as the freedom of consenting citizens, is constrained. Individual autonomy suffers but also democracy. In an age in which so many problems are international problems and the effects of government policies are felt globally, it is crucial that citizens of different countries are permitted to interact. The power of governments and corporations transcend borders; ordinary people must not be trapped behind them.

If personal and political liberty are to be sufficiently protected, immigration must be recognized as a human right. In recognizing immigration as a human right, we discover the full value of EU free movement. Not only does free movement allow EU citizens to freely interact, it also provides a model for the rest of the world. In time, the world can and should follow Europe's example.

There are other implications that are less flattering to the EU project, however. Human rights are universal. If EU citizens have a human right to immigrate to other EU states, non-EU citizens do likewise. The Syrians, Afghans and others at the frontier must be free to enter. Refugees have a right to live where they choose, not just the 'safe' third countries to which the EU seeks to confine them. Indeed, all migrants have a right to migrate not just refugees.

Floris de Witte's article thus starts out exactly right. Retired teachers, Romanian IT consultants, Hungarian nurses and everyone else should be able to make basic decisions regarding their lives free from state interference.

That is what is crucial. There is no need to add that free movement encourages people to achieve a new 'self-understanding' as 'anchorless' EU citizens. The value of free movement is both more basic and more important.

The freedom to stay

The discussion following Floris De Witte's article has been fascinating and I have learned a great deal. Let me address two points. First, it is striking that, in the midst of a refugee and migration crisis, the discussion should have focussed so narrowly on free movement within the EU. Sarah Fine is certainly right to remark on this, asking 'whose freedom of movement is worth defending?' If the EU is not to forever remain a gated community, we must not ignore the gates.

Second, a number of contributors have raised an important problem: how can supporters of free movement demonstrate its value to those citizens who do not migrate? Floris de Witte distinguishes between 'mobile' and 'immobile' citizens; a distinction that Rainer Bauböck picks up on. He wonders how the 'immobile' can be won over? The problem is an important one but, in its general form, is far from new. A central theme of what remains the greatest book on the subject of liberty – JS Mills' 'On Liberty' – is the problem of justifying the freedom to pursue minority options to the disinterested majority. The answer Mill gave then still holds true today. There is an enormous difference between choosing not to pursue an option and being prevented from pursuing it. In the former case, one retains control and, with it, the opportunity to assess how one lives in comparison to alternative possibilities. In the latter case, one never makes a choice; one's life is dictated by others. Consider the point in relation to freedom of religion. One does not have to be a religious Jew (say) to regard a state ban on Judaism as a violation of one's freedom of religion. One's freedom of religion entitles one to have the option to practicing Judaism, even if one never chooses to pursue it. The option is important because in having it one has a source of control over one's life that is rightfully one's own.

There is a further point to be made, however. It is not only that people who stay have an interest in the option of moving. People who stay are actually exercising the same basic liberty as the people who migrate: their freedom of movement. This point is too easily missed. People tend to assume that freedom of movement is all about movement, when in fact freedom *of* movement includes the freedom to stay. Freedom of movement entitles one to control over one's movements. To have control, one must be able to decide not just *where* to move but *whether* to move. The point is not purely conceptual. Freedom of movement encompasses the freedom to move and to stay because the same set of interests are at stake in each case. People's

personal and political liberty depends as much on the freedom to stay as the freedom to move. We cannot make our own life decisions and engage in free political activity unless we are free to stay and to move as we wish.

It is easy to picture the free movement debate in terms of stereotypes: the 'young Euro jetsetters' vs. the 'resentful go-nowhere locals'. It is also easy to assume that freedom of movement is all about the movers and offers nothing to the stayers. But we need to think again. From a normative perspective, there is no sharp contrast. When we move or when we stay we are engaged in the same core activity: deciding how we spend our lives and with whom. Whatever choices we make, and wherever our choices take us, we should all be able to see how important it is that our choices are our own.

Having come this far, we can now discern something misleading in De Witte and Bauböck's terminology. The 'immobile' category is much too broad. It lumps together people who, due to poverty and other social barriers, cannot move with people who simply choose not to. In the case of the former, the correct response is to make free movement an effective rather than merely formal freedom by tackling poverty and other social barriers to movement. In the case of the latter, the correct response is to remind these people that they are not, in fact, immobile. They have made a choice about where they live and, thereby, exercised their freedom of movement. They should now allow others to do likewise.

Of course, providing a philosophical argument for why everyone should value freedom of movement is not the same as actually convincing them. After Brexit, the latter task appears daunting. But the problem we face is, in at least one sense, easier than the problem Mill faced in his day. Mill had to convince people of the value of basic liberties. In our day, most people accept the value of basic liberties; they just fail to realize their full implications.

Union Citizenship for UK Citizens

Glyn Morgan

In the wake of the Brexit vote, Floris de Witte's defence of citizenship-based freedom of movement is as important as it is timely. In linking movement to citizenship, as de Witte notices, those who move have a secure status in their new country. In any member state, the new arrival is not a foreigner, not a guest, not someone who has to apologize for being there, but a citizen whose rights are guaranteed by the EU. No one can say: 'you don't belong here.' And if they did; the response would be: 'I have the same rights as you to live and work anywhere in the EU.'

Now with Brexit, UK citizens will lose freedom of movement, and Europeans resident in Britain will lose the protection afforded by Union citizenship. More worrying still, Brexit threatens to unravel the postwar achievements of European integration. If the UK prospers in the immediate aftermath of Brexit, other countries might follow. A Europe of nation-states will be the outcome. The idea of a unified European polity[1] powerful enough to defend itself and project its values abroad will be lost.

The EU must act to ensure that Brexit is a failure. It can do this by crafty deployment of a carrot and stick strategy. The stick should come in the form of refusing the UK any privileged access to the Single Market without accepting freedom of movement. No 'passporting' for the UK financial services industry—a key component of the British economy—should be allowed. US and other foreign banks should be forced to relocate their headquarters to an EU financial centre. The EU should make crafty use of non-trade barriers to hinder the exports of British manufacturers. If the UK wants out of the Customs Union, then the EU should monitor in fine-grained detail, a slow and cumbersome process, the foreign component of UK exports. British visitors to the Continent should be required to attain expensive visas.

The carrot comes in the form of citizenship-based freedom of movement. One step in the right direction would be for the EU to move towards a form of Union citizenship unmediated by any prior national citizenship. At the

[1] Morgan, G. (2007), *The Idea of a European Superstate Public Justification and European Integration*, 2nd edition. Princeton: Princeton University Press.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_30

moment, people in Europe are offered only the status of being hyphenated Europeans (French-European; German-European, Italian-European etc.) rather than Europeans as such. Brexit provides an opportunity here. Sixteen million UK electors voted to remain in the EU. These people will now lose even their meagre hyphenated status and become, for the most part, reluctant national citizens of a country in the grip of populist nativism.[2] The EU can rescue pro-Europeans from their fallen state by offering them Union citizenship –European passports unmediated by national citizenship, which will provide them with the right to live and work anywhere in Europe. Many UK citizens will jump at the opportunity.

One difficulty with this proposal is that it offers UK citizens an advantage not currently extended to other Europeans, including, most worryingly, those now living in Britain who are threatened with losing their right to live and work there. To address this problem, the offer of unmediated European citizenship for Brits could be made conditional on Britain offering current EU citizens full national citizenship in Britain. Doubtless, the current Conservative Government will reject this suggestion. Alternatively, the offer of EU citizenship for Brits could be made contingent on certain forms of equitable treatment for current EU citizens resident in Britain. Such conditional offers from the EU will further encourage the pro-European British citizens to fight for the rights of current EU citizens in Britain. Any future British government that might wish to play fast and loose with such people will face the ire of the pro-European British eagerly awaiting the opportunity to acquire EU citizenship.

More generally, it might be objected that this citizenship proposal rewards secessionists like Britain by offering UK citizens a desirable form of unmediated citizenship. Surely, this might simply encourage other European member states to follow Britain out of Europe. This objection can be met by charging UK citizens a fee, say €10,000, to acquire European Citizenship. This policy will not only provide the funds to finance the Citizenship Office, which will have to be created *de novo*, but will discourage countries from thinking that they can secede from Europe while enjoying the full benefits of membership. If €10,000 is too much for some people, they could be offered European citizenship for free in return for working on pro-EU projects, which could be arranged and overseen by the new

[2] 'Polish men attacked in "hate crime" hours after murdered Pole's vigil in Harlow', *Independent*, 4 September 2016, available at http://www.independent.co.uk/news/uk/crime/polish-hate-crime-harlow-essex-attacked-murdered-vigil-arek-j-wik-brexit-a7225166.html.

Citizenship Office. Alternatively, UK citizens could acquire Union Citizenship only if they agree to pay a small tax indexed to their salary. Needless to say, these are bold and radical proposals, which those familiar only with mediated member-state based citizenship will take time to accept.

Admittedly, this proposal does nothing to address the concerns of Rainer Bauböck who worries about the divide between the mobile and the immobile citizens. Indeed, in some ways this proposal further exacerbates the division between these two groups. Nor does it solve Sarah Fine's concerns about 'the growing divide between European citizens and the people they want to keep out.' The proposal does, however, connect with Kieran Oberman's appeal to John Stuart Mill. Many of Mill's political writings are the works of a partisan. They are written to and for progressives who find themselves in a society where they are a minority. Mill was forever coming up with clever institutional wheezes and innovative policies that would move the cause of progress along. Knowing how to overcome setbacks is a necessary part of this project. Citizenship for pro-European Brits does not solve all of the problems that now plague post-Brexit Europe. But it offers rewards for people who need encouragement and are the most likely to become the agents of change needed to address the more serious global problems raised by Fine, Oberman, and others.

UK Citizens as Former EU Citizens: Predicament and Remedies

Reuven (Ruvi) Ziegler

This contribution, like those immediately preceding it, is written in the aftermath of the 23rd June 2016 referendum on the UK continued membership of the EU. At the time of writing, there are precious few known knowns ('Brexit means Brexit'), critical known unknowns (notably, the nature of future relations between the UK and the EU-27 and ensuing free movement arrangements), and doubtlessly many unknown unknowns. Nevertheless, the premise for this contribution will be that, following negotiations (pursuant to Article 50 of the Treaty on European Union)[1] the UK will cease to be a member of the EU, and the EU treaties will cease to apply to it on exit day (E-day).

Before turning to the legal predicament of UK citizens, and its potential remedies, it would be helpful to consider the effect on the estimated 3.1 million citizens of the EU-27, resident in the UK (unofficial data: Migration Observatory)[2].

EU-27 citizens resident in the UK

The status of citizens of other EU Member States *qua EU citizens* will not be affected by the UK's departure. Their ability to continue to exercise their acquired rights in post-Brexit UK would largely depends on decisions which can be made by the UK Parliament irrespective of the outcome of negotiations with the EU-27.

Hence, the UK could 'take back control' over (future) immigration and nevertheless maintain, *mutatis mutandis*, the arrangements in the Immigration

[1] The Lisbon Treaty, available at http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html.

[2] The Migration Observatory at the University of Oxford (2016), *Commentary: Here today, gone tomorrow? The status of EU citizens already living in the UK*, available at http://www.migrationobservatory.ox.ac.uk/resources/commentaries/today-gone-tomorrow-status-eu-citizens-already-living-uk/.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_31

(European Economic Area) Regulations 2006[3] which implement the Citizens Directive.[4] Nevertheless, while the UK government (July 2016 statement)[5] 'fully expects' that the legal status of EU-27 citizens 'will be properly protected', it refuses to give assurances before the commencement of the withdrawal negotiations. At the time of writing, parliamentary initiatives (Early Day motion 259[6], EU Citizens Resident in the UK (Right to Stay) Bill[7], and a Rights of EU Nationals motion[8]) as well as public campaigning (see here[9]) have not yet come to fruition (but one remains hopeful).

Similarly, there is nothing preventing the UK from continuing to enfranchise EU-27 citizens in local government elections (pursuant to section 2 of the Representation of the People Act 1983[10]) even when it is no longer bound to do so in order to implement its treaty obligations. Notably, the UK has broadly interpreted the phrase 'municipal elections' in Article 20(2)(b) of the Treaty on the Functioning of the European Union[11] so that EU-27 citizens can currently vote in elections for devolved administrations (Scottish Parliament, Welsh Assembly, Northern Ireland Assembly), for the London Assembly, and for mayors (where they are directly elected). Most notably, EU-27 citizens, resident in Scotland, were enfranchised in the 2014 Scottish independence referendum (see EUDO forum discussion[12]).

---

3 http://www.legislation.gov.uk/uksi/2006/1003/contents/made.

4 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:229:0035:0048:en:PDF.

5 https://www.gov.uk/government/news/statement-the-status-of-eu-nationals-in-the-uk

6 http://www.parliament.uk/edm/2016-17/259.

7 http://services.parliament.uk/bills/2016-17/eucitizensresidentintheunitedkingdomrighttostay.html.

8 https://hansard.parliament.uk/commons/2016-10-19/debates/F1337420-EBD9-413C-949B-A4AEA0832B2C/RightsOfEUNationals.

9 'Government can "unilaterally" grant EU citizens right to remain after Brexit', *The Guardian*, 18 October 2016, available at https://www.theguardian.com/politics/2016/oct/18/government-unilateral-eu-citizens-right-to-remain-brexit-roger-casale-nicolas-hatton.

10 http://www.legislation.gov.uk/ukpga/1983/2/section/2.

11 https://europadatenbank.iaaeu.de/user/view_legalact.php?id=24

12 Ziegler, R., J. Shaw & R. Bauböck (eds.) (2014), 'Independence Referendums: Who Should Vote and Who Should be Offered Citizenship', *Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory Working Paper 2014/90*, available at ?http://cadmus.eui.eu/bitstream/handle/1814/32516/RSCAS_2014_90.pdf.

In contradistinction, their right to 'participate in the democratic life of the Union' (Article 10(3) of the Treaty on European Union[13]) is inevitably going to be affected, as the UK will no longer send MEPs to the European Parliament whom they could elect. Nevertheless, citizens of the EU-27 need not thereby fully lose their right to vote for MEPs. A 2015 European Parliament report[14] notes that 22 Member States of the EU-27 allow their citizens to vote for the European Parliament when they reside in a non-EU state. There are sound reasons for the EU institutions to pressure the remaining five to change their policy, especially in light of the Court of Justice's Zambrano[15] ratio that Member States should not hinder [43] 'the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the Union'. Moreover, it is not implausible that the Court of Justice's Delvigne[16] ratio (concerning disenfranchisement of prisoners, discussed here[17]) will prompt a legal challenge to disenfranchisement of Union citizens residing in non-EU Member States. In addition to the legal framework, it is submitted that the policy reasons for enfranchisement apply *a fortiori* when Member State citizens reside in a former EU Member State.

UK citizens as former EU citizens

Under the current treaty arrangements, all UK citizens who do not hold the citizenship of another EU Member State will cease to be citizens of the Union, whether or not they have exercised their EU mobility rights: citizenship of an EU Member State is a *necessary and sufficient* condition for Union citizenship (Article 9 TEU)[18].

---

13 http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT

14 Poptcheva, E. M. (2015), *Disenfranchisement of EU Citizens resident abroad. Situation in national and European elections in EU Member States*, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/564379/EPRS_IDA(2015)564379_EN.pdf

15 Judgment of the Court (Grand Chamber) of 8 March 2011, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0034.

16 ECLI:EU:C:2015:648, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=169189&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=115706.

17 Ziegler, R. (2016), 'The "Brexit" Referendum: We Need to Talk about the (General Election) Franchise', *Verfassungsblog On Matters Constitutional*, available at https://verfassungsblog.de/the-brexit-referendum-we-need-to-talk-about-the-general-election-franchise/.

18 http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT.

Bauböck lucidly describes a 'cleavage' between mobile and immobile EU citizens, characterising the Brexit vote as 'a political revolt of immobile against mobile Europeans'. But, as Oberman notes, 'the right to immigrate' means that today's immobile EU citizens can choose whether to become mobile in future: indeed, while for citizens of other EU Member States, the choice may come early in life (see Paskalev's and Sardelić's contributions) many Britons (cue Harry Shindler[19], excluded from voting in the EU referendum pursuant to the 15 year of non-residence bar[20]) made use of mobility rights in their later years. To borrow Joni Mitchell's exhortation, for many Britons, the vote to leave may yet turn into a case-in-point of 'you don't know what you've got till it's gone'.

The Court of Justice held in *Rottmann*[21] that, when a Member State strips its citizen of her or his citizenship, the situation [42] 'falls by reason of its nature and its consequences, within the ambit of EU law'. Consequently [55–56] 'each individual decision…must be in line with the European principle of proportionality' and 'take into consideration…the loss of the rights enjoyed by every citizen of the Union'. Hence, it is perhaps ironic that the prospective *en masse* stripping of EU citizenship from UK citizens (save for those who are also citizens of another EU Member State) will likely occur without (Court of Justice) judicial scrutiny as and when the treaties cease to apply to the UK. It casts a realistic light on the judgment in *Chen*[22] where the Court of Justice pronounced that [25] 'Union citizenship is destined to be the fundamental status of nationals of the Member States.'

Nevertheless, as Advocate General Maduro noted in his opinion in *Rottmann*[23] [23] 'Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality. Nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union.

---

19 https://www.youtube.com/watch?v=I3BNvWFA9ME.

20 Ziegler, R. (2016), 'The referendum of the UK's EU membership: No legal salve for its disenfranchised non-resident citizens', *Verfassungsblog On Matters Constitutional*, available at http://verfassungsblog.de/the-referendum-of-the-uks-eu-membership-no-legal-salve-for-its-disenfranchised-non-resident-citizens/.

21 http://curia.europa.eu/juris/celex.jsf?celex=62008CJ0135&lang1=en&type=TXT&ancre=

22 http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49231&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=60233

23 http://curia.europa.eu/juris/document/document.jsf?text=&docid=72572&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1131383

European citizenship is more than a body of rights which, in themselves, could be granted even to those who do not possess it.' Coupled with the *Zambrano* ratio (above), the question is: how can the predicament arising from UK citizens' loss of EU citizenship status and rights be addressed?

Automatic/accelerated naturalisation of UK citizens (residing) in other member states

Politicians in Germany[24] and Italy[25] were reported to have suggested naturalisation of 'young' Britons residing in their respective states, and many Britons have (individually) started searching for a nationality link, most notably to Ireland[26]. Now, it is within the gift of Member States to determine their naturalisation criteria, and requires no treaty change; the UK tolerates acquisition of other nationalities.

However, notwithstanding their well-intentioned premises, such proposals pose substantive challenges: First, they will inevitably lead to divergent treatment of UK citizens across the Union, as some states will not relax their naturalisation requirements to accommodate UK citizens. Second, relaxation of naturalisation requirements (which may include citizenship tests) on an *ad hoc* basis for one national group may be deemed unjustified. In this context, it is noteworthy that the Union generally encourages states that do not permit dual nationality to relax their objections in relation to the acquisition of the nationality of another Member State (Germany, for instance, generally requires its nationals to obtain permission before acquiring another nationality, save in the case of another EU Member State or Switzerland). In contradistinction, the Maltese 'citizenship for sale' (see EUDO debate[27]) caused a degree of discomfort; hence, doubts could be raised as to the

---

24 'German politicians propose offering young Britons dual citizenship', *The Guardian*, 3 July 2016, available at https://www.theguardian.com/world/2016/jul/03/german-politicians-propose-offering-young-britons-dual-citizenship.

25 'Italy's Renzi suggests "ad hoc" citizenship for young Britons abroad', *EBL News*, 29 June 2016, available at https://eblnews.com//news/europe/italys-renzi-suggests-ad-hoc-citizenship-young-britons-abroad-27245.

26 'Huge rise in Britons applying for Irish citizenship after Brexit vote', *The Guardian*, 13 October 2016, https://www.theguardian.com/world/2016/oct/13/huge-rise-in-britons-applying-for-irish-citizenship-after-brexit-vote

27 Shachar, A. & R. Bauböck (eds.) (2014), 'Should Citizenship be for Sale?', *Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory Working Paper 2014/01*, Florence: European University Institute, available at http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1.

propriety of e.g. *en masse* waver of residence requirements for naturalisation. Third, naturalisation is an inexact remedy: Britons have an effective nationality, albeit one whose instrumental value for free movement will have (potentially, depending on the UK-EU future relations) been adversely affected.

(Partial) decoupling of Union citizenship from Member State citizenship

Morgan's proposition to create 'a form of Union citizenship unmediated by any prior national citizenship' appears to offer a more direct link between the predicament (loss of EU citizenship rights) and the remedy. However, by making the offer 'conditional on Britain offering current EU citizens full national citizenship in Britain' or 'contingent on certain forms of equitable treatment for current EU citizens resident in Britain', and by making the re-attainment (viz. retention) of EU citizenship financially contingent (€10,000) so as to 'discourage countries from thinking that they can secede from Europe while enjoying the full benefits of membership', he significantly weakens the normative basis of his proposition. If the Union ought to be concerned about the individual loss of EU citizenship status and rights, why should its retention be made contingent on policy choices of a former Member States? This seems like the UK government's 'bargaining chips' or 'cards' strategy[28] in reverse (it is also noteworthy, for the reasons noted above, that the predicament of EU-27 citizens residing in the UK does not arise from an ineffective nationality).

Moreover, it is not only morally contestable, but also puzzling how making the re-attainment of Union citizenship costly for individuals will discourage states from 'seceding' (withdrawing) from the Union: it seems plausible to assume that (most if not all of) those UK citizens who would wish to retain their Union citizenship had preferred that the UK remain in the Union, but were outvoted. If the Union is concerned about preservation of their individual status and rights, it is due to the disjuncture between their own preferences and the aggregate preferences of their polity. Finally, it is rather unclear whether Morgan proposes to open the Union citizenship route to all UK citizens who do not hold the citizenship of another EU Member State, or just to those who have already exercised mobility rights.

---

[28] 'Liam Fox: EU nationals in UK one of "main cards" in Brexit negotiations', *The Guardian*, 4 October 2016, available at https://www.theguardian.com/politics/2016/oct/04/liam-fox-refuses-to-guarantee-right-of-eu-citizens-to-remain-in-uk.

Dawson and Augenstein argued elsewhere[29] that the decision to *withdraw* Union citizenship (viz. obtaining Union citizenship through citizenship of a Member State) should rest not with the withdrawing state but with the individual EU citizen, who may either retain or renounce his or her citizenship. This proposition appears more comprehensive and normatively consistent: it would apply to all Britons (whether or not they have exercised mobility rights), recognising their unique predicament as citizens of a *former Member State*, and thus distinguishing them from citizens of other states, for whom the route to Union citizenship will remain via acquisition of Member State citizenship. It also does not tie their fate to that of the EU-27 citizens. Indeed, there is arguably a qualitative difference (for individuals) between exclusion from club membership and benefits, on the one hand, and non-inclusion therein, on the other hand: many organisations (think universities) retain a special relationship with their alumni.

However, the decoupling of Union citizenship from citizenship of a Member State would require a fundamental treaty change. What will the creation of two categories of Union citizens do to the self-perception of the EU as an '[ever closer] union among the peoples of Europe' (Article 1 TEU[30]), a '*demoi*cracy' a-la Nicolaïdis[31]? To draw on the university alumni analogy, their privileged status (compared with members of the public) is manifested by retention of access to entitlements generally restricted to members – but they are nonetheless *former* members.

UK citizens as Third Country Nationals

Absent treaty change that will address the predicament of UK citizens *qua former Union citizens*, UK citizens who do not hold the citizenship of another Member State on E-day will become Third Country Nationals (TCN). Mobile UK citizens may qualify as Long Term Residents (LTR). As

---

29 Dawson, M. & D. Augenstein (2016), 'After Brexit: Time for a further Decoupling of European and National Citizenship?', *Verfassungsblog On Matters Constitutional*, available at http://verfassungsblog.de/brexit-decoupling-european-national-citizenship/.

30 Consolidated Version of the Treaty of the European Union, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF.

31 Nicolaïdis, K. (2012), 'The Idea of European Demoicracy,' in J. Dickson & P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, 247-274. Oxford: Oxford University Press, available online http://kalypsonicolaidis.com/wp-content/uploads/2015/02/2013_TheIdeaofDemoicracy.pdf.

such, they will benefit from the LTR Directive[32] (as amended[33] in 2011 to extend its scope to beneficiaries of international protection) and from the Right to Family Unification Directive[34]. Both Directives apply in all EU-27 Member States except Ireland (where UK citizens have a free-standing right to reside that preceded Union membership) and Denmark.

Pertinently for this debate, after five years of continuous residence (Article 4 LTRD) and subject to satisfying additional criteria, LTRs acquire the right to reside in the territory of Member States other than the one which granted them the long-term residence status (Article 14(1) LTRD); following the acquisition of LTR status, they enjoy substantive entitlements under EU law wherever the reside in the Union, including equality of treatment with Union citizens in a wide range of economic and social matters (Article 11 LTRD) and enhanced protection against expulsion (Article 12 LTRD). A fairly modest legislative change to the LTRD that would mitigate the predicament of UK citizens could be the granting of LTR status to mobile UK citizens, irrespective of whether they have met the continuous residence and/or other LTRD requirements.

One of the substantive differences between mobile EU citizens and TCNs concerns political participation. TCNs are not entitled to participate in the 'democratic life of the Union'; nor are Member States required to enfranchise them in local elections. However, nothing prevents Member States from so doing: indeed, the (limited[35]) number of signatories to the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level[36] are committed to residence-based enfranchisement on the local level and among the EU-27, eleven states permit TCNs to vote in local

---

[32] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003L0109.

[33] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:132:0001:0004:EN:PDF

[34] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF.

[35] Chart of signatures and ratifications of Treaty 144, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144/signatures?p_auth=0ZKv2OhD.

[36] Convention on the Participation of Foreigners in Public Life at Local Level, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007bd26.

elections. The Union could amend the LTR by disaggregating certain citizenship rights, such as national treatment in respect of local voting rights, from Union citizenship.

Ruptures in the legal terrain

The Brexit vote came about, in part, due to anxieties surrounding the (perceived) absence of suitable controls on the exercise of the right to free movement by Union citizens. To borrow an earthquake metaphor, the extent to which the aftershocks of 23rd June 2016 will rupture the Union's legal terrain remains to be seen.

‘Migrants’, ‘Mobile Citizens’ and the Borders of Exclusion in the European Union

Martin Ruhs

In his opening contribution to this debate about the future of free movement in the European Union, Floris de Witte concludes that ‘free movement must be celebrated and defended as the core of EU citizenship, as a right that is available for all 500 million EU citizens, and as an idea that *benefits all those citizens* – whether they make use of it or not.’ [emphasis mine] One of the key reasons de Witte provides for his defence of free movement is that ‘it makes us sensitive to practices of exclusion’. He argues that ‘the right to free movement and non-discrimination attached to EU citizenship can be understood to correct instances of injustice and promote the inclusion of outsiders: it makes national distributive systems sensitive to the need to incorporate EU migrants who contribute to the host state in an economic and social way.’

De Witte is right that free movement serves the important goal of promoting the inclusion of EU migrants (the ‘outsiders’ in de Witte’s analysis) in the economies and societies of EU member states. This is clearly an important achievement of free movement. However, what about the inclusion and exclusion of the much larger group of ‘outsiders’, namely, people from outside the European Union? If part of our evaluation of free movement is based on its effects on the exclusion of outsiders –and I agree that this should be a fundamental concern – don’t we need to consider *all* outsiders, not just those from within the EU?

My main critique of de Witte’s discussion is that it considers free movement in complete isolation of EU countries’ immigration policies and exclusionary practises toward non-EU nationals. This focus on free movement without consideration of wider immigration policies is striking, especially in the context of many EU member states’ highly restrictive policies towards

---

Parts of this chapter appear in Ruhs, M. (2017), ‘Making linkages in migration research: “Migrants” and “mobile citizens” in the European Union’, in F. Altenburg et al. (eds.), *Migration und Globalisierung in Zeiten des Umbruchs. Festschrift für Gudrun Biffl* [Migration and Globalisation in Times of Change. Festschrift for Gudrun Biffl], 37–46. Krems: Edition Donau-Universität Krems.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_32

the large number of refugees and other migrants seeking protection in Europe over the past few years. As Sarah Fine points out in her contribution, 'how can we try to defend free movement as the core of EU citizenship without considering what is happening right now at (and indeed within) the EU's own borders?'

I argue that we need to connect debates about the 'free movement' of EU citizens with discussions about EU member states' 'immigration policies' toward people from outside Europe. This is exactly the opposite approach to the one traditionally taken and advocated by the European Commission and many other European policy-makers who have insisted on a clear distinction between 'mobility' of EU citizens on the one hand, and 'immigration' of third-country nationals on the other.

To develop my argument, I first outline some of the key differences between how 'migrants' and 'mobile EU citizens' are debated and regulated in the European Union. This is followed by a brief explanation of why I think the current distinctions may be considered problematic from both a moral and political perspective.

Migrants

There are very large differences between how EU member states currently treat "migrants" from outside Europe and 'mobile EU citizens' from within Europe, in terms of both regulating their admission and rights after entry. In all countries, immigration is restricted through an often complex range of national admission policies that regulate the scale and selection of migrants. National immigration policies typically distinguish between high-skilled migrants (who face fewer restrictions on admission), lower-skilled migrants (relatively more restrictions) as well as different rules for admitting family migrants, students, asylum seekers and refugees.

National immigration policies also place considerable restrictions on the rights of migrants after admission, including their access to the labour market, welfare state, family reunion, permanent residence and citizenship. As it is the case with admission policies, rights restrictions typically vary between high- and low-skilled migrant workers (with the rights of lower-skilled migrant workers significantly more restricted) and across family migrants, students, asylum seekers and refugees. As I have shown in my recent book[1] that focuses on international labour migration; European and

[1] Ruhs, M. (2015), *The Price of Rights Regulating International Labor Migration*. Princeton: Princeton University Press.

other high-income countries' immigration policies are often characterised by trade-offs between 'openness' and some 'migrant rights', that is, labour immigration programmes that are more open to admitting migrant workers are also more restrictive with regard to specific rights (especially social rights).

Public debates and policy-making on immigration vary across countries but they are typically framed in highly consequentialist terms, i.e. based on the (perceived and/or real) costs and benefits of particular admission policies and restrictions of migrants' rights for the host economy and society. This cost-benefit approach to policy-making has been a long-standing feature of labour immigration policies. Arguably, it is also becoming an important factor, and in some European countries *the* most important consideration, when it comes to polices towards asylum seekers and refugees. Some European countries' recent policies toward refugees and migrants fleeing conflicts and violence in Syria and other places are primarily shaped by the perceived impacts on the national interest of the host country rather than by humanitarian considerations, protection needs or respect for international refugee conventions.

A central feature of national migration policy debates in European and other high-income countries is the idea of 'control' i.e. the idea that immigration and the rights of migrants can be controlled and regulated, at least to a considerable degree, based on the perceived costs and benefits for the existing residents of the host country. Of course, states' control over immigration is never complete and subject to a number of constraints but the idea of control is still at the heart of national immigration debates and policy-making. The perceived 'loss of control' over immigration has been a major driver of the rise of Donald Trump in the United States, Britain's referendum vote to leave the European Union, and the growing support for right-wing parties across various European countries.

Mobile citizens

The policy framework for regulating the movement of EU citizens across member states, and their rights when residing in a member state other than their own, is very different from the restrictions imposed on people from outside the EU (or the EEA, to be exact). The current rules for free movement give citizens of EU countries the right to move freely and take up employment in any other EU country and – as long as they are 'workers' – the right to full and equal access to the host country's welfare state. This combination of unrestricted intra-EU mobility and equal access to national welfare states for EU workers is an important exception to the trade-off between immigration and

access to social rights that characterises the labour immigration policies of high-income countries. Critically, while the idea of 'control' is a central feature of debates and policies on the immigration of people from outside the EU, EU member states have effectively no direct control over the scale and characteristics of the inflows of EU workers. From the perspective of the EU, the overall aim has been to encourage rather than limit and control the mobility of EU citizens between different member states.

In terms of the European institutional framework, *free movement* is kept completely separate from the immigration of third-country nationals. While free movement is part of the remit of DG Employment, Social Affairs and Inclusion and DG Justice, policies for regulating immigration from outside Europe are dealt with by the DG Migration and Home Affairs. One of the consequences of this division has been that EU debates and policy aimed at the integration of migrants have been heavily focused on migrants from outside the EU.

A third distinction relates to the terminology used to describe and discuss the cross-border movement of EU citizens and non-EU citizens. European policy-makers typically insist that EU citizens moving from one member state to another are not 'migrants' but 'mobile EU citizens. (Although I am critical of this distinction, for the sake of clarity I have stuck with this terminology in this contribution.) This distinction is not just a reflection of differences in policy approaches but also serves the purpose of framing public debates in a way that suggests that mobile EU citizens are very different from the (non-EU) outsiders whose migration needs to be carefully regulated and controlled.

Linking migration and mobility

The distinctions made in the public debates and policies on 'immigration' and 'mobile EU citizens' raise a number of important ethical and political questions. First, insisting on near-equality of rights for mobile EU citizens while at the same time tolerating what are sometimes severe restrictions of the rights of migrants from outside the EU is, in my view, morally problematic. On the one hand, current policy insists on equality of rights for EU workers including, for example, equal access to non-contributory welfare benefits, i.e. benefits that are paid regardless of whether the beneficiary has made prior contributions or not. On the other hand, many EU member states are unwilling to admit and protect large numbers of refugees who are fleeing

violence and conflict and/or grant them full access to the national welfare state. While a preference for protecting the interests and rights of insiders can of course be defended on moral grounds, I suggest that the magnitude of the discrepancy between how EU member states treat each other's 'citizens compared to most migrants from outside the EU should give us pause for critical reflection.

The disconnect between 'mobile EU citizens' and 'migrants' may also be politically problematic, in the sense that it potentially endangers (rather than protects, as is commonly argued) the future sustainability of the free movement of EU workers within the European Union as well as public support for immigration more generally. The inflow of 'mobile EU citizens' in a particular member state has very similar types of effects, and raises very similar economic issues and tensions, as the immigration of migrants from outside the EU. As it is the case with 'migrants', 'mobile EU citizens' affect the labour markets and welfare states of host countries in one way or another, creating costs and benefits for different groups. Insisting that 'mobile citizens' are not 'migrants' runs the danger of obscuring these impacts that mobile EU citizens have on the economies and societies of their host countries. This may, in turn, prevent important debates at European level about the consequences of free movement for EU citizens who do not move, and ultimately result in a decline in political support for the free movement of labour within the EU and perhaps also for immigration more generally.

A third question concerns the potential inter-relationships between EU member states' policies on immigration and mobility. How are our policies for the inclusion/exclusion of EU citizens related to our policies for the inclusion/exclusion of people from outside the EU? We know[2] that past EU enlargements have in many member states led to more restrictive labour immigration policies for non EU-nationals, especially lower-skilled workers. This may be a perfectly justifiable response within the sphere of labour immigration. The picture gets more complicated and problematic, however, if we consider the potential relationships between the free movement and equal treatment of EU *workers* and the highly regulated admission and restricted rights of *asylum seekers* and *refugees* from outside Europe. How, if at all, do the current policies for the inclusion of mobile EU citizens affect our policies

[2] Zelano, K. (ed.) (2012), *Labour Migration: What's in it for us? Experiences from Sweden, the UK and Poland*. European Liberal Forum, available at http://fores.se/wp-content/uploads/2013/04/labour-pdf-web_1_.pdf.

for excluding/excluding asylum seekers, refugees and other migrants from outside Europe – and vice versa? These are open and important issues for empirical research. Any defence of the current rules for free movement should, in my view, consider and engage with these wider questions and inter-relationships

EU Citizenship, Free Movement and Emancipation: A Rejoinder

Floris De Witte

As was to be expected on a topic such as the relationship between free movement and Union citizenship, the discussion above has been both fruitful and wide-ranging, not in the least due to the decision of the British electorate to leave the EU that took place half-way through this EUDO forum debate (and that throws in doubt the rights of residence of Union citizens in the UK, as well as that of UK citizens in the EU). Rather than replying to the many interesting and insightful contributions individually, I will aim to address some of the themes that transcend the various points of view expressed. These are, in my view, three.

First, many commentators have suggested that my defence of Union citizenship as being primarily about free movement is insufficiently sensitive to its exclusionary potential. This exclusion may take place at Europe's borders (think of the refugee crisis), but also *within* the Member States, where free movement has been understood as being available primarily – and *actually* – for the young, urban, educated elite. For those left behind – be it at Europe's borders or at home – free movement, on this account, is not a promise but a problem at the core of Union citizenship. The second theme that can be traced in the discussion is the effect that my understanding of free movement has on the state and its structures. On this view, construing Union citizenship as being centred on its capacity to discipline the nation state and its political processes through free movement creates a number of problems of its own – ranging from the reconstruction of political participation to the destabilization of internal processes of solidarity and will-formation. The third and final theme that many commentators have picked up on, in different ways, is that understanding Union citizenship as being primarily about free movement offers (at best) a partial, inaccurate and normatively unattractive vision of what the individual European subject is. Union citizenship, on this account, ought to be about more than allowing individuals to escape their nation state and its political or normative preferences.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_33

The exclusionary potential of free movement and Union citizenship

In my initial contribution, I have defended the close link between free movement and Union citizenship on account that it liberates the individual from the shackles of majoritarian views 'at home', that it recalibrates ideas of justice in a more appropriate fashion, and that it is not premised on a vision of community that is exclusionary. Several commentators have emphasized that this vision is, however, also one that is selective. Sarah Fine highlights that while free movement might be a right that is available for EU citizens, it is also a reason for the creation of 'hard' external borders that attempt to keep out non-Europeans, who often find themselves stranded in terrible circumstances outside (or even inside) the EU. Kieran Oberman, likewise, points out that such closure on the EU-level simply recreates the problem that I am trying to overcome: it excludes outsiders, limits their emancipation and capacity to enjoy a range of rights.

Others, such as Rainer Bauböck, have emphasized that free movement (and therefore Union citizenship) prioritises the needs and aspirations of *certain* Europeans (let's say the well-educated, young, urban, and middle-classes) over those of other Europeans (in the traditional account, this group comprises of the elderly, the rural, working classes). This division, as is well documented, also appeared to lie at the core of the electoral split in the UK on Brexit. Julija Sardelić adds to this account that mobility requires certain social and cultural resources that are unavailable for whole swathes of the population. The differentiation that is implicit in free movement, on these accounts, jars with the basic premise of equality that is central to our understanding of citizenship.

Let me take these arguments in turn, starting with the exclusionary potential of free movement and Union citizenship in the most dramatic – territorial – sense. Sarah Fine is certainly correct to highlight that the process of integration and its manifestation as Fortress Europe has dramatic consequences for those that cannot claim a right to free movement or Union citizenship. And certainly the institutions of the EU have placed a dodgy understanding of vulnerability at the core of its external border policy: one that understands the EU and its Member States to be vulnerable from intrusion by 'the other' as an *object*, rather than one that understands the refugees as the *subject* of vulnerability. This process can, possibly, indeed by reduced to the creation of a category of Union citizen that remains the main subject of the EU legal order, and main preoccupation of its institutional order, as Martin Ruhs claims. But the argument that reduces the drama

unfolding at the Union's borders (and within the Union's borders) to a problem that is created by free movement and Union citizenship conflates two – admittedly intertwined – processes.

Borders matter. Borders construct polities and engender certain relationships. And those relationships matter for the way in which we attribute rights and obligations. Many of us would not feel particularly inclined to share our resources with, say, a Russian oligarch. Most of us, conversely, would give up just about anything for the sake of our children or partner. Between these two extreme poles, our commitment to others depends on a range of factors – from the agapistic reflex that extreme suffering generates, to ideas of historical, ethnic, linguistic communities and from those revolving around sexual orientation, gender or political preferences to those created by shared institutional frameworks. On this relational account, the creation of the EU is, in its simplest form, the institutionalization of new relationships between citizens across borders. *Something* links the Polish national to the Belgian national that does not include their Ukrainian (or Australian, Ecuadorian, Senegalese) neighbour. The relationships generated by Union citizenship, in other words, must mean *something* – in my account primarily a shared commitment towards opening up national communities. That does not, of course, mean that non-EU citizens ought to be treated poorly, that they are somehow undeserving of protection, admission to the territory of the EU or help. What it does mean is that these are two conceptually separate discussions. The extent to which we defend or limit free movement of Union citizens, and the matter in which we construe *internally* the rights and obligations of those EU citizens *based on their inter-personal relationship as institutionalized by EU citizenship*, has little to do with how we treat those outside our borders of membership. Conditions, obligations, and rights of membership are bounded: they include members, and exclude non-members. This applies to book clubs, terrorist organisations, and transnational political communities. What we owe refugees fleeing war in atrocious and hazardous circumstances is a question that is distinct from the question what we owe fellow European citizens. The difference – which also explains why the former is so difficult to answer legitimately and authoritatively – is that one of these questions has been institutionalized, and the other has not: we have legal norms and institutional structures that translate the ill-defined bond between Europeans into Union citizenship. And that institutionalization, in turn, is only possible once we accept that borders matter. Not as instruments to keep people out, but as instruments to solidify the relationships between those *inside* the borders. This also means that, contrary to Glyn Morgan's suggestion, if the UK were to leave the EU its citizens cannot remain Union citizens, and cannot derive rights and obligations under that heading.

But the close link between free movement and Union citizenship has a second exclusionary effect – one that is internal to the EU. On this view, Union citizenship is an advantage for those willing and able to make use of it; but a disadvantage for those who cannot. On this narrative, the 'immobile' citizen faces increased competition for jobs and welfare resources from the 'mobile' citizen. Citizenship and free movement, then, create winners and losers – a process that became blatantly obvious in the Brexit-vote. I would contest this argument both normatively and institutionally. The fact that only a portion of citizens actually make use of their right to free movement does not make the right any less important or relevant. A small proportion of the population makes use of their rights to free association or freedom of expression. Increasingly fewer people use their right to vote. Does that make these rights increasingly less relevant or important? Of course not. The same applies to free movement. The mere *possibility* of movement, legally guaranteed by free movement and Union citizenship, moreover, also has a reflexive virtue, as picked up by Vesco Paskalev (who highlights that younger Brits – regardless of their exercise of free movement – understand it to be a public *good*) and Saara Koikkalainen (who shows that 78 per cent of EU-wide respondents support free movement). The possibility of free movement liberates the self-understanding of the individual from the collective self-understanding of the polity they happen to be born in.

This does not mean that Union citizenship and free movement offer an equal opportunity of exercise to all Union citizens. As I will discuss below, the EU does not dispose of the institutional framework that can articulate and sustain such an understanding of substantive justice. To be sure, free movement presupposes certain social and cultural resources (if not necessarily those associated with the 'transnational elite' – it is hardly against these groups that the Brexit-vitriol was directed). What matters for our argument in this section, however, is not that free movement has high conditions of entry, but that it creates negative effects for those that do *not* make use of it (for whatever reason). This can be explained in one of two ways. First, and in the most important narrative in the Brexit campaign, it was suggested the EU migrants not only take jobs away from UK citizens, but also welfare resources, and create increased pressure on schools and hospitals. At the same time, every single piece of research that has taken place suggests that the UK *benefits* fiscally from free movement. How can these two positions be squared? It's very simple: by the decision of successive UK governments not to invest the fiscal windfall from free movement in additional welfare resources such as schools and hospitals.

The other way of explaining the cleavage between pro-mobile and anti-mobile citizens is not to focus on the economics, but on identity politics. Rainer Bauböck, for example, refers to Theresa Kuhn's book in highlighting that individual experiences of transnationalism ('lived experience') makes them more pro-European and pro-free movement. On this view, it is to be expected that, say, Gibraltar, would vote in favour of staying in the EU with 96 per cent, while, say, Stoke-on-Trent would vote with 69.4 per cent against it. But that argument understands the idea of 'transnational experiences' much too narrowly. The 'Leave' voters in Stoke eat pizza and drink Stella Artois. The local pride – Stoke City football club – combines English players with Dutch, Austrian, Spanish, Italian and Irish stars. These kind of less obvious transnational experiences matter as they locate elements of 'the other' in something we consider our 'own'. The social capital built up through free movement extends much beyond instances of Erasmus or holidays abroad. It pervades our world.

But if both the economic and the sociological argument explaining the cleavage between pro-mobile and anti-mobile are at best oversold, how can we explain its indisputable emergence? The starting point in this analysis was intimated above – and that is that many of the citizens that have rejected the EU *have indeed* been 'left behind'. But the main culprit is their own government, not the EU. This is different, of course, in instances where the EU mandates welfare reform through its austerity drive. But blaming welfare scarcity in the UK on the EU seems a bit rich. Yet why do voters blame the EU and not the UK? This is where Brexit reveals a more structural problem for the EU, as I have discussed elsewhere[1]. It is because the EU cannot institutionalize contestation appropriately. In a well-functioning democracy, discontent that is so widely spread as the Brexit-cleavage is internalized in the system, and mediated through the politics of contestation. In such a system, political conflict feeds into the process of decision-making and stabilizes the overall project. Democracy, on this view, is a safety valve for emergent discontent. In the EU, on the other hand, the nature, conditions, and consequences of free movement *cannot* be contested. The only possible way to contest the normative orientation of the European market is to *leave* the EU. And so we see 'hard left' parties claiming that if we want to resist the neo-liberal nature of the EU, the only thing we can do is leave it. And so we have parties on the extreme right claiming that if we want to resist

[1] Dawson, M and F. de Witte (2016), 'The Future of the EU between Independence and Interdependence', *Verfassungsblog On Matters Constitutional*, available at http://verfassungsblog.de/the-future-of-the-eu-between-independence-and-interdependence/.

immigration (for whatever reason), the only thing that we can do is leave the EU. If the EU doesn't start to think about how it can internalize and institutionalize contestation of its values, Union citizenship and free movement will indeed be seen as something that divides, that creates winners and losers. Not necessarily because it *does* create winners and losers, but because its contours and effects are not mediated through a process that can legitimize and explain the outcome.

What Union citizenship and free movement do to the state

A second theme that has emerged in the discussion is that my account of Union citizenship as 'anchorless' and as getting round the 'ethno-centric' vision of the nation state, on the one hand, underestimates the virtues of national institutional structures in solidifying inter-personal commitments and general will-formation and, on the other hand, underestimates the power of free movement as an instrument for cosmopolitan justice. These two points – made by Richard Bellamy and Kieran Oberman, respectively – suggest that my argument takes seriously neither the nation state nor cosmopolitanism. Instead, it is precariously perched between these two poles: free movement and non-discriminatory access to welfare benefits for EU migrants, on this account, are parasitical on domestic political commitments and extend them across borders without succeeding in fully disentangling them from the nation state and its structures. In simple terms, it destabilizes the nation state without replacing it with the promise of egalitarian cosmopolitanism. More is lost than gained in the exercise.

Richard Bellamy highlights that my argument is premised on the quest to create 'a fully fledged political and legal cosmopolitanism that looks to the ultimate demise of nation states as a necessary condition for justice'. He suggests that in doing so I misrepresent the state. The modern-day nation state is less exclusionary and more pluralist than I have presented it to be; and it is, crucially, indispensible for the determination, enforcement and stability of sharing practices. On the first point Bellamy is partially right: it is empirically demonstrable that *membership* to national political communities has never been more inclusive and pluralist. But this has clearly not affected the capacity for exclusionary and ethno-centric political narratives to control the political process – across the EU (and the US). It seems that the more diverse and inclusive our societies have become in terms of their membership, the less sensitive their politics become to diversity and inclusion of those that are *not* members. More inclusive membership thus does not equate to a pluralist society. On the second point Bellamy is completely right: the nation state remains absolutely indispensible in the determination,

enforcement and stability of sharing practices and the processes of collective will-formation. My argument is not based on the rejection of the state – and on the slow process towards a political cosmopolitanism. Instead, it is based on the realization that, *given that the state and its institutional structures are indispensible for structuring authority in a legitimate fashion*, we must be sensitive to its externalities. On this view, EU citizenship and free movement are not meant to obliterate the state; they are meant to limit the externalities of the institutional structure of the nation state. The first externality has been discussed at length in my initial post: that the nation state limits choices available for the citizen. The trade-off in liberal democracies is that in return for your chance to vote, you accept the majority position. Free movement cuts across this limit and offers Union citizens the choice of different visions of 'the good'.

The second and more structural externality, which Bellamy has picked up, is most easily explained if we pick up an element discussed above – that demands of justice are relational. As Païvi Johanna Neuvonen also reminds us, relationships between individuals that generate claims of justice or solidarity might take place within borders, but also *across* borders. The point that my initial contribution makes is essentially that while we have institutions that can make sense of the former type of relationships (namely, the domestic political process, that can mediate between competing claims of justice by *insiders*), it cannot possibly make sense of the relationships *across* borders. Imagine an Irish woman living in France and working in Belgium. What does the social relationship between her and French society mean in terms of justice? What does Belgium 'owe' her because of her economic participation in the Belgian market? Allowing the French or Belgian political system to answer these questions creates a democratic problem, as our Irish women (and therefore her relational position vis-à-vis nationals) are not included in its determination. This is where and how free movement and Union citizenship, and particularly through the principle of non-discrimination based on nationality serve to more appropriately settle questions of justice and democracy. Union citizenship and free movement respect the institutional structures of the nation state in the *determination and enforcement* of questions of justice. As far as EU law is concerned, the Austrian decision to have free tertiary education is as 'just' as the UK's decision to charge £9,000 per year. This respect for national choices is indeed, as Bellamy highlights, necessary for its stability. What free movement law does is simply *extend* that decision to include those Union citizens who have a sufficiently strong relationship with the host state – be it through economic or social interactions. As such, free movement and Union citizenship do not serve to substitute for the nation state and its structures, they serve, instead,

to recalibrate questions of justice in a fashion that is more sensitive to the relationships *across* border that the EU has engendered, to which the nation state is *structurally* blind.

This idea of Union citizenship as supplementing national citizenship can, of course, be deduced from the text of the Treaty. It also means that Union citizenship and free movement are not codifications of a sort of cosmopolitanism as suggested by Kieran Oberman. Free movement, on my account, is not a good *per se*. It is a good because of the way in which it recalibrates domestic processes of will-formation and sharing – not because it seeks to replace or subvert them. It creates emancipatory potential for individuals exactly because they can navigate between existing institutional articulations of justice and 'the good life'. Without those institutional structures of the nation state, free movement and equal treatment is pointless. Being equally entitled to nothing, after all, entitles you to nothing. This leads to me to the final point that I made in my initial contribution. The way in which Union citizenship and free movement attempt to internalize relationships across borders within domestic institutional structures is normatively appealing exactly *because* it piggy-backs on those domestic structures. There is no need for the articulation of a European form of 'being' that can integrate and structure its own idea of community and political form. EU citizenship is, in a sense, agnostic.

A normative vision for Union citizenship

The final theme that has come through the discussion is that this link between free movement and citizenship that is central in my account makes for a normatively and institutionally impoverished vision of justice. This critique comes in many flavours. Daniel Thym highlights that the Court's ruling in *Dano*, for example, demonstrates the absence of a robust or 'thick' principle of justice in the Court's understanding of what free movement and Union citizenship mean. More broadly, he argues that even if free movement once constituted the core of a normatively ambitious idea of what it means to be a European citizen; the Union has now lost constitutional confidence, and has become more deferential to domestic ideas of belonging, sharing and justice. What is needed, then, is a thicker vision of social justice that engages all Europeans, whether they move or not. Criticism of this lack of a more coherent and nuanced idea of justice can also be traced in other contributions. Johanna Païvi Neuvonen suggests that the normative centrality of free movement understands the subject as atomistic and unencumbered – which makes for a narrow, individualistic, and, ultimately, not particularly emancipated, self. Emancipation, after all, requires the capacity to encounter the 'other' as

part of the construction of the self. Vesco Paskalev argues that the ease of movement across borders destabilizes another element that is crucial to justice and citizenship: that of (equal) political participation and engagement. On these accounts, free movement does not suffice. Union citizenship should be about more than simply free movement if it is to be normatively appealing. I broadly agree on these points, in so far as they indicate that Union citizenship offers a partial vision of justice at best. It does not set out a vision of substantive justice for 500 million Europeans. It does not deal well with instances of discrimination that transcend borders, as Julija Sardelić reminds us.

The problem is that Union citizenship can never offer more than a partial vision of justice unless we recreate on the European level the institutional preconditions that we find on the national level (and that I have argued in favour of above). To use the example mentioned above: is it more 'just' to fund tertiary education through general taxation or make the student pay himself? If we have a fiscal windfall of €400 million, should we spend it on healthcare, pensions, or education? These questions can only legitimately be answered if they are discussed and mediated through a 'thick' democratic institutional structure – of which the EU is a very very distant cousin. The EU simply does not possess the institutional structure required to answer the question: 'what is it to be European?' or 'what do we Europeans owe each other'. And this institutional incapacity leaves us in a double bind: national political processes are sufficiently 'thick', but structurally exclude relationships across borders from consideration. European political processes are too thin to articulate a substantive vision of justice for all 500 million Europeans. What we are left with is the legal norms of free movement and EU citizenship that seek (and not always succeed) to figure out what these relationships across borders mean in terms of justice. The idea of justice in the EU, in a sense, is tiered: it depends on *both* national institutional structures and transnational legal norms. Free movement and Union citizenship, then, as Païvi Johanna Neuvonen forcefully argues in her comment and her recent book, may not be *sufficient* to achieve justice in the EU – but they are *necessary*. Unless and until the EU develops its institutional structure in a way that is more sensitive to the views of its citizens, this is as good as it gets.

The institutional implication of this argument is that the scope and limits of free movement and Union citizenship cannot be decided through political structures *as they currently are*. Martijn van den Brink has argued that the Union legislator offers a democratic – if not particularly ambitious – vision on what free movement means, and the Court in *Dano* was right in accepting this vision. Union citizenship, in his view, is not a normative commitment towards emancipation and the limitation of state power, but its opposite: an

expression of state power. Member States, acting together in the Council, have the right to decide when and under which conditions free movement is possible, and to decide what the limits of EU citizenship ought to be. This argument underestimates the level of institutional sophistication that is required for a system to be able to 'translate' inter-personal relational claims of justice and solidarity into a legitimate and enforceable system of rights and obligations. As Richard Bellamy has highlighted as well, the institutional presuppositions for this task cannot be found beyond the nation state. The EU lacks thick representative, deliberative and participatory elements, it lacks the support cast of integrated political parties, civil society, grassroots movements, transnational media that allow for inter-personal communication about the question: 'how do we want to live together in this social space?' 'What do we owe each other by virtue of our shared participation in the EU?'. The Union legislator cannot possibly get the answer to these questions 'right'. So we are left in an institutional situation where these incipient, partial, and ill-defined bonds and relationships between Europeans, created by transnational economic, social, political and cultural links cannot be articulated by either national legislatures or their European counterparts. Ill-equipped as the Court may be to makes sense of these new relationships, it is the only institution that can make good on its premise: that it must mean 'something' to be a Union citizen beyond what it means to be a national of a Member State.

Part III: Should EU Citizenship Be Duty-Free?

Abstract

Maurizio Ferrera argues for strengthening EU citizenship in order to make it not only attractive for mobile Europeans but also for 'stayers' who feel left behind in processes of globalisation and European integration. According to Ferrera, EU citizenship is primarily 'isopolitical' and regulatory; it confers horizontal rights to people to enter the citizenship spaces of other member states and it imposes duties of non-discrimination on these states without providing for redistribution in response to perceived or real burdens resulting from free movement. Ferrera suggests several reforms that aim broadly at empowering the stayers. Among his proposals are an 'EU social card', universal transferrable vouchers for accessing social rights in other member states that stayers can pass on to their children who want to move, and a European wide social insurance scheme that would supplement those of the member states. He also suggests to strengthen EU citizenship with some soft duties, such as earmarking a small percentage of personal income tax for EU social policies or raising funds for such policies through fees on an EU social card or EU passports. Some respondents to Ferrera's essay deny that free movement creates burdens that call for compensation or insist that EU citizenship should remain duty free. Others focus on the sources of solidarity and ask what duties of social justice apply to the EU. Several authors support Ferrera's arguments while advocating bolder policy reforms.

Keywords

EU citizenship; Citizenship duties; Welfare states; Free movement; Social Justice; Solidarity.

EU Citizenship Needs a Stronger Social Dimension and Soft Duties

Maurizio Ferrera

Introduction

In the historical process of state formation, citizenship has played a key role for political integration. It has sorted out 'insiders' (the full members of the political community) from aliens/outsiders, has conferred to citizens an equal status, regardless of market and other social positions, it has stabilised and generalised compliance, sustained social cooperation, the legitimation of political authority and, last but not least, the formation of cultural and material bonds throughout the population.

With the Treaty of Maastricht, national citizenship has been complemented with a new layer, EU citizenship. It can be said that the purpose of this innovation was two-pronged: on the one hand, to rationalize (symbolically and institutionally) the disordered array of individual freedoms and faculties linked to the EU and its legal order; on the other hand, to create a new recognizable symbol capable of enhancing, precisely, political integration and mutual bonding among all EU citizens, regardless of nationality.

While there is evidence, twenty-five years on, that European citizens do know and value EU citizenship[1], there is also some disappointment about the latter's actual effects in terms of integration and bonding, especially in the light of rising Euroscepticism, *souverainisme* and anti-immigration (including intra-EU mobility) sentiments.

In a recent speech,[2] Rainer Bauböck has raised a challenging question: can the integrative functions of EU citizenship be enhanced and how? In a

This text has been written in the context of the REScEU Project (Reconciling Economic and Social Europe, www.resceu.eu), funded by the European Research Council (Advanced Grant no. 340534)

1 European Commission (2016), *European Citizenship*, Flash Eurobarometer 430/2016.

2 Bauböck, R. (2017), *Still United in Diversity?* The State of the Union Address, Florence, 5 May 2017, available at https://stateoftheunion.eui.eu/wp-content/uploads/sites/8/2017/05/The-State-of-the-Union-Address-by-Rainer-Bauböck.pdf.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_34

nutshell, Bauböck's proposal is that we need to 'add stuff' in the container, in order to make it more immediately recognizable and salient to individual citizens and more effective as a bonding mechanism. Two additions are, in particular, proposed by this author: a stronger social component (individual rights and levels of protection that apply universally) and 'some duty'. EU citizenship is exclusively centered on rights: 'a duty-free citizenship does not support a sense of solidarity and it makes citizens less keen to hold governments accountable'.

I generally sympathize with this argument and welcome an open discussion on this topic. Before outlining an agenda for reform, we need, however, to better articulate the diagnosis and clearly identify the existing flaws of the EU citizenship construct – especially in its social dimension. With this aim in mind, I will start by briefly revisiting the key historical steps and elements of national and EU citizenship. I will then highlight the political shortcomings and perverse effects of the latter and single out the challenges that need to be addressed. The last sections will outline some modest proposals for 'adding stuff' to the EU citizenship container, making it more consequential and, hopefully, more capable of integrating and bonding.

A bit of history

Citizenship in the modern sense was born with the French Revolution. The Declaration of Human and Citizens' Rights (1789) identified a series of 'natural, sacred and inalienable' rights based on the fact that men are born free and equal. The 'political association' is tasked with defending and safeguarding these rights. Thus the *citoyen* is not only the bearer of natural rights, but also of state-backed guarantees for the exercise of such rights. During the nineteenth century, the pre-eminent political association became the nation (the nation-state). Membership of this entity began to be called nationality. With the advent of mass democracy and the welfare state, 'nationality' became the first filter for the exercise of the rights of citizenship and, prior to that, for the very legitimacy of a person's presence on the state territory. In the sense of 'nationality', citizenship assumed the role of 'assigning people to states',[3] giving them the 'right to have rights'[4] and participation in collective decisions.

[3] Brubaker, R. (1992), *Citizenship and Nationhood in France and Germany*. Cambridge: Cambridge University Press.

[4] According to Arendt's famous formula. See Arendt, H. (1951), *The Origins of Totalitarianism*. New York: Harcourt, Brace & Co.

Historically, the contents of citizenship/nationality appeared much earlier than the container. State formation was a slow process. For ordinary people, it essentially meant becoming subject to novel duties: paying taxes and serving in the army. Mass conscription was a key element of nation-building. It contributed to turning states into fully-fledged political communities, sharing an identity and a sense of 'destiny', with high symbolic charges as it implied the possibility of personal sacrifice. Territorial borders came to be perceived as 'inviolable' national boundaries to be defended *usque ad effusionem sanguinis*. *Bounding* promoted *bonding*, which in turn generalised and strengthened the affectual and normative loyalty vis-à-vis state authorities and their *binding* decisions. The link between taxation and nation-building was less strong. Up to World War I indirect taxes remained by far the most important source of state revenue. Personal income taxes were legally introduced between the end of the nineteenth and the beginning of the twentieth century but only acquired quantitative relevance in the second half of that century. The words for taxation used in Northern and Southern Europe testify that its impact on social solidarity and political legitimation varied greatly: think of the Scandinavian *ska/skatt* (which also means common treasury) vis-à-vis the neo-Latin terms *impôt, imposta, impuesta* (which evoke a subtraction).

The introduction of social entitlements as subjective rights greatly enhanced the material salience of citizenship. But it also imposed new duties. In 'Bismarckian' systems based on compulsory insurance, there was a programmatic link between contributions and benefits from the very beginning. In tax-funded, universalistic systems the link remained weaker. But in the UK, for example, the sense of civic duty and reciprocity was so strong that when the means-tested pension was introduced in 1908, elderly ladies in the countryside brought flowers and food to the post officers who once a week paid them a 'free' allowance.[5]

During the *Trente Glorieuses,* the link between the duties and rights of citizenship (especially social rights) started to weaken. This phenomenon was noted as early as in 1950 by T.H. Marshall himself, who observed that in the UK citizenship was increasingly invoked for the defence of rights, ignoring 'the corresponding duties … [which] do not require a man to sacrifice his individual liberty or to submit without question to the demands made by government. But they do require that his acts should be inspired by a

[5] Harris, J. (1993), *Private Lives, Public Spirit: A Social History of Britain 1870–1914*. Oxford: Oxford University Press.

lively sense of responsibility for the welfare of the community'.[6] Such sense of responsibility has been constantly eroding since the 1950s, especially within the 'middle mass' of employees and pensioners. The growth of social spending has been accompanied by an increase of taxes and contributions. But since the 1990s survey evidence has shown that the vast majority of citizens think that they pay far too much for the benefits they receive – which they consider as untouchable entitlements and property rights. When the Italian trade unions supported the first reforms of a hugely unbalanced pension system in the early 1990s, workers hurled iron bolts at their leaders: a striking departure from the times when old ladies brought flowers to the post office.

The welfare state has indeed been retrenched in the last couple of decades and the access to benefits and services has been made conditional or even 'contractual' (i.e. responsibility-sensitive) in the field of unemployment and social assistance. The big 'elephants' of the welfare state (pensions and health care) have also been reigned in, but the prevailing justificatory narrative has focused here on the need for cost containment, sustainability, or compliance with 'the demands of the EU'. The Marshallian 'lively sense of responsibility', the fact that the rights of citizenship cannot be severed from 'the corresponding duties' seem to have gone lost and appealing to them has today very limited political purchase. Even during economic crises or emergencies, consensus building must stay clear of duty-talk.

Enter EU citizenship

In his analysis of European citizenship, Paul Magnette has introduced the distinction between 'isopolitical' and 'sympolitical' rights (the distinction is drawn from the law and war practices of ancient Greece).[7] Isopolitical rights are horizontal, as it were: they confer upon individuals belonging to a given political community the freedom to enter into the citizenship space of another community and enjoy the rights recognised by the latter. Sympolitical rights are 'vertical': they stem from a common authority which takes binding decisions for all the members of the participating communities – who in turn have some say on the content of such decisions.

National citizenship is predominantly sympolitical: its scope and content are decided by central authorities through democratic procedures. Only in

---

6 Marshall, T. H. & T. Bottomore (1992), *Citizenship and Social Class*. London: Pluto, 41.

7 Magnette, P. (2005), *Citizenship. The History of an Idea*. Colchester: ECPR Press.

the case of some welfare benefits are the national rights of citizenship isopolitical, e.g. when they allow any citizen to freely move and to enjoy whatever services – say health care – are provided at the local level, based on choices made by subnational authorities. In the historical federations, sympolitical social rights made a later appearance and still play a lesser role compared to unitary states: federated units have preserved substantial autonomy, especially in health care, social services and assistance. Here the federal government limits itself to guaranteeing free movement and nondiscrimination.[8]

What about EU citizenship? If we exclude some political rights (most notably the right to elect the European Parliament), EU citizenship is almost entirely isopolitical. It is derivative from national citizenship and basically entitles its holders to be treated as equals when they enter the citizenship space of another member state. The rights attached to the EU passport only apply when one crosses an internal border. True, the EU has adopted a Charter of Fundamental Rights and has recently launched a new initiative called the European Pillar of Social Rights. But these are rather soft rights, they apply only in respect of EU legislative acts and do not really add anything substantial to the catalogue of rights already existing in the member states.

EU citizenship does not confer subjective entitlements to material protections (transfers or services) directly provided by the EU. The limited supranational funds that exist in the social field (e.g. the European Social Fund) can only be accessed by national or regional governments. When sympolitical regulatory measures are adopted (e.g. on gender equality or employment protection) they need to be transposed into national legislation to become operative. Even if they concern individual cases, jurisdictional decisions – the rulings of the Court of Justice of the European Union (CJEU) – can only result from a request on the side of a national Court.

As all rights, also isopolitical ones have corresponding duties. In the first place, mobile citizens are subject to the same obligations that are in force in the country of destination: in particular, they must pay taxes and social security contributions. We can define these obligations as isopolitical duties. But 'isopolitics' generates a second, and less visible, type of duty. Stay-at-home citizens are obliged to make room for the mobiles, share with them their own national space (an identity-thick and rights-thick space) and bear the

---

[8] Obinger, H., S. Leibfried & F.G. Castles, (eds.) (2005), *Federalism and the Welfare State: New World and European Experiences*. Oxford: Oxford University Press.

burdens of 'hospitality'.[9] Empirical studies demonstrate that intra-EU mobility is not driven by benefit tourism and that, in the aggregate, it tends to benefit the receiving member states. But at the disaggregate level (this or that territorial area, this or that economic sector, this or that policy field) the negative economic and social externalities produced by the mobiles may be greater than the positive ones. The influx of citizens from other EU member states may in fact decrease – locally and contingently – the availability of scarce resources such as jobs, hospital beds, emergency care, social housing, school places and so on.[10] While it may be true that national or local governments have not made the necessary public investments in this policy areas[11], the fact remains that mobility has increased the overall problem pressure and originated novel unprecedented needs and policy challenges (e.g. in terms of educational assistance, spatial congestion and segregation, and so on). The social impact of mobility has been significant and it has been perceived as such by a great number of ordinary citizens, who 'blame Brussels' because mobility rules do come from Brussels.

Contrary to what happens at the domestic level, the social component of EU citizenship rests on regulation, not on allocation (i.e. material provisions directly funded through tax extractions on the side of the conferring authority). The obstacles to expand the EU budget and powers were (and still are) huge; when it was introduced – in the early 1970s – social security coordination, instead of social supranationalisation, was probably the only feasible solution. But this strategy has caused serious political asymmetries: as a matter of fact, it has empowered a relatively small constituency of mobile citizens, at the (perceived) expenses of large majorities of non-mobile natives.[12] In the medium and large EU countries, more than half of the natives have always lived in the region where they were born and hardly expect to exercise themselves the rights of free movement. On average, large majorities of nationals have never visited another EU country, watched TV or read a book in another language, used the internet to purchase goods from abroad. It is not surprising that many of these people perceive the

---

9 Ferrera, M. (2017), The contentious politics of hospitality. Intra-Eu mobility and social rights. European Law Journal, published online on 25 May 2017.

10 See European Commission (2014), *Evaluation of the impact of the free movement of EU citizens at local level. Final Report*. Brussels, January 2014.

11 As argued, among others, by the contributions in Part II of this book.

12 The capacity of free movement rights and actual transnational mobility to nurture a sense of identification with the EU seems to be, paradoxically, rather limited. See Damay, L. & H. Mercenier (2016), 'Free Movement and EU Citizenship: a virtuous circle?' *Journal of European Public Policy* 23 (8): 1139–1157.

rights of immigrants as a loss in the value of their own rights and opportunities within their communities. Such perceptions are stronger among the less educated and within poorer areas, where vulnerability is higher and immigration can be seen as a threat in the competition for scarce resources or as a symbolic threat to national values and identities.[13] Free movement rights have expanded options (freedoms, faculties), but have also disturbed national social ligatures and thus tend to generate grievances which can be – and have already been – easily politicised. The above-mentioned (cultural) transformation of social benefits and services into 'property rights' and the parallel erosion of the 'lively sense of collective responsibility' has offered, in turn, a fertile ground for the spread of resentments and feelings of relative deprivation.

As a result of these dynamics, the introduction of EU citizenship has not met its integrative and bonding promises. Quite to the contrary, it has provoked a sort of boomerang effect. The strategy of equal rights involves generating a 'we', but because of the isopolitical nature of the system, this strategy encounters the mobilisation of a different 'we'. As aptly put by Van Middelaar, the goal was 'Hurray, we Europeans can work in twenty-seven countries! The public response has in fact been: Polish plumbers are coming to take our jobs and Brussels is to blame!'[14]

Is there a way to remedy this failure? If the diagnosis is correct, any remedial strategy must address two distinct challenges: 1) deactivating the current vicious disintegrative circle by rebalancing the isopolitical system; 2) making the rebalanced container of EU citizenship more visible and its content more substantial. Only after meeting these challenges can the question of attaching 'some duty' (as in Bauböck's proposal) be put on the agenda.

Deactivating the vicious circle by empowering the stayers

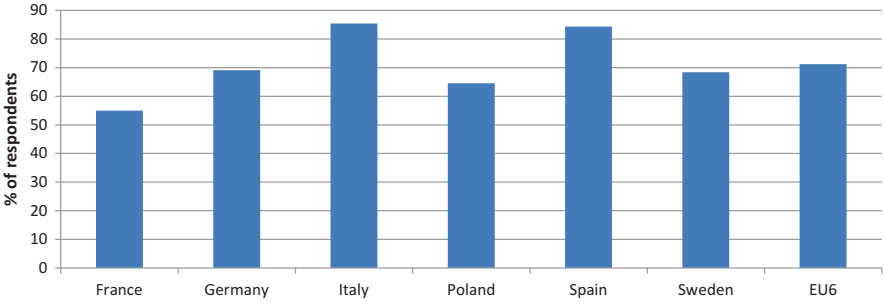
The rebalancing of the current isopolitical system can be achieved in two complementary ways: through a partial compensation for the negative externalities produced by free movers and through some forms of empowerment of those who do not exercise free movement rights. For the time being, it seems unrealistic to imagine that such responses can be given by creating

[13] Ferrera, M., & Pellegata, A. (2018 forthcoming). Worker mobility under attack? Explaining labour market chauvinism in the EU, *Journal of European Public Policy*.

[14] Van Middelaar, L. (2013), *The Passage to Europe*. New Haven and London: Yale University Press, 261.

individual sympolitical rights, i.e. subjective entitlements conferred directly by the EU on the basis of a joint decision and funded by EU taxation. But the EU can at least provide the resources for the necessary compensations. As mentioned, negative externalities are felt locally, for certain occupational groups and in respect of certain public and welfare services. The establishment of something like an EU Fund to ease the impact of mobility (or immigration more generally) could serve the purpose. It could work through national (better: subnational) applications and selection criteria based on adequate evidence of impact. In the UK a similar fund was established in 2008 by the Brown government and la ter (rather inconsiderately) scrapped by the Cameron government in 2010. According to a recent survey, the creation of such a pan-European scheme would be highly welcomed by EU citizens (see Figure 1).

Figure 1 Support for a common EU fund compensating national governments and local communities for the costs related to immigration



Source: Ferrera and Pellegata, *Can Economic and Social Europe Be Reconciled? Citizen Views on Integration and Solidarity*, Milan, 2017, available at: www.resceu.eu

Empowering the stayers could be a second promising step. If we unpack isopolitical forms of protection, in addition to the binding supranational regulations that force the opening up of national spaces we also find a number of facilitating initiatives sponsored, organised and funded by the EU with a view to easing and supporting cross border mobility and transactions. Among these we can mention: information platforms such as EURES (European network of employment services), exchange programs such as Erasmus, the European health insurance card, e-health, quick assistance services to travelling citizens – including an EU-wide emergency number, 112 –, a support service for crime victims. A number of additional initiatives are planned for the future, such as a single digital gateway to receive counsel and assistance in cross-border situations or a common EU disability card.

While it is true that all these facilitating initiatives provide tangible benefits only if there is a cross border element, their personal scope is potentially very wide: it goes well beyond the constituency of mobile workers, affecting travellers and tourists, patients, students, consumers. Among ordinary people there is only a very limited awareness of these initiatives. The first thing to do is thus to popularize these opportunities among the wider public, disconnecting them from free movement in the thick sense (i.e. work mobility).

A way of doing this would be to introduce an 'EU social card' (with a number identifier) available to all European citizens to enhance the visibility of (and also easing access to) the various privileges and services already provided by the existing programs. In the US the social security number is not only a pre-requisite for most contacts with the public administration, but also a visible and tangible symbol of membership in the US legal space. Italy has a similar code, which is called *codice fiscale*, requested for any application to a public benefit, in addition to being used for tax purposes. This number used to be shown on a dedicated plastic card, identifying each citizen (and legal resident) primarily as a taxpayer. Smartly, the number is now shown on a different card: the *carta sanitaria* – used to access the National Health Service -– which evokes the idea of an entitlement associated to tax duties. A clever move in terms of integration and bonding.[15]

A more ambitious idea is to create a direct stake also for stay-at-homers in the area of free movement. As has been aptly noted by various authors, the freedom to move implies also the freedom to stay.[16] Those who opt for staying do not have access to the facilitating benefits and services that the EU provides to the movers. Why not imagine a scheme offering, upon application, universal transferable vouchers (or drawing rights) that workers could pass on to their kin – in particular sons and daughters wishing to move? Such vouchers (each having a certain value) could be used to access the existing benefits and services aimed for mobile workers or cashed in for covering extra expenses linked to mobility. Every worker would be entitled

---

[15] One should not underestimate the symbolic – in addition to the practical and control-oriented – value of administrative papers in forging belongingness and even bonding. See the interesting historical reconstruction by Torpey, J. (2000), *The Invention of Passports: Surveillance, Citizenship and the State*. New York: Cambridge University Press. On the importance of symbols and everyday practices in EU building, see also the very interesting book by McNamara, K. (2015), *The Politics of Everyday Europe*. Oxford: Oxford University Press.

[16] See the various responses to the kick-off essay by De Witte, supra, ft. 11.

to a voucher. Some workers could just transfer their voucher to other workers or young people in search of job, wishing to move, thus endowing them with more value. One might also consider, however, to allow using vouchers for participating to lifelong learning activities *at home* (and/or in other member states, for short periods) on the side of workers who do not wish to exercise their right of long term free movement. One promising possibility would be to link the use of vouchers for temporary, short term participation to cross border training programs and exchanges. This system would increase the stakes of stay-at-homers. It is to be noted that EU facilitating schemes in the area of childcare, education, training, lifelong learning can be justified not only on the basis of free movement, but also on the mere fact of economic and monetary unification. Providing stayers with some EU funded benefit compensate them at least partially for the often disruptive impact of integration on domestic labour markets.[17]

Making EU citizenship more visible and salient

Personal security and welfare are today key political goods guaranteed by the liberal democratic nation-state. In what ways is EU citizenship complementing the security and welfare component of domestic citizenship? As is well known, Europe has no common army and only a very small (social) budget. It is hardly seen as a source of protection by its citizens. A relatively novel right (in part sympolitical, in part isopolitical) which has augmented the content of EU citizenship is the guarantee of consular protection abroad for EU citizens finding themselves in need of assistance in a country outside the EU where their home country is not represented. This novelty can be

[17] This evolution might be seen as a social counterpart of an economic dynamic which affected in the past the free movement of goods and the competition regime. In the period which led to the completion to the single market, virtually all types of public regulations at the domestic level became subject to market-compatibility scrutiny regardless of the presence of cross border elements, in the wake of a maximalist interpretation of Treaty provisions (see. Poaires Maduro, M. (1999), 'Striking the Elusive Balance Between Economic and Social Rights in the EU', in P. Alston (ed.) *The EU and Human Rights*, 449–472. Oxford: Oxford University Press). The Lisbon Treaty could serve as the basis for a possible countermovement. European Monetary Union requires domestic adjustments which may clash with the social principles of the Treaty on European Union. Facilitating upskilling and lifelong learning at the national level even in the absence of cross-border elements could be defended based on the same logic that facilitated access to the market and deregulations at the domestic level, regardless of their pertinence for or link with free movement as such.

interpreted as a branching out of EU citizenship from the internal to the external (i.e. extra-EU) sphere. According to some scholars, the external dimension remains today the only one in which citizenship continues to make a difference compared to mere legal residence.[18] The external protection guaranteed by the Union to all its citizens as such would not only make the burgundy-coloured passport more consequential, but would also increase its symbolic value. As argued by Torpey, passport-based external protection can serve as an effective loyalty and bonding channel, for its capacity to 'embrace' movers as citizen-members of a political community.[19] The Commission is currently studying a series of practical measures to make external protection of citizens more effective. A front along which this type of protection could be strengthened is the occurrence of terrorist attacks, in Europe and abroad. Italy already has a scheme for compensating (in the name of 'solidarity') the victims of terrorism and persons killed or injured in the line of duty. It might be a good idea to consider establishing a similar EU wide scheme, sending a signal of pan-European activism on a front – personal security – which is a fast growing popular concern.

The salience of EU citizenship could be enhanced also by strengthening the existing social funds and creating new ones. During the last decade two new funds have been created: the Globalisation Adjustment Fund, providing resources to workers affected by plant restructuring or closure, and the Fund for European Aid to Deprived Persons, providing resources in case of extreme poverty. Benefits are not paid directly to recipients, but through local authorities – which must previously apply for assistance. The indirect character and the small budget of these funds greatly limit their public visibility and salience. At a minimum, the EU should seek some credit by prescribing to local authorities to clearly indicate the provenance of resources at the endpoints of the delivery chain. If an "EU social card" was in place, it could provide a tangible instrument for linking benefits and EU citizenship.

In the wake of a proposal of the Italian government during its last EU presidency (following preparatory work by the Commission), the establishment of

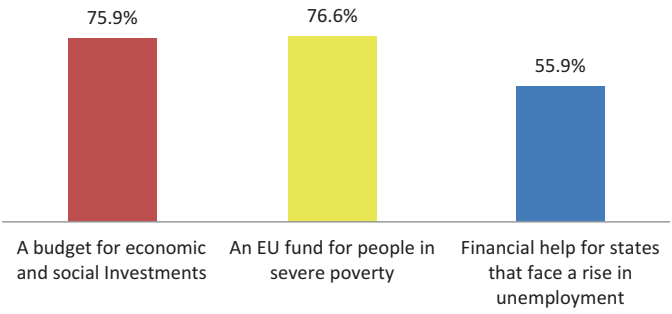
---

[18] Among others, Spiro, P. J. (2013), 'The (Dwindling) Rights and Obligations of Citizenship', *William & Mary Bill of Rights Journal* 21: 899, *Temple University Legal Studies Research Paper No. 2013-46*, available at http://scholarship.law.wm.edu/wmborj/vol21/iss3/6; Bosniak, L.S. (1998), 'The Citizenship of Aliens', *Social Text* 56: 29–35,

[19] Passports cannot be regarded merely as an instrument of government control. To use the words of the United States passport, the 'passport is a valuable citizenship and identity document'. See Torpey, cited above ft. 14.

an EU fund to compensate cyclical unemployment is currently on the EU agenda. This would be a major step in terms of pan-European solidarity – possibly one of the first important building blocks of a future European Social Union. Most likely, this fund will also operate indirectly. Given its wide personal scope, it will be extremely important to render the link between the EU and the resources accruing to national authorities and, ultimately, citizens as clear and evident as possible. Survey data show that popular support for pan-European forms of solidarity (see Figure 2).

Figure 2 Support for various forms of pan-European solidarity (EU 6 averages)

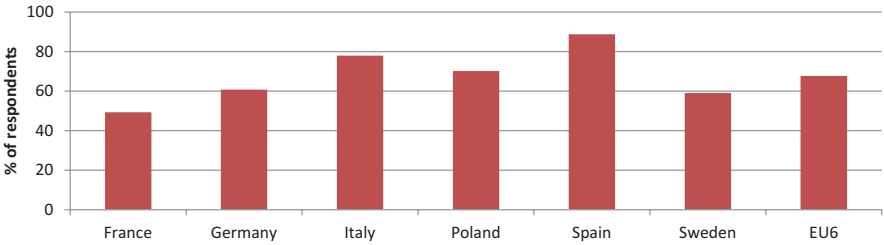


Source: Ferrera and Pellegata, *Can Economic and Social Europe Be Reconciled? Citizen Views on Integration and Solidarity*, Milan, 2017, available at: www.resceu.eu

Finally, a brand new supranational (and thus sympolitical) scheme could be established for insuring mobile workers against some risks (unemployment, maternity, disability etc.): a sort of 29th scheme (or 28th, after Brexit) separate from existing national schemes and providing homogeneous protections to those workers who move across borders. This idea has been circulating in the debate ever since the 1980s.[20] As shown by Figure 3, popular support for the establishment of such a scheme would be very high. One of its advantages would be to ease the financial pressure (real or perceived) on domestic social protection systems stemming from the inflow of mobile workers and their families. In an ambitious scenario, this supranational scheme could catalyse the formation of cross-border insurance schemes, in line with the spatial and functional reconfiguration of the European econ-

[20] Peters, D. & S. Vansteenkiste (1992), *The Thirteenth State*. Leuven: Acco.

Figure 3 Support for a common EU social insurance scheme that covers intra-EU migrant workers



Source: Ferrera & Pellegata, Can Economic and Social Europe Be Reconciled? Citizen Views on Integration and Solidarity, Milan, 2017, available at: www.resceu.eu

omy and labour market. In due course, such schemes might break the path towards novel forms of transnational risk pooling and thus solidarity.[21]

Adding citizenship duties: Is it desirable? Is it feasible?

The Lisbon Treaty makes it clear that EU citizenship is not 'duty-free': rights come with duties (art. 20 TFEU). So far, such duties essentially consist in complying with EU law, including free movement and its potential negative externalities. Would it be desirable to introduce some heavier, more tangible burden, directly linked to being a citizen of the Union?

As mentioned, the classical duties of citizenship (prior to it: of 'subjectship') have historically consisted in paying taxes and serving in the army. In present times, the former duty can be absolved through indirect taxation, income/wealth taxation, social security contributions and, to some extent, co-payments and fees-for-service. As to the latter duty, mandatory service is today the exception rather than the rule: the vast majority of EU countries have replaced it with voluntary service or with professional armies.

Given widespread anti-tax sentiments among voters, today the imposition of some explicit and visible EU tax would not be a good idea in terms

[21] Cross-border pension schemes are already being experimented with in the wake of Directive 2003/41/EC. Almost 700,000 EU workers are already covered by such schemes. See: European Iinsurance and Occupational Pensions Authority (2017), *2016 Market development report on occupational pensions and cross-border IORPs*. Frankfurt: EIOPA, available at https://eiopa.europa.eu/Publications/Reports/EIOPA-BoS-16-222_2016%20market%20development%20report%202016.pdf.

of political support, integration and bonding.[22] Even a recourse to 'the most Europeanised of all taxes', i.e. the VAT, could be counterproductive.[23] In the present context, the only feasible strategy would probably be to introduce some voluntary financial contribution 'for Europe' by means of nudging incentives. In some countries, when filling in their forms, taxpayers have the option to earmark a certain percentage (or per thousand) of their taxes for certain activities or institutions: churches, philanthropic, third sector, humanitarian institutions, political parties, cultural associations and so on. In Italy, 0.8 per cent is mandatory (taxpayers must choose between the state or a church among a list of different denominations); 0.5 per cent is voluntary (it can be earmarked for a long list of recognised institutions engaged in social, humanitarian and scientific research activities). An additional 0.2 per cent can be earmarked for political parties. The *cinquexmille* is chosen by more than 16 million taxpayers and produces an annual revenue of half a billion euros. A similar system could be established by all national tax authorities of the member states, giving the option of earmarking a small quota of personal taxes in favour of the EU as such (or, better still, of some of the abovementioned social funds). A bolder move of nudging would be to reverse the sequence of choice: the contribution for Europe (its social funds) is mandatory, unless the taxpayer explicitly opts out of it ('automatic enrolment').

Another possibility would be to use the co-payment or fee-for-service route in exchange for the array of facilitating initiatives that the EU already provides to ease the exercise of free movement and related rights. If access to the benefits and services of these initiatives (and the new ones that might be added) were filtered through an EU social card, the issuing (and renewal) of such card could be subject to a fee, to be used for funding the most expensive schemes (such as the above-mentioned voucher system). The UK scheme for easing the impact of migration was funded through a levy of 50 pounds on immigration permits. The possible fund for compensating the

[22] Italy did introduce a *tassa per l'Europa* in 1997, to meet the deficit target required to join the euro. Nobody protested: but it was an extraordinary levy, for a defined goal, at the time perceived as beneficial for the whole nation. And then prime minister Romano Prodi promised that the tax would be paid back – a promise that was at least partially kept.

[23] Van Parijs has proposed, for instance, an EU-wide VAT of 20 per cent to finance a monthly universal euro-dividend of 200 euros per month, for reference see Bidadanure, J. (2013), 'Rediscovering The Utopian In Europe: An Interview With Philippe Van Parijs', *The Global Journal* (26 March 2013), available at http://www.theglobaljournal.net/article/view/1038/.

victims of terrorism could be financed through a small fee on the issuing of passports – obviously clarifying the purpose of this fee.

Beyond taxes and fees, another voluntary form of duty could be a pan-European civil service for young people. The EU has recently established a European Voluntary Service and a European Solidarity Corps. Participating to such services could be made more appealing to young people by stressing the benefit of acquiring valuable skills and experiences. In due course, these two services could morph into some sort of an EU civilian defence and civic community service that could be chosen as an alternative to national service in those member states where the latter is mandatory; in the other member states it could still be chosen voluntarily.[24] Although remaining far from proper and 'hard' duties, the proposed extractive instruments would indeed move in Bauböck's direction, through cautious and experimental steps. In the current 'euro-critical' context, jumping from 'duty-free' to 'duty-heavy' citizenship might be politically dangerous and even counterproductive.

An incremental strategy – with a vision

Following the tradition of Max Weber, we can define rights as sources of power (*Machtquellen*). Since power is a social relation in which somebody's 'will' causes the behaviour of somebody else, regardless of the latter's 'will', the creation of a right automatically creates a correlative duty of compliance. But what exactly are the power resources, which back the actual exercise of rights? First, there are normative resources: holding a right means having legitimate reasons to claim compliance (horizontally from fellow-citizens and vertically from political authorities). Secondly, there are enforcement resources: if compliance is not obtained, the right holder can activate legal coercion. Thirdly, there are instrumental resources: the conferring political authority typically provides the conditions for a full exercise of rights. In the case of social entitlements, for example, the state sets up social insurance systems (securing their financial bases), provides information and advice for accessing benefits and so on. While the second type of resources (enforcement) are what makes rights (and, by extension, citizenship) 'hard', in contemporary liberal-democratic societies we should not underestimate the importance of the other two types: normative and instrumental resources.

[24] The US National Guard and the Swiss militia system – originally meant for military and defence purposes – are being increasingly transformed into civilian defence and civic community services, and are often mobilised for various types of internal emergencies or natural disasters.

Even when it adopts binding norms that indirectly impinge on national citizenship, the EU cannot provide enforcement resources directly to citizens. As mentioned, even access to the CJEU is mediated by national courts. The EU does provide, however, normative resources (if only through soft law) and EU citizenship does directly empower citizens with instrumental resources for the exercise of rights.

It is precisely the provision of instrumental resources (money, benefits and services, infrastructures and so on) that could make EU citizenship more salient, visible and tangible for wide social constituencies. A smart enhancement and packaging of such resources (accompanied by an adequate communication, capable of bringing some credit to the EU directly), could be the trampoline for strengthening the social citizenship dimension of the EU and experimenting with a range of soft duties. Intra-EU free movement rights (more precisely: the freedom to reside and work in any member state) is not only the hardest right of EU citizenship; it is also the only one that differentiates EU citizens from third-country legal residents. In other words, it is the key marker of EU belonging in the thick sense.

In the debate it is often argued that the increased harmonisation of rights and obligations between citizens and legal residents is making citizenship a less robust form of association, and that consequently its bonding potential has lost traction. The peculiar features of EU citizenship make it less sensitive, however, to such trends.

Internally, EU citizenship entitles to free movement. So far, this entitlement empowers only a limited constituency and has the risk of generating boomerang effects. In my scenario, the fact of free movement (and of the monetary union – a point which I cannot develop here) justifies the expansion of facilitating benefits and services that could be accessible to everybody: either in the form of transferrable drawing rights or in the form of access to training and life-long-learning services at home (or in another member state, for a short time) aimed at endowing all Europeans with the skills required by the new integrated European economy, based on a single market and international openness.

Externally, EU citizenship (which carries a passport eligibility foreclosed to third country legal residents) entitles to forms of protection against harms to personal or material security which are unfortunately becoming more frequent. The motto *Civis Europaeus Sum* would thus acquire a consequential meaning, both within and outside the EU.

Table 1 Enhancing EU social citizenship

Compensating the stayers:
- EU Fund to ease the impact of mobility
Enabling the stayers:
- A system of (transferable) universal vouchers for mobility/upskilling purposes
Autonomising the movers:
- EU social insurance scheme for mobile workers
Universal empowerment and protection
- A social card for access to the whole range of EU funded facilitating services
- Enhancing the visibility and salience of the Global Adjustment Fund, the Fund for European Aid to the Most Deprived Persons (FEAD) and of the various initiatives of the European Social Fund
- An EU Fund against cyclical unemployment
- An EU insurance against the victims of terrorism and persons injured in the line of duty
- Enhancing and making more visible the external protections linked to the EU passport

Table 2 Possible forms of EU citizenship duties

Financial duties:
- An earmarked contribution for 'Social Europe' (or the European Social Union, or any of the socially oriented EU funds) as a voluntary option when compiling national tax forms (e.g. Italy's *cinquepermille* system)
- Fees for the issuing/renewal of the EU social card and the EU passport (explicitly earmarked for their 'protective' functions)
Personal duties:
- An EU civilian defence and civic community service. As an alternative option for young people of member states with mandatory services; as a voluntary option in the other member states

My proposals (summarised in Tables 1 and 2) may seem unambitious and low-key, but they have the advantage of being practical and can become operative without Treaty changes or major legislative innovations. National citizenship and welfare regimes were not born with a historical Bing Bang, but with a slow sequence of incremental reforms. Given the heavy legacy of

such regimes, incrementalism is the only policy strategy for the EU today. A strategy that does not rule out the elaboration of grand political visions. Quite to the contrary, it presupposes visionary thinking, otherwise small steps become a purposeless and random walk, very likely to result in political failure.

Liberal Citizenship Is Duty-Free

Christian Joppke

Maurizio Ferrera has produced an admirably detailed and savvy catalogue of suggestions to 'add stuff' to European Union citizenship, particularly on its social rights dimension. The idea is that more deliverables, particularly for the vast majority of Europeans who do not take advantage of the right of free movement that remains the beating heart of EU citizenship, will increase the cohesive and integrative powers of the European citizenship, and allow to attach some 'soft' duties to it that in its current form are entirely missing. The question whether EU citizenship 'should' be duty-free is only tangentially raised, and it is presumed rather than discussed that the only reasonable answer could be negative.

While the spirit of this proposal is 'incremental' and pragmatic, I would like to question some larger presumptions that go into it. The first and central is that duties are a necessary component of citizenship. However, tax paying and army service, which are mentioned by Ferrera as 'novel duties' attached to the rise of national citizenship, and apparently considered as model duties for a strengthened EU citizenship also, are no specific citizen duties. All legal residents are required to pay taxes; and most armies today are professional and thus facultative (and some armies, like the American, following the Imperial Roman model, also recruit non-citizens). As already Hans Kelsen observed, even 'allegiance', that quintessential citizen duty, is not a legal duty but merely a 'political and moral' exigency: 'There is no special legal obligation covered by the term allegiance. Legally, allegiance means no more than the general obligation of obeying the legal order, an obligation that aliens also have'.[1]

Kelsen wrote this at a time when 'treason' was still a crime that only citizens could commit; its functional equivalent today, 'sedition', which is the legally enforceable opposite of allegiance, is a crime that non-citizens also can be charged for.[2] A non-starter at the national level already, where – as

[1] Kelsen, H. (1949), *General Theory of Law and State*. Cambridge, Mass.: Harvard University Press, p. 235.

[2] See Fletcher, G. (1993), *Loyalty: An Essay on the Morality of Relationships*. New York: Oxford University Press, chapter 3.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_35

Dimitry Kochenov put it – citizenship has undergone a process of 'liberal de-dutification'[3], it is obvious that a 'dutified' EU citizenship would be extra-anachronistic.

This leads me to question a second presumption of Ferrera's proposal, which is that national citizenship provides a model for EU citizenship. If anything, one might argue, in reverse order, that EU citizenship provides a model (and guarantor) of a 'lightened' citizenship that is observable at the state level already.[4] For Ferrera, the direction is for EU citizenship to move up to the national model. This entails certain questionable idealisations, for instance, of national citizenship to feed 'affectual and normative loyalty vis-à-vis state authorities and their *binding* decisions' (Ferrera). When was that, and where, one must ask. From the ground up, states are better conceived as 'protection rackets'[5], so that an 'affectual and normative' attitude to that sort of thing appears delusional, at best. Undeniably, in the nationalist past, citizenship *was* a reason for people to spill their blood and that of others, and it was a ground to be duped by 'state authorities' (who is *that*, one must continue asking). It isn't, and shouldn't be, today. Add to this the element that the EU is no ordinary state. If the equivalent of 'state authorities' in Brussels, which is the European Commission, decides to relicense Monsanto's glyphosate, a controversial weed killer that is strongly suspected by the World Health Organisation to be carcinogenic to humans, in this decision presumably not uninfluenced by this multinational's formidably resourceful, state-dwarfing lobby, [6] there shouldn't be a EU citizenship tranquilizer around to let that pass as 'binding decision'. Perhaps it would be a category mistake to deploy the citizenship concept in the first place. The EU is a regulatory regime, not a protection racket, so that 'citizenship', which has grown out of a protection logic, providing a flowery 'allegiance' and 'loyalty' coating to the elementary state function of providing security, is the wrong concept to

---

3 Kochenov, D. (2014), 'EU Citizenship Without Duties', *European Law Journal* 20 (4): 482–498.

4 See Joppke, C. (2010), 'The Inevitable Lightening of Citizenship', *European Journal of Sociology* 51 (1): 9–32.

5 Tilly, C. (1985), 'War Making and State Making as Organized Crime', in P. Evans et al. (eds.), *Bringing the State Back In,* 169–187. New York: Cambridge University Press.

6 'European Commission Plans to Relicense Controversial Weedkiller', *The Guardian,* 24 February 2016, available at https://www.theguardian.com/environment/2016/feb/24/weedkiller-glyphosate-controversial-european-commission-plans-relicense. One must concede, however, that the European Commission's stubborn support for the multinational is backed by some large member states, including Germany and France.

begin with. Citizens and others have every reason to be suspicious of a notionally technocratic but still humanly fallible European Commission that is only indirectly, if at all, liable to democratic constraints. Karl Marx would be posthumously redeemed if 'citizenship' were available to feed 'affectual and normative loyalty' to that elite.

There is a third problematic presumption in Ferrera's proposal to 'add stuff' and to 'dutify' EU citizenship, which is the idea that 'moving' – incidentally, by a tiny group that does not even cross the five per cent mark of the EU population – causes harm that 'stayers' should be indemnified for. As Ferrera writes, EU citizenship 'has empowered … mobile citizens, at the (perceived) expenses of large majorities of nonmobile citizens'. Ferrera cautiously talks about 'perception' here but then gives credence to it by proposing to compensate for the 'negative externalities' of free movers and to 'empower' the stayers. This would give legal dignity to the ur-trope of European populists, that of migrants as perpetrators and of natives are victims. More fundamentally still, it buys into the populists' hideous re-labelling of mobile EU citizens as 'immigrants'. It is a fact that the fiscal effects of post-Enlargement migration into the UK, mainly from Poland, which has been the single-biggest theme of the Brexit campaign, have been positive. But then it would reward the British state twice over if taxpayers of other EU states were to pick up the bill of the region-specific infrastructural impasses (schooling, health care, transport, etc.) that are inevitably caused by this migration. In short, any scheme that gives legal dignity to slicing the European citizenry into two unequal halves, movers and stayers, with the perverse and absolutely anti-European connotation of moving as harmful and staying as virtuous (at least, as something to be rewarded for), is dangerous, because it confirms the demonology of European populists.

This is not to deny that the binary of moving v. staying maps closely into that of openness v. closure, which is the central new cleavage of societies undergoing globalisation, being layered over the classic left-right cleavage that has structured Western politics for over 200 years. However, if the old cleavage was reconciled by the welfare state and its social citizenship, doubts are allowed that these compromise structures can be simply applied to a new situation in which globally mobile capital has greatly diminished the fiscal capacity of the state and its judicial authority over the economy. The European citizenship, in contrast to traditional citizenship that eulogises the value of staying and closure, has moving and openness written on its forehead. No compensatory EU funds for stayers or tangible benefits for tourists, patients, students, consumers, via a 'EU Social Card', etc., as proposed with alacrity and a great sense of practicality by Ferrera, will ever warm up the stayers to

'Europe'. Peter Spiro nicely describes the novelty of the day that a Londoner opposing Brexit will feel closer to a New Yorker opposing Trump than to their notional fellow-citizens in the province voting for Brexit or Trump.[7] Or as David Goodhart commented on Brexit opponents' sense of waking up 'in a different country' on the morning of June 24, 2016, this is exactly how Brexit proponents had felt *before* the fateful referendum.[8] Both camps quite literally inhabit different spaces, from the mental to the physical, and are tied up in incompatible loyalty structures. 'Citizenship' has become an obsolete clip to tie them together. The cohesion and bottom-up support that the European project needs to survive, and to move on, is unlikely to stem from cosmetic corrections to a citizenship that cannot but be partisan in the openness v. closure rift. More urgent would be to end the intolerable situation that not just populist movements but entire member states have decisively thrown themselves on the 'closure' end of the spectrum, opposing Europe from within it, by building 'illiberal democracies' that openly repudiate the common values upon which the EU also legally rests.

Finally, if I understood Ferrera correctly, he defends his proposal as one that would sharpen the distinction between privileged EU citizens and less privileged third-state nationals, or 'immigrants' proper, because only EU citizens but not settled immigrants are meant to benefit from the proposed social policy measures. This strikes me as retrograde (and against the territorial logic of providing welfare). The thinning distinction between citizens and legal permanent residents is a side-effect of a larger liberalisation of citizenship in Western states and of the 'civilising' of nationhood that undergirds the latter. This is a hard-won achievement, not a liability. For the opposite tribal model of a citizen elite tightly sealed from second-class immigrants, consult the Gulf States. It would be ironic if the European Union, which has been created to tame nationalist exclusiveness, were now to mimic it.

These somewhat grand-scheming objections, some perhaps more plausible than others, are raised for the sake of debate; they are not meant to diminish Ferrera's powerful and deeply knowledgeable proposal. We share the same vision of strengthening the European citizenship. At heart, however, I would guard against the notion that citizenship should be duty-full. Liberal citizenship is duty-free, in a legal (not moral!) sense, and EU citizenship is even more so. A citizenship that imposed hard legal duties was the

---

7 Spiro, P.J. (2017), *Citizenship After Trump Center for Migration Studies,* available at http://cmsny.org/publications/spiro-citizenship-after-trump/.

8 Goodhart, D. (2017), *The Road to Somewhere*. London: Hurst.

'citizenship' of communist states, today also that of Islamic states, which arrogate to themselves a strong formatting of the preferences and beliefs of their members. This is not a model to follow, because it impairs liberty.

Building Social Europe Requires Challenging the Judicialisation of Citizenship

Susanne K. Schmidt

Which rights should European citizenship entail to protect the achievements of European integration, while overcoming its pitfalls? Should we aim to 'add stuff', as Ferrera suggests, or rather follow Joppke's plea for non-exclusive citizenship rights? I agree with Ferrera's diagnosis that EU citizenship has an isopolitical bias, it horizontally opens nationally shaped (and financed) welfare systems to citizens from other member states. However, in his 'detecting of the flaws' he overlooks the largely judicial genesis of citizenship rights, which are crucial for understanding the shortcomings of EU citizenship. In the following, I start by filling this gap. Because Ferrera's suggestions require political decisions, they are much welcome on this basis.

Since Maastricht, EU citizenship saw an impressive advancement from a rather symbolic Treaty addition to being the 'most fundamental status' (C-184/99 *Grzelczyk*). In the light of *van Gend* (26/62), *Costa* (6/64), *Cassis de Dijon* (120/78), and multiple other rulings, scholars of European integration have taken for granted how much the Court of Justice of the European Court (CJEU) shapes policy in the EU by interpreting the many policy objectives the Treaty contains (four freedoms, competition law, and then citizenship). For citizenship, the judicial development implied an increasing pressure on nationally financed welfare states to open up non-discriminately to EU citizens, even if economically inactive, and with few and recent ties. But in late 2014 the CJEU made clear that those entering a state but never intending to work and contribute (C-333/13 *Dano*) have no European right to claim equal access to funds.

Behind the extraordinary policymaking power of the CJEU is what Dieter Grimm calls over-constitutionalisation.[1] An intergovernmental Treaty describing cooperation aims is policy-rich. If this Treaty is transformed into a constitution by declaring it directly effective and supreme, the Court's

Funding of Norface is gratefully acknowledged (www.transjudfare.eu).

[1] Grimm, D. (2015), 'The democratic costs of constitutionalisation: the European case', *European Law Journal* 21: 460–473.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_36

interpretations of the Treaty acquire constitutional status themselves. For citizenship rights, this means that the rights enshrined in the Citizenship Directive or in the regulations on the coordination of national social security systems, have been shaped back and forth between the EU's judiciary and its legislature, with the latter not being able to overrule the former's constitutionalised rulings.[2] Next to EU secondary law, CJEU case law directly shapes the social policy of member states.

This peculiar way of policymaking has repercussions. As rulings on single cases take generalised effect, the resulting policy is unable to cater equally well for the differences of national welfare systems. Its character of 'one size fits none' is more pronounced than a negotiated policy would be, where all member states could make their preferences known regarding national conditions and singularities. And, more seriously in our context, the CJEU is hardly legitimised for opening up national welfare systems to EU citizens. This is not to say that those advocating for welfare chauvinism know about the judicial background of the rules, but rather that member-state governments would not have legitimated, absent judicial pressure, the partly far-reaching opening of national welfare systems even to those that have hardly contributed so far. For instance, following *Styrelsen* (C-46/12, 2013), EU students working 10–12 hours per week have gained access to Denmark's generous non-repayable student support. Labour-activating welfare states subsidise poorly paid EU citizens, implying that tax-financed in-work benefits may be higher than actual pay, resulting also in incentives for workers' exploitation.[3]

Nationally financed welfare state systems that are only coordinated at the EU level may need to balance openness and closure in the way of an 'earned' social citizenship excluding those that recently joined the national community for a transition period.[4] This is not to say that internal EU migration currently takes a toll on the old member states. Overall contributions appear positive, and it is rather of grave concern that the poorer EU countries seem to lose out from the free movement rights of their citizens.[5] But within the

---

2 Schmidt, S.K. (2018), *The European Court of Justice and the Policy Process: The Shadow of Case Law*. Oxford: Oxford University Press.

3 Ruhs, M. (2015), 'Is Unrestricted Immigration Compatible with Inclusive Welfare States? The (Un)Sustainability of EU Exceptionalism', *Oxford: Compas, Centre on Migration, Policy and Society, Working Paper No. 125*.

4 Kramer, D. (2016), 'Earning social citizenship in the European Union: free movement and access to social assistance benefits reconstructed', *Cambridge Yearbook of European Legal Studies* 18: 270–301.

5 Atoyan, R. et al. (2016), 'Emigration and Its Economic Impact on Eastern Europe'. *IMF Staff Discussion Note*; Sindbjerg Martinsen, D. & G. Pons

rich states the benefits of European integration, as of globalisation, do not appear to be distributed equally. The working class feels left out from the liberal consensus. This needs to, and could be handled better within the member states. But inevitably, like the free movement of capital, individual free movement rights can be used to free-ride on different member states' provisions or to engage in regulatory arbitrage. Empirically, this may be of much less relevance than tax evasion. But to those contributing to national welfare systems, to those having themselves difficulties making ends meet, arbitrage and lack of reciprocity undermines the legitimacy of national welfare alongside that of the EU.[6]

Are Ferrera's suggestions likely to remedy the situation? They strengthen the necessary political debate. If the opening of national protection systems to those with recent links and few financial contributions to the member-state community lacks legitimacy, because solidarity is claimed with no reciprocity, his suggestion of an EU social scheme for those on the move appears the most promising. Those using their free movement rights, requiring support in the transition, should be compensated directly from the EU level to top up, for instance, their Bulgarian unemployment payments that do not allow them to look for a job in Denmark.[7] In addition to Ferrera's argument, this would lessen the normative drawback of the immediate opening of national welfare. To me, it therefore appears better suited than his other suggestions of compensating for possible costs of 'hospitality'. The array of national welfare schemes and European funds already appears sufficiently confusing to the non-expert, so that more may be gained from greater transparency than from further additions. A division of competences, where the level of government granting rights also has to cover their costs would allow social Europe to progress from 'regulation' to 'allocation'. And it would bolster the EU's legitimacy if it could give added value to EU citizens moving to other member states.

Rotger (2017), 'The fiscal impact of EU immigration on the tax-financed welfare state: Testing the "welfare burden" thesis', *European Union Politics* 18 (4): 620–639, doi:https://doi.org/10.1177/1465116517717340.

Dustmann, C. & T. Frattini (2014), 'The Fiscal Effects of Immigration to the UK', *The Economic Journal* 124 (580): F593–F643, doi:10.1111/ecoj.12181.

6 Beaudonnet, L. (2016) 'A threatening horizon: the impact of the welfare state on support for Europe', *Journal of Common Market Studies* 53 (3): 457–475.

7 Bruzelius, C., C. Reinprecht & M. Seeleib-Kaiser (2017), 'Stratified Social Rights Limiting EU Citizenship', *Journal of Common Market Studies* 55 (6): 1239–1253, doi: https://doi.org/10.1111/jcms.12555.

Such an EU citizenship could not treat newly settled third-country nationals on a par, in the same way as mobile EU citizens would have to 'earn' their equal rights in host member states. If I understand Joppke well, he argues against such exclusion and for a thin, liberal citizenship, reminding us of the dangers of national privilege and allegiance.

Intuitively, inclusion has greater appeal than exclusion, but possible costs to the achievements of advanced welfare states need empirical analysis. Highly differentiated societies rely on redistribution, social services, public education, and infrastructure. Solidarity and reciprocity are closely related, as Ferrera reminds us. A currently positive fiscal balance under conditions of EU free movement is insufficient proof, as there is no full opening and member states tread carefully to maintain their welfare schemes under the relative openness forced by the CJEU. If we fail to consider how redistribution could work in a context of encompassing non-discrimination without resulting in a race to the bottom of welfare services, we may strengthen rather than beat right-wing populism.

Freedom of movement and EU citizenship have liberating force for the individual. But they have to be embedded so that they do not undermine the republican basis on which they ultimately rest.[8] A solely liberal notion of citizenship that does not exclude anyone, extending to third-country nationals, may be a citizenship for those whose fortunes do not seem to depend on collective action as they are individually imbued with sufficient resources. Is the inclusive, liberal citizenship vision possible without transforming it into a neoliberal nightmare of the fully liberated market-citizen? And is it really politically more attractive than a temporary exclusion from full equal treatment for those moving into other communities? An all-inclusive, truly cosmopolitan citizenship conception can hardly assure those fellow citizens that are losers of globalisation of our solidarity if they feel pitted against all humankind in need. It has been asked why the working class abandoned the Left.[9] But the converse question similarly merits debate.

We all depend on the surplus of functioning, highly differentiated societies. The rising number of failed states, and increasing problems with rule of law even in EU member states show how much ridden with prerequisites the Western highly developed (welfare) state is. Joppke sees 'incompatible

---

[8] Scharpf, F.W. (2009), 'Legitimacy in the multilevel European polity', *European Political Science Review* 1 (2): 173–204.

[9] Rothstein, B. (2017), 'Why Has The White Working Class Abandoned The Left?', *Social Europe*, available at https://www.socialeurope.eu/white-working-class-abandoned-left.

loyalty structures' on both sides of the openness v. closure cleavage that cannot be tied together by citizenship anymore. That does not bode well for the necessary political discussion of how open national welfare states should be and under which conditions they integrate newcomers. The decision cannot be left to courts that deal with it under the principle of non-discrimination. Different from democratic majorities, the judiciary is ill-equipped to take decisions on allocating resources. Non-discrimination as a principle neither gives clear guidelines, as it requires treating like cases alike, and unlike cases differently. For welfare states depending on redistribution, which are legitimate criteria for distinction?

Traditionally European integration has been market integration and as such it is not sustainable. But the building of communities sharing values and solidarity takes time. It cannot be surprising that the increasing economic and social heterogeneity through simultaneous deepening and widening of the EU resulted in challenges. To strengthen the sense of belonging, EU citizenship rights are important, but in order to have societal backing they need to be politically shaped and granted, not judicially. Has this not been amply demonstrated by the Brexit vote? Without entering this debate, which Ferrera opens, sustainable progress towards a real European Community is unlikely. Relying on courts is insufficient.

EU Citizenship Should Speak Both to the Mobile and the Non-Mobile European

Frank Vandenbroucke

Maurizio Ferrera tables a catalogue of proposals to add a social dimension and 'some duty' to EU citizenship. As always, his search for incremental solutions that reconcile feasibility and vision is challenging. However, I have some sympathy with Joppke's reaction that one cannot dispense with a more fundamental debate on free movement, on which public opinion is deeply divided. Ferrera's proposals may be relatively peripheral to settling that fundamental debate. On the other hand, Joppke's insistence that EU citizenship is duty-free, because it is liberal, does not yield a justification for free movement and non-discrimination of mobile Europeans. I believe it is possible to justify free movement in a framework of principles that speak both to the mobile and the non-mobile European, whereby openness is embedded in principles of reciprocity. Reciprocity bridges rights and obligations.

To clarify the issues at hand, we should distinguish three questions:

1. How can we justify free movement?
2. How can we justify non-discriminatory access to social benefits for those who move?
3. How can we justify a difference between active and non-active citizens in the application of (1) and (2)?

Why free movement for active citizens?

Simply postulating that EU citizenship implies free movement begs the question. The most robust normative justification holds that free movement of workers means that EU citizens share an opportunity set, which is much larger than the opportunity sets offered by separate national labour markets. If free movement is about '*equal* access to opportunities' across borders for *all* Europeans, it is hard to see how it can be mitigated or nuanced on a permanent basis (which is different from postponing it during a transitory period): either equal access applies for everybody – for the low-skilled as

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_37

much as for the high-skilled, for all kinds of jobs –, or it does not apply, at least as long as equal access to opportunities is so conceived.[1]

This normative justification is not premised on the idea that free movement would *per se* improve the position of the worst-off within the EU. The status of such a principle in a conception of social justice is comparable to Rawls' principle of 'fair equality of opportunity', which has priority over his 'difference principle': for Rawls, 'fair equality of opportunity' (which is about access to positions and offices) has to be respected, even if it would limit the scope for redistribution. But is there an *inevitable* trade-off? With regard to the distributive consequences of free movement, I agree with Joppke that there is something problematic in Ferrera's proposal to set up a compensation mechanism for countries experiencing intra-EU immigration. Next to Joppke's observation that national governments are not incurring budgetary losses because of immigration and should be responsible for securing adequate provision of social services for their residents, the 'negative externalities' mentioned by Ferrera may be more real for countries of mass emigration than for countries of immigration. Therefore, such a proposal risks to be highly divisive in today's Europe. The only way to tackle the distributive risks associated with mobility is to be more demanding vis-à-vis member states with regard to the quality of their welfare states, notably in the realm of labour market regulation and the provision of social services – more demanding than the EU is today. The regulation of minimum wages is a prime example. Different traditions exist with regard to the regulation of minimum wages: in some member states public authorities set minimum wage levels, in other member states this is the exclusive domain of social partners. But, however minimum wages are determined, a common European principle should be that *all* workers are covered by minimum wage regulation: decent minimum wages should apply universally in the EU's member states, without exceptions for certain sectors, or types of jobs, or types of workers. A related example is access to social protection: there should be no jobs that do not create access to social protection. In short, if we don't want immigration to boost a precarious, hyper-flexible segment of labour markets, there should be limits to precariousness and flexibility *across the board*. Or, think about access to social services, which can be

[1] There is no denying that formal equality of opportunity does not guarantee real, substantive equality of opportunity. This distinction is emphasized, rightly, by Bruzelius, C., C. Reinprecht & M. Seeleib-Kaiser (2017), 'Stratified Social Rights Limiting EU Citizenship', *Journal of Common Market Studies* 55 (6): 1239–1253 (although I am not convinced by the policy solutions they propose – but space forbids to pursue this here).

under pressure in municipalities or regions with significant immigration: member states should guarantee sufficient provision of social services to safeguard universal access, for non-mobile citizens as much as for mobile citizens. The debate on the European Pillar of Social Rights can be the starting point to develop such common principles. Admittedly, developing and translating such principles into tangible realities is an uphill battle in today's Europe; but there is no alternative if free movement is to be reconciled with domestic social cohesion.

Next to the principled case based on a notion of equality of opportunity, there is a second, more contingent argument in support of free movement: a single market needs both a regime of free movement of workers and a regime of posting of workers (which supports the freedom of service delivery), and the two regimes *need each other* and should constitute a well-balanced and sustainable whole. Posting[2] has become a controversial issue in the EU: it is difficult to control and generates problems of social dumping in particular economic sectors. Therefore, reform is necessary. However, one cannot dispense of a posting regime: an integrated market for services requires that workers can be sent to other member states for short-term projects, without being employed and affiliated to the social security system of the receiving country. Simultaneously, a single market needs a regime of free movement of workers seeking regular employment contracts in other countries as a *necessary corollary* to a regime of posting.[3] Limiting free movement of workers (with the principles of non-discrimination it implies) between a country A and a country B while allowing posting would be unfair from the point of view of workers living in A, since it would make it impossible to work in B on the basis of the full social and employment policy regime in that country. Moreover, such an imbalance would enhance a dynamic of social dumping in B: the alternative 'non-dumping' option,

---

2 A 'posted worker' is an employee who is sent by his employer to carry out a service in another EU member state on a temporary basis. Posted workers are different from EU mobile workers in that they remain in the host member state temporarily and do not integrate in its labour market, as they maintain an employment contract with an employer in their home ('sending') country. In contrast to posted workers, EU mobile citizens who work in another member state and have an employment contract with an employer in the latter member state are entitled to full equal treatment with nationals in access to employment, working conditions and all other social and tax conditions.

3 I develop this argument in a paper on basic income, reciprocity and free movement: Vandenbroucke, F. (2017), 'Basic income in the European Union: a conundrum rather than a solution', *ACCESS EUROPE Research Paper No. 2017/02*, available at SSRN: https://ssrn.com/abstract=3011847.

which some workers from country A might prefer (compared to the 'posting' option), is simply unavailable in such a scenario. For it to be fair to workers, an integrated, single market for services needs both a well-delineated posting regime and free access of workers to regular employment contracts in other countries.

Why non-discrimination?

There should be no denying that the case for free movement for workers has often been made on mainly economic grounds (with a view to the efficient allocation of factors of production), and that the principle of non-discrimination, notably with regard to social security entitlements, has often been defended as a corollary of free movement: non-discriminatory access to social security entitlements associated with employment obviously facilitates free movement. In the previous section, I tabled an argument for free movement based on access to opportunities, which does not refer to the traditional economic efficiency argument. In addition, we need independent arguments for non-discrimination that are not premised on the idea that free movement should be promoted *per se*.

The fact that a mobile worker is incorporated in the solidarity circle of the country where he or she works is most often defended as crucial to European citizenship. Without appeal to European citizenship, there is another argument, premised on the idea that the European Union should be union of welfare states. The fact that a Polish worker enjoys the same social rights as Belgian workers when working and living in Belgium justifies that his employment generates the same social security contributions and tax revenue for the Belgian government as the employment of a Belgian national in Belgium. In other words, non-discrimination in terms of social rights justifies and so sustains the principle that we do not tolerate competition between the Polish and the Belgian social and taxation system on Belgian territory: such competition is a recipe for social dumping. The non-discrimination principle establishes a notion of reciprocity across EU member states, in the following sense: all member states guarantee that all economically active mobile citizens will have equal access to social policies in each of the member states; simultaneously, all member states understand that including economically active mobile citizens in the solidarity circle of their host country protects these solidarity circles against practices of social dumping within their own territory.

Earned social citizenship

The coexistence of national welfare states and free movement in the EU is made possible by a principle of 'earned social citizenship'. Historically, the tension between free movement and the bounded welfare state was reconciled by granting the right to move only to the economically active (and their dependents) to the exclusion of the economically inactive and by establishing a coordination regime for social security systems to the exclusion of social assistance. This simple dichotomy was not tenable, but, when the right to free movement became open to economically non-active citizens, EU citizens were granted a right of residence throughout Europe 'as long as they do not become an unreasonable burden on the social assistance system of the host Member State'. The 2014 *Dano*-judgment by the Court stresses that member states have 'the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right of free movement *solely* in order to obtain another Member State's social assistance'.[4] Dion Kramer sketches the combination of continuity and change in the evolution of the EU's principle of 'earned social citizenship' and situates that evolution in a broader notion of 'neoliberal communitarianism', which 'combines a communitarian care of the national welfare state with a neo-liberal emphasis on the individual's responsibility to achieve membership of that welfare community'. He labels it 'neo-liberal' since 'it becomes the individual's own responsibility, expressed in the form of 'earning' citizenship, to convert to a bounded community of economic, cultural and social values'.[5] Kramer sees dangers in the current evolution, as an expanding notion of individual responsibility, not only with regard to economic contribution but also with regard to cultural traits such as language, risks to be pushed further and further within the confines of the national welfare state itself. However, taking on board these cautionary notes, there is also a more positive reading of the notion of 'earned social citizenship' for mobile Europeans, at least *if the EU would oblige its member states to develop comprehensive and adequate systems of minimum income protection* and if an increasingly restrictive interpretation of what 'earned social citizenship' means can be avoided. In this more positive reading, a carefully delineated possibility for member states to exclude non-nationals from domains of social policy in which principles of compassion rather than

---

4 *Dano*, C-333/13, EU: C: 2014:2358, para 78, emphasis added.

5 Kramer, D. (2016), 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed', *Cambridge Yearbook of European Legal Studies* 18: 270–301. The first quote is on p. 277; the second quote is on p. 272.

principles of responsibility dominate (such as social assistance) would be a corollary of a *duty* for each welfare state to protect its own citizens against vulnerability on the basis of compassion.

I would indeed argue that in a 'European Social Union' – a true union of welfare states – two complementary logics can apply legitimately with regard to social citizenship if they are applied conjointly:

1. Economically active citizens have the right to take up employment opportunities across borders, and on the basis of employment they – and those who depend on them – 'earn' non-discriminatory access to all social benefits in the member state where they work, including protection against the consequences of involuntary inactivity (unemployment, illness). National regulations that guarantee fairness in labour markets apply fully to them. This serves both a pan-European notion of equal access to employment opportunities and the purpose of social cohesion in each welfare state.
2. A non-active citizen who needs protection cannot simply rely on any member state of his (or her) choice: his nationality determines the member state, which is first and foremost responsible for his protection. Under carefully delineated conditions, another member state to which he has no bond of nationality is allowed to say that the non-active citizen's social protection would create an 'unreasonable burden' on its welfare state (these conditions must substantiate that, in the absence of a real link with the host member state, the right of free movement was exercised solely in order to benefit from the host state's social assistance). In contrast, it would be 'unreasonable' for any member state not to provide adequate social protection for its national citizens, whatever the causes of their vulnerability and dependence.

Obviously, setting the boundaries between these logics is a complex task and raises many questions. As Verschueren pointed out, there is both a broad and a narrow interpretation of the *Dano* judgment to which I referred earlier.[6] What are the exact conditions under which the notion of 'unreasonable burden' can be applied, and what is the role played by criteria of 'integration in the host country' to show a 'real link' with that country? The reciprocity that a member state can demand from nationals of another EU member state must be judiciously defined. Also, next to principles that apply to labour markets and income protection, a space of European social citizenship needs

[6] Verschueren, H. (2015), 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?', *Common Market Law Review* 52 (2): 363–390.

specific principles in the domains of education and health care. In addition, and importantly, if these logics lead to a regime of 'enter at your own risk' (whereby residence of non-active non-nationals is *de facto* tolerated, without guarantee of protection), this may lead to precariousness and marginalisation of non-nationals.[7]

I am not implying that, today, the EU and its member states apply these complimentary logics carefully and consistently: both with regard to 'fair mobility' and minimum income protection for the non-mobile citizens there is an agenda to be taken up (some of Ferrera's proposals fit well into an agenda of 'fair mobility'). However, these complexities, tensions and risks do not make these complementary logics illegitimate as a general framework for regulating social citizenship in the EU. If those principles were applied consistently, EU citizenship would speak both to the mobile and the non-mobile citizen: it would support mobility, but also impose on member states the adequate protection of and delivery of social services to the non-mobile.

[7] Heindlmaier, A. & M. Blauberger (2017) 'Enter at your own risk: free movement of EU citizens in practice', *West European Politics* 40 (6): 1198–1217, doi: 10.1080/01402382.2017.1294383.

The Impact and Political Accountability of EU Citizenship

Dorte Sindbjerg Martinsen

Maurizio Ferrera's essay on how to take EU citizenship forward is an inspiring and welcome contribution to a heated, politicised debate. Ferrera not only presents the state of EU citizenship, its current challenges but also suggests concrete policy proposals how to make it more substantial and less counterproductive. His essay addresses the question raised by Rainer Bauböck: can the integrative function of EU citizenship be strengthened and how?

Ferrera's text raises several pertinent issues one could take up, but here I shall focus on the sketched tension between the 'small constituency of mobile citizens' and those who stay. As Ferrera writes, the hardest right of EU citizenship is the right to reside, work and become a member of the welfare community of another member state. At the same time, this core of EU citizenship has produced public and political concerns about social dumping and welfare tourism. To confront this tension, Ferrera proposes to empower the 'stayers' by, for example, introducing an EU social card while at the same time 'dutifying' EU citizens, for example by introducing a small earmarked 'Social Europe' tax.

While I agree that there is a pressing need to examine and confront the tension between the 'free movers' and the 'stayers', I see neither time nor current political support for such EU solutions to materialize. They may be interesting future objectives but there is a call for more immediate engagement with the tensions described, be they mainly perceived or real. First of all, in my view, as researchers we should engage in a fact-finding mission. We need to know more about how EU rules and rights actually work in the member states and what their outcomes are. Much of the debate has been assumptive and situational. However, as also noted by Ferrera, empirical evidence demonstrates that mobile EU citizens are net contributors to the public purse, i.e. at an aggregate level they contribute more to the welfare budget than they take out.[1] Such findings should lead to a more nuanced way

[1] Dustmann, C. & T. Frattini (2014), 'The Fiscal Effects of Immigration to the UK', *The Economic Journal* 124 (580): F593–F643; Ruist, J. (2014), 'Free immigration and welfare access: The Swedish experience', *Fiscal Studies* 35

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_38

of portraying mobile EU citizens. They pay income tax, VAT, corporate tax, estate tax and social security contributions in their hosting member state, tend to be relatively young and take time to claim benefits. The public revenue they generate are part of financing the welfare benefits, services and public goods for the 'stayers' too. In addition, research demonstrates that EU citizenship is stratified[2] and that when applied in practice, some EU citizens have only precarious status in their host member state.[3]

This is not to say that EU mobility has no negative social and economic consequences. Some citizens – and some member states[4] – are obviously more fit for the internal market than others. Negative externalities should indeed be confronted politically. The question then becomes at what regulatory level and with which means? First of all, domestic politics is foremost responsible for scarce welfare resources, i.e. hospital beds, emergency care, social housing or school places, etc. Ordinary citizens may tend to blame Brussels because mobility rules come from Brussels, but Brussels does not decide on the level of taxation or the proper level of public investment. Domestic politics does and should be held accountable. Secondly, domestic politics is responsible for the implementation of EU rules. Social dumping, lowering wages and reducing health and safety at work places across the Union, is indeed a negative side-effect of free movement. The recently adopted enforcement directive concerning posting of workers gives the member states new means of monitoring compliance with the rules and introduces a principle of chain responsibility in the construction sectors. But the effectiveness of these new control measures again depends on national implementation and the resources allocated to control and correct for social dumping. Domestic politics shares political accountability for ineffective EU rules. The 'blame-game' seems so far to disregard domestic implementation and enforcement of Brussels' mobility rules. Thirdly, EU politics is responsible for the adoption of EU rules and should be held accountable for

(1): 19–39 and Martinsen, D.S. & G.P. Rotger (2017) 'The fiscal impact of EU immigration on the tax-financed welfare state: Testing the "welfare burden" thesis', *European Union Politics* 18 (4): 620-639, https://doi.org/10.1177/1465116517717340.

2 Bruzelius, C., C. Reinprecht & M. Seeleib-Kaiser (2017), 'Stratified Social Rights Limiting EU Citizenship', *Journal of Common Market Studies* 55 (6): 1239–1253.

3 Heindlmaier, A. & M. Blauberger (2017), 'Enter at Your Own Risk: Free Movement of EU Citizens in Practice'. *West European Politics* 40 (6): 1198-1217.

4 Hassel, A, J. Steen Knudsen & B. Wagner (2016), 'Winning the Battle or Losing the War: The Impact of European Integration on Labour Market Institutions in Germany and Denmark', *Journal of European Public Policy* 23 (8): 1218-1239.

their content and development. When unintended consequences of EU rules surface, it is a political obligation to correct such rules. Here there is no quick fix in a European context. Changing EU rules requires overcoming significant thresholds for the necessary majorities in both the Council of Ministers and the European Parliament. But it is not mission impossible.[5] If the Court of Justice of the European Union has interpreted the concept of worker in EU law in a way that deviates too far from political intentions, this calls for EU legislative politics. Otherwise, considerable variation in implementation will continue.[6] Or if member states can prove that influx of EU citizens or outflow of benefits challenge the financial sustainability of a specific welfare scheme, corrective mechanisms or exemptions should be adoptable. The latter form of differentiated integration may disturb the uniformity of EU rules – but could at the same time increase its domestic support.

We have already seen the disruptive effects of political discourse where EU mobile citizens are regarded as welfare seekers and social dumpers; just recall the Brexit debate. Ferrera's call for avoiding further disintegrative and counterproductive consequences of EU citizenship's core rights is thus timely and urgent. Bridging the cleavage between the 'mobile' and the 'stayers' calls for further research, for multilevel politics as well as multilevel accountability.

5 Martinsen, D.S. (2015), *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union*. Oxford: OUP.

6 O'Brien, C., E. Spaventa & J. De Corninck (2016), 'Comparative Report 2015-the Concept of Worker under Article 45 TFEU and Certain Non-Standard Forms of Employment'. European Commission Directorate General for Employment, Social Affairs and Inclusion, available at *ec.europa.eu/social/BlobServlet?docId=15476.*

‘Feed them First, Then Ask Virtue of Them’: Broadening and Deepening Freedom of Movement

Andrea Sangiovanni

Maurizio Ferrera’s contribution is characteristically sharp, engaged, and imaginative. In this comment, I will not unpack his various proposals. Rather, I want to discuss the way the issues are framed, and propose an alternative way of grounding them.

Citizenship as an instrument for bonding and integrating

‘In the light of rising Euroscepticism, *souvranisme* and anti-immigration … sentiments’, Ferrera wonders under what conditions EU citizenship might play a more integrative role in European politics. Currently, EU citizenship only secures a thin set of entitlements (to nondiscrimination activated only when an EU citizen is involved in activities or situations that cross an internal EU border), and only secures them for a tiny fraction of the European population (primarily those who actually exercise their rights to freedom of movement, which amounts to less than 5 per cent of the EU population). Ferrera’s proposals for reform aim both to broaden and deepen the appeal of EU citizenship, mainly by securing a novel set of entitlements to immobile citizens and by extending the range of social entitlements available to those who move.

Given Ferrera’s insistence that EU citizenship should play a more ‘integrative role’, the criteria by which we should judge whether his proposals would be successful, assuming they were ever adopted, are therefore explicitly functional. We should endorse the proposals if and insofar as they enhance the *perceived legitimacy* of further European social integration and if and insofar as they *increase support* for freedom of movement. Ferrera writes, ‘I have argued that it is precisely the provision of instrumental resources (money, benefits and services, infrastructures and so on) that could make EU citizenship more salient, visible and tangible for wide social constituencies. A smart enhancement and packaging of such resources … could be the trampoline for strengthening the social citizenship dimension of the EU…’ It is as if Ferrera were to say: ‘We (European elites?) agree that further European social integration and freedom of movement are desirable;

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_39

the task that remains is to get EU publics to agree with us. How might we do that? By enhancing the symbolic, material, and instrumental significance of European citizenship in such and such ways. "Feed them first, then ask virtue of them"'[1]

What is odd about such a perspective is that it cannot be offered to EU publics *themselves*. Imagine a member of the public asks: 'And why should I aim to augment European citizenship in the ways you propose?' Given how Ferrera has framed his question, the answer must be: 'Because it will get you to bond more with fellow Europeans and therefore assent to further EU social integration without undermining freedom of movement'. But that's no answer at all, given she is asking why she should assent to the proposals, bond with other Europeans, and support freedom of movement *in the first place*.

To be sure, there is nothing wrong with making an argument intended to propose reforms that might feasibly sustain the European project in the face of growing scepticism. And yet there is still something lacking. This contrast can be sharpened if we further imagine that EU publics in fact reject Ferrera's proposals (despite the evidence that Ferrera has marshalled that indicates some support for the general direction). Should one abandon them as *therefore* misguided? Or might there be something still to be said for them? What might we say, for example, to an engaged, publically minded EU citizen that rejects Ferrera's proposals because they believe either that (a) freedom of movement is a mistake (as many British do, including those who voted for Remain), (b) freedom of movement should remain formally open to all but without further support for either movers or stayers, or (c) freedom of movement should not be limited to EU nationals (but extended to all third-country nationals [TCNs] as well)?

Broadening and deepening freedom of movement

In the following, I want to sketch a response that provides an alternative basis for Ferrera's proposed reforms while addressing (a) and (b).

With our publically minded EU citizen in view, what is the best argument in favour of EU-wide freedom of movement? One might argue that the free movement of persons is an essential aspect of the Single Market, and, as such, is to be recommended mainly as a device for securing a more efficient allocation of the factors of production. This is an advantage that leads,

[1] As the Grand Inquisitor says in Dostoevsky, F. (1991), *The Brothers Karamazov.* R. Pevear and L. Volokhonsky (trans.), New York: Vintage Books, 253.

through productivity gains, to aggregate gains. But there is also an advantage, in principle, from the perspective of each individual. Freedom of movement and nondiscrimination expands every EU citizen's choice set, providing them with an expanded range of opportunities both to seek gainful employment abroad and to pursue broader cultural, social, political and personal interests.[2]

But, as Ferrera and others have rightly pointed out, freedom of movement also brings costs—costs, furthermore, that do not fall equally on everyone. In particular, there is some (albeit heavily contested) evidence that, while there are net aggregate economic benefits from greater immigration, some communities, some groups, and indeed some member states will inevitably lose out. In the same way as any shift in technology, say, from candlesticks to electric bulbs, will diminish the pay and bargaining power of the candlestick makers (or displace them entirely), the same can be said with immigration: a greater supply of cheaper, unorganised labour will put downward pressure on wages and diminish the bargaining power of those who work in immigrant-heavy sectors. At the same time, public services (education, healthcare, social services, etc.) in communities in which newly arrived immigrants concentrate will bear relatively greater burdens than other communities. Finally, member states that are net senders of immigrants may suffer brain drain, as their skilled labour force moves abroad.[3] These costs are most often borne not by the well-off but by those who are already disadvantaged. Our member of the public will want some explanation for why she must bear these costs to make way for gains that accrue mostly to others.

The best response will appeal to a broader conception of social justice for the European Union.[4] Consider that, in integrating, member states and their peoples open their societies, polities, economies, and territories to international and supranational control. By pooling sovereignty, member states and their peoples of course stand to gain, but the constraints of intergovernmental bargaining and supranational control often expose states both to a range of negative externalities and to risks and costs that they can no longer con-

---

2 This point is well made in Vandenbroucke, F. (2017), 'Basic Income in the European Union: A Conundrum Rather Than a Solution', *SSRN Research Paper* 2017/02, The Amsterdam Centre for Contemporary European Studies.

3 To calibrate this effect, one must also take into account that many of the CEEC countries were happy to support free movement as it served as a means of relieving excessive labor supply. See, e.g., 'M. Kahanec, Labor Mobility in an Enlarged European Union', in *International Handbook on the Economics of Migration*, A. Constant and C. Zimmerman (eds.), Cheltenham: Edward Elgar Publishing, 2013, pp. 137-52 and references cited therein.

4 For this point, see also the contribution by D. Thym 'The failure of Union Citizenship beyond the Single Market' in Part II of this book.

front on their own. To face them, member states depend on the collaboration and cooperation of other member states and supranational actors. To name but one example, think of the constraints of monetary union, and the relative position of Greece and Germany within it. As I argue elsewhere[5], the best normative model for deciding how these benefits, costs, and risks ought to be distributed is grounded in a conception of reciprocity: member state peoples owe one another a *fair return* for their mutual submission to EU rules and supervision. The fair return for risks and losses is, in turn, best captured by the idea of a hypothetical insurance market, in which member state peoples know the risks associated with integration but not their place in that distribution. On this view, member state peoples and their citizens are owed a fair division of the gains—which are secured mainly through the convergence promised by the implementation of a Single Market—and indemnification against those risks and losses that are a result of integration, and which they could do little to prevent or avoid. This model can be used to support a much broader Social Union among member state peoples than at present (though stopping well short of providing support for an EU-wide federal welfare state).

We can also use this framework to address our hypothetical members of the public and their concerns with respect to freedom of movement (recall [a] and [b]).[6] As I have said, freedom of movement brings benefits, but with these benefits also come costs that fall disproportionately on some. Those on whom such costs fall – those whose communities, services, career opportunities and wages are most affected – have a claim, according to the reciprocity-based view of social justice I have just outlined, to be indemnified against these losses in exchange for their support for freedom of movement as a whole. The logic of this reciprocity-based view reinforces and undergirds Ferrera's proposals for an EU fund (modelled on the Globalisation Adjustment Fund) to ease the impact of mobility on affected groups. Although this is not discussed by Ferrera, we could also imagine extending the fund to provide for education and vocational programs in countries suf-

---

[5] See Sangiovanni, A. (2013), 'Solidarity in the European Union', *Oxford Journal of Legal Studies* 33 (2): 213-241; Sangiovanni, A. (2012), 'Solidarity in the European Union: Problems and Prospects', in J. Dickson & P. Eleftheriadis (eds.) *Philosophical Foundations of European Union Law*, 384-412. Oxford: Oxford University Press; Sangiovanni, A. (forthcoming), *The Bounds of Solidarity: International Distributive Justice, Reciprocity, and the European Union.* Cambridge: Harvard University Press. Here of course I can only briefly sketch the model.

[6] I say more about the tension—and how to resolve it—between facilitating freedom of movement and domestic commitments to social solidarity in Sangiovanni, A. (2013), 'Solidarity in the European Union', see above.

fering from brain drain. This addresses the member of the public who wonders why she should support freedom of movement in the first place, given the costs involved (see [a] above), and, at the same time and in the other direction, addresses those who wonder why they have a duty to support those who bear the costs, given the aggregate benefits.

From within such a reciprocity-based conception of social justice for the EU, what can be said on behalf Ferrera's proposals for 'empowering the stayers'? In this category, Ferrera includes, among other things, a proposal for a universal and transferable voucher system intended to compensate those who do not exercise their rights to freedom of movement. Here we can invoke again our member of the public who, in (b) above, wonders why freedom of movement should guarantee anything more than a formal right to move. An appealing response points to the difference between a merely *formal* and a more *substantive* equality of opportunity, not generally (i.e., with respect to *all* socioeconomic opportunities – as in Rawls's Fair Equality of Opportunity principle – which would require vastly more redistribution across EU member states) but with respect to opportunities to exercise, more specifically, *freedom of movement*. Recall that one rationale for freedom of movement is an expansion of every EU citizen's opportunity set. The value of that opportunity set to each individual will be very unequal if some can exercise the option to move easily and others, through no fault or choice of their own, cannot – for example, because they have dependents or lack sufficient resources to make use of that freedom. (Here I register a small disagreement with Ferrera, who does not distinguish – from the point of view of their respective entitlements – between those immobile citizens who freely choose to stay and those whose choice is much more constrained.[7]) In those cases, providing merely formal freedom of movement unfairly disadvantages those who cannot easily move. As in the previous case, we can say that they have a reciprocity-based entitlement to compensation derived from their support for freedom of movement as a whole.

The same logic, finally, can be used to buttress Ferrera's perhaps most ambitious proposal, namely to set up a social insurance scheme – a kind of mobility fund – protecting workers who decide to exercise their free movement rights. Such a fund would have the effect of mitigating inequalities of opportunity to move that are due to differences, for example, in the exportability of benefits for mobile jobseekers. As Bruzelius et al. have shown, given differences in the exportability of benefits for jobseekers and limitations

[7] See also the useful discussion in Part II of this book by K. Oberman. 'What to Say to Those Who Stay? Free Movement is a Human Right of Universal Value'.

in access to social benefits for jobseekers in host states, it is much easier for someone to move from Britain to Latvia in search of work than the other way around.[8] An EU-funded mobility fund of the kind advocated by Ferrera would serve, among other things, to dampen these inequalities and so, once again, to address our hypothetical member of the public in (b).

The duties of citizenship

In his comment, Christian Joppke wonders whether an excessive emphasis on the duties of citizenship betrays an anachronistic and potentially dangerous revival of what we might call Romantic citizenship. Allegiance and loyalty, death and ethnic belonging, exclusion of those who do not share in the myths of national identity, suspicion of immigrants, and so on, are the foundation stones of Romantic citizenship. To be sure, Ferrera invokes none of these in defence of his proposals, but Joppke worries that Ferrera's proposals (whose aim is to strengthen allegiance to EU citizenship) have an unavoidably exclusionary ring to them. They both give too much credence to those who falsely see movers as 'benefit tourists' or (in the language of the CJEU) 'unreasonable burdens', and threaten to impose an artificial divide between EU citizens (who are entitled to the benefits of freedom of movement Ferrera advocates) and TCNs (who are not).

I think that that Ferrera has a ready response. The first step is to emphasize that not all 'citizenship duties' are made equal. Ferrera here can easily agree with Joppke (as I, too, would) that the set of Romantic duties are outmoded and dangerous. But citizenship also includes more prosaic duties, e.g., to pay one's taxes, as well as duties of civility, toleration, and, indeed, justice. These are duties that flow from what Rawls calls citizens' 'sense of justice'. It is these duties that support Ferrera's proposals, not the Romantic ones. This becomes especially clear if we interpret those duties as obligations of reciprocity in the ways I have suggested. From this point of view, we do owe those whose communities, wages, and so on, are most affected indemnification – but this duty is compatible with both requiring evidence of such effects and with acceptance of the fact that movers are, *on average*, a net benefit – socially, culturally, fiscally, economically, politically – to the polity *as a whole*.

What about the divide between TCNs and EU citizens (and so [c] above)? Here the response – again within a reciprocity-based perspective – is

[8] Bruzelius, C., C. Reinprecht & M. Seeleib-Kaiser (2017), 'Stratified Social Rights Limiting EU Citizenship', *Journal of Common Market Studies* 55 (6): 1239–1253.

straightforward. Because legally resident TCNs participate in their host society's political, civil, social, economic life (in the relevant sense) to the same extent as EU citizens, they bear the same duties and are owed the same benefits and advantages as member state citizens (even if they are economically inactive).[9] And because of their legal residence in their host country, they also contribute willy-nilly to the European project. Recall that TCNs, too, contribute – in the same way as EU citizens – to the project of integration both in complying with laws enacted or constrained by the European legal order and in contributing (politically, socially, economically, etc.) in ways that ultimately support and sustain European institutions (and EU freedom of movement). To be sure, such an extension of duties and entitlements is not currently on the agenda, but the point is that it should be as a matter of justice. If Ferrera were to qualify his functionalism (which gives perhaps too much credence to the current state of public opinion), I do not see why a conclusion like this would not be available to him as well.

In this comment, I have not sought to challenge Ferrera's proposed reforms. Rather, I have sought to ground them, not in a functional-empirical analysis of what is most likely to inspire support for EU citizenship, but in a broader conception of social justice. The two perspectives are not in direct competition, but they do depart from very different starting points.

[9] I say much more about the grounds for such reciprocity in Sangiovanni, A. (2007), 'Global Justice, Reciprocity, and the State', *Philosophy & Public Affairs* 35 (1): 2-39.

EU Citizenship, Duties and Social Rights

Martin Seeleib-Kaiser

Social rights and EU citizenship have moved from the fringe to the centre of the political debate. Ferrera's proposals are timely and address important issues of this urgently needed political and academic debates.

Since the ratification of the Maastricht Treaty (1993) European Union citizenship has formally become a reality and citizens of European Union Member States are no longer *only* citizens of the respective Member States, but also 'multinational citizens' of the European Union.[1] However, welfare states continue to be largely defined through nation-state borders,[2] creating welfare state insiders and outsiders. Accordingly, EU migrant citizens[3] are often considered as outsiders, who access social benefits and services without having fulfilled their duty of having paid taxes in the country of destination. This perception has led to a significant politicisation of freedom of movement and to the notion of 'welfare tourism' in a number of Member States.

Despite the at times dominant frame of 'welfare tourism', especially in the UK media, *the* main reason for intra-EU migration is work. Due to high employment rates among EU migrant citizens, it is not surprising that empirically there is no evidence of 'welfare tourism.' Moreover, various analyses have demonstrated that EU migrant citizens are net contributors in countries of destination, i.e. they contribute more in taxes and social (insurance) contributions than they

---

1 Aron, R. (1974), 'Is Multinational citizenship possible?', *Social Research* 41 (4): 638-656.

2 Ferrera, M. (2005), *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*. Oxford: Oxford University Press.

3 I define EU migrant citizens as EU citizens who are, or intend to become, habitually resident in a Member State of which they do not hold nationality. This category differs from EU mobile citizens, i.e. citizens who move across borders for limited periods of time. EU citizens belonging to the category of mobile citizens fall into the subcategories of cross-border workers, posted workers, students or tourists.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_40

take out in benefits and services.[4] As a group EU migrant citizens 'over-fulfil' their duty to contribute to funding welfare benefits and services in the Member State of destination. This obviously does not mean that every EU migrant citizen fulfils an *individual* duty. But, does this mean s/he should not be entitled to minimum income benefits or services? In this context it might be helpful to highlight that welfare states do not apply the principle of an individual duty to nationals or permanent residents as a precondition for receiving (subsistence) benefits or certain social services, such as health care. And there are good reasons not to do so!

Nevertheless, the significant increase in intra-EU migration has led to problems and challenges at the local and regional level putting pressure on social services. Ferrera suggests the establishment of a special EU fund to address these problems, while Joppke argues that such a fund would benefit those countries that already benefit from intra-EU migration. In my view, this debate seems rather academic, as EU funds to deal with challenges arising from intra-EU migration are already available under current EU funding arrangements. By using resources from the European Social Fund (ESF) and the Fund for European Aid to the Most Deprived (FEAD) affected local authorities and organisations, for instance in Germany and Sweden, were able to address some of the challenges arising from intra-EU migration at the local level. In other words, existing European funds can provide local actors with additional resources, without necessarily providing Member States that benefit from intra-EU migration with additional funds. No such funds were used in England to address the challenges in the localities most affected by intra-EU migration – a political choice by the UK government! For the future it would seem reasonable to increase the overall levels of the ESF or FEAD and making these funds more conditional upon addressing 'European' social issues (including the potential negative effects of intra-EU migration at the local level, be this in the countries of origin or destination), thereby strengthening EU social citizenship at the local level.[5]

---

[4] Dustmann, C. & T. Frattini (2014), 'The Fiscal Effects of Immigration to the UK', *The Economic Journal* 124 (580): F593–F643; Martinsen, D. S. & G. P. Rotger (2017), 'The Fiscal Impact of EU Immigration on the Tax-financed Welfare State', *European Union Politics* 18 (4): 620-639, doi: https://doi.org/10.1177/1465116517717340.

[5] Bruzelius, C, E. Chase & M. Seeleib-Kaiser (2014), 'Semi-Sovereign Welfare States, Social Rights of EU Migrant Citizens and the Need for Strong State Capacities', *Social Europe Journal*, Research Essay No. 3, available at https://www.socialeurope.eu/book/re-no-3-semi-sovereign-welfare-states-social-rights-of-eu-migrant-citizens-and-the-need-for-strong-state-capacities

Another challenge associated with EU citizenship is the risk of exploitation in labour and housing markets. Job-seeking EU migrant citizens from Central and Eastern European as well as Southern Member States often cannot rely on substantive social rights, as the system of Social Security Coordination does not provide any substantive exportable unemployment benefits for them. As a consequence of residence requirements they are neither entitled to minimum income benefits in the country of destination, putting them at risk of exploitation. If one considers the concept of freedom of movement not only as a negative liberty, but also as a positive right, it would seem reasonable to introduce a European Minimum Income Scheme or a supra-national unemployment scheme, as suggested by Ferrera, to address the identified challenge of insufficient social security and risk of exploitation among job-seeking EU migrant citizens.[6]

Vandenbroucke suggests the introduction of an EU minimum wage, strengthening the ability of Member States to provide good and comprehensive social protection at the national level and reforming the existing arrangements for posted workers. These are laudable proposals, but they would seem largely ineffective to address the problems of potential exploitation among EU migrant citizens without substantive exportable unemployment benefits or insufficient social protection, especially since main destination countries, such as Britain and Germany, already have national minimum wage systems. It is the duty of Member States to enforce national and EU minimum standards in labour and social law to avoid social dumping and the undermining of national working conditions for this we do not need new regulation, but the enforcement of current laws![7] In this context it seems worthwhile to note that British authorities have only recently started to 'accept' the duty to enforce minimum wage and working conditions by appointing the UK's first labour market enforcement chief.[8]

Irrespective of the increasing importance of EU citizenship and social rights in the current political and academic debates, many participants still shy away from getting to the core of EU citizenship as a fundamental right. The issue of social rights and duties of EU migrant citizens within the EU is not *sui generis*, as it has been at the centre of many political and judicial debates in (con)federal jurisdictions. In this context it might be worthwhile

---

6 Bruzelius, C., C. Reinprecht & M. Seeleib-Kaiser (2017), 'Stratified Social Rights Limiting EU Citizenship', *Journal of Common Market Studies* 55 (6): 1239–1253.

7 Bruzelius, C., E. Chase, E & M. Seeleib-Kaiser (2014), see above.

8 Khan, M. 'UK appoints enforcer to crack down on minimum wage abuse', *Financial Times,* 17 January 2017, available at https://www.ft.com/content/b61d7370-d31e-11e6-9341-7393bb2e1b51.

to learn from two historical examples: the North German Confederation (*Norddeutscher Bund, NDB*; 1867-1870) and the United States of America. Citizenship of these two jurisdictions was derived from the citizenship of the constituent states – very similar to EU citizenship. Furthermore, important elements of the welfare state, such as providing a minimum of subsistence or certain social services, were the responsibility of the constituent states. For Bismarck the system of local and regional poor relief with restrictive residence requirements was incompatible with the principle of freedom of movement in the NDB. Consequently, the *Unterstützungswohnsitzgesetz* (law on the domicile for social assistance) of 1870 entitled every poor person within the territory of the NDB to poor relief at the place of residence, irrespective of the Member State of origin and duration of residence. The US Supreme Court ruled against the State of California, which in the 1990s once again had introduced minimum residence requirements for the state welfare programme, declaring the residence clause as unconstitutional, arguing: 'Citizens of the United States, whether rich or poor, have the right to choose to be citizens of the State wherein they reside. … The States, however, do not have any right to select their citizens' (Saenz v. Roe; 526 U.S. 489 (1999): 511)[9].

For EU citizenship to become truly a fundamental status it is necessary to overcome the differentiation between economically active and non-active EU migrant citizens and finally abolish the residence requirements, as it was the case in the NDB and the US – territorial jurisdictions with isopolitical citizenship. Simply put: to be, or not to be, an EU citizen that is the question!

[9] Bruzelius, C. & M. Seeleib-Kaiser (2017), 'Freedom of Movement and the Right to a Minimum Income: Comparing the North German Confederation, the US and the EU', paper presented at the 2017 Annual Conference of the Research Committee 19, ISA, University of North Carolina, Chapel Hill, 22-14 June 2017.

Why Compensating the 'Stayers' for the Costs of Mobility Is the Wrong Way to Go

Julia Hermann

Like most of the previous respondents, I agree with Ferrera that the unequal division of the costs and benefits of free movement calls for action. My main criticism concerns his proposal to compensate non-mobile citizens. In my response, I shall expand on Christian Joppke's critique of Ferrera's presumption that 'moving' causes harm that 'stayers' should be indemnified for.

Ferrera argues that one way of strengthening the integrative capacity of EU citizenship would be to compensate those EU citizens who do not make use of their right to free movement for the negative effects of intra-EU mobility, and to empower them through particular initiatives. Joppke takes this to be a non-starter, because by making such a proposal, Ferrera confirms the populist portray of migrants as perpetrators and natives as victims and 'buys into the populists' hideous re-labelling of mobile EU citizens as "immigrants"'. I agree with the direction of this criticism, but not with Joppke's apparent denial of the existence of real adverse effects of freedom of movement. A crucial question is to what extent the perceived negative externalities are real. Ferrera is fully aware of the fact that some of the fears are ungrounded, and Joppke rightly criticises him for not addressing this when he makes his proposals for compensating and empowering non-mobile citizens. However, Joppke seems to presume that there are no negative externalities at all, thereby ignoring the point emphasised by Ferrera that despite the fact that, in the aggregate, mobility tends to benefit the receiving member states, there are also adverse effects, which are felt at the local level. We have to identify the real adverse effects in order to get a clearer picture of those perceptions of negative effects that are false, and must then ask what can and ought to be done to change these false perceptions.

Ferrera notes that in a particular territorial area, economic sector or policy field, the negative economic and social externalities (e.g. a decrease in available jobs, hospital beds, emergency care, social housing, school places etc.) may exceed the positive ones. He presents the negative externalities as 'produced by the mobiles'. Vandenbroucke and Sindbjerg Martinsen address 'social dumping'. Vandenbroucke moreover mentions the possibility that

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_41

the negative externalities may be more real for countries of mass emigration than for countries of immigration. Independently of the answer to that question, it is important to address the fact that mobility can place a big burden on the former countries. Take a country such as Italy, where many well-educated young people emigrate in order to work in Britain, Germany, The Netherlands, etc. (brain drain). Would compensating, for instance, non-mobile Italian citizens be the adequate response to the brain drain that the country experiences? No. The adequate response would be to make the reforms necessary for making it attractive for talented young Italians to stay in their country, and for attracting talented citizens of other member states.

The proposal to compensate non-mobile citizens is problematic for a number of reasons. First, it gains support from the view that the mobiles produce the negative externalities, which is not correct. They are produced by the system, i.e., they are the consequences of giving people the right to free movement without providing mechanisms that prevent a race to the bottom of welfare services, wage dumping and so forth. Once we abandon the picture of movers producing negative externalities, Ferrera's proposal becomes much less plausible. Second, every EU citizen is a potential mover. Someone who is a stayer today might be a mover tomorrow. Every EU citizen has the formal freedom of movement. At any point in time, this is not a substantial freedom for many people, but this situation is not static. Not only is it possible that stayers may want to exercise their freedom of movement in the future, it is also possible that they get into a situation where they find themselves compelled to do so. Third, the demand for compensation doesn't fit well with Ferrera's claim that one of the corresponding duties of the right to free-movement is 'to bear the burdens of "hospitality"'. Fourth, the demand makes negative externalities seem unavoidable, which is not the case. Fifth, although the burdens are not shared equally, mobility ultimately affects society as a whole when it leads to a decline of domestic cohesion. In the long run, the burdens are not felt merely locally, but globally. Finally, compensatory measures don't go far enough. We have to address the systemic flaws, the origins of the European *malaise*.

The costs of mobility call for two things: a justification to those bearing them disproportionately, and measures to reduce them. Those who lose out are entitled to a justification for why they ought to support freedom of movement (see Sangiovanni's contribution to this debate). It might well be that such a justification is currently not available, because if we consider the situation of EU citizens on the whole, the costs of free movement might be disproportionately high. There seems to be an agreement between most of the respondents in this forum that the required justification would be avail-

able if the social dimension of the EU were strengthened significantly, implying that, as things are now, many EU citizens are entirely justified in opposing freedom of movement.

Given the present form of the EU, some of the negative effects might indeed be unavoidable. Due to big differences between member states concerning minimum wage regulations, access to social protection, flexibility of the labour market, taxes etc., mobility of workers leads to a race to the bottom. As Vandenbroucke writes, 'if we don't want immigration to boost a precarious, hyper-flexible segment of labour markets, there should be limits to precariousness and flexibility *across the board*'. Vandenbroucke claims that the only way to tackle the distributive risks associated with mobility is to be more demanding with regard to the quality of welfare states. He asks for common principles, e.g. 'All workers are covered by minimum wage regulation'. Seeleib-Kaiser argues that the relevant regulation (in the form of national and EU minimum standards in labour and social law) is already there but needs to be enforced. At this point the question becomes whether the EU is, in its current state, able to enforce it. Vandenbroucke admits that 'developing and translating such principles into tangible realities is an uphill battle in today's Europe', but emphasises that 'there is no alternative if free movement is to be reconciled with domestic cohesion'. Ferrera proposes to establish a supranational scheme providing homogeneous protections to mobile workers. Sangiovanni stresses that justice requires a much broader social union than we currently have. He suggests grounding Ferrera's proposals in his conception of justice for the European Union.

There are doubts as to whether the EU as we know it is capable of achieving the political union necessary for broadening the social union. Because the EU is, in the first instance, an economic union – the project of a common market – and because of its well-known democratic deficit, a broader social union might only be reachable via fundamental reforms. Perhaps we even need to start all over again. Ferrera may be right that 'incrementalism is the only policy strategy for the EU today', but this may mean that our problem is not solvable by any of the policy strategies that are available to the EU in its current form. One rather radical proposal is to create a European Republic, in which there are no nation-states anymore, but only regions, cities, and – most importantly – citizens.[1] I do not wish to defend this utopia here, but want to emphasise that there is the real possibility that in its current form,

[1] Guérot, U. (2017), *Warum Europa eine Republik werden muss! Eine politische Utopie* [Why Europe Needs to Become a Republic! A Political Utopia], third edition. Bonn: Dietz.

the EU cannot achieve the required social union. This would mean that due to the internal constitution of the EU, EU citizenship couldn't fulfil its integrative functions. If we follow Ulrike Guérot, citizenship that fosters integration and solidarity has to imply equality in front of the law, equal general voting rights and equal social participatory rights.[2] In today's EU, citizens do not have any of this. Unfortunately, this is not stuff that could simply be added to the 'EU citizenship container'. I am not saying that this is the correct diagnosis. My point is that given the enormous problems the EU is facing, we have to take this possibility very seriously.

[2] Guérot, U. (2017), see above.

Balancing the Rights of European Citizenship with Duties Towards National Citizens: An Inter-National Perspective

Richard Bellamy

Discussions of European citizenship have tended to mobilise around two somewhat divergent views. The first view, well represented by Maurizio Ferrera's argument for his ingenious proposals, treats this status instrumentally: as a mechanism for promoting both greater allegiance to the EU from those individuals subject to its authority and greater solidarity amongst them. As with Ferrera's argument, such views tend to conceive European citizenship in analogous terms to citizenship within the member states, with the goal being to wean individuals away from the national to the supranational, at least to some degree (Habermas's 1992 essay remains the classic statement of this approach).[1] By contrast, the second view, of which Christian Joppke's contribution offers a fine example, treats European citizenship as transnational. So conceived, it involves not only denationalising citizenship but also transforming the very nature of citizenship itself.[2] A citizen becomes no more than an individual bearer of liberal rights, with no special duties to any particular political community but only the moral obligations to uphold the liberal rights of all other individuals (actually Joppke is silent on this issue, but I assume de-dutification can only be taken so far).

Although Ferrera's account moves in the direction of a supranational view, his policy proposals occupy a mid-point, providing a transitionary phase that seeks to reconcile the national to the transnational. By contrast to Joppke, I believe such a reconciliation is not only a pragmatically necessary endeavour but also normatively justifiable. However, I shall argue that the grounds for doing so indicate difficulties with the conventional supra- and

1 Habermas, J (1992), 'Citizenship and National Identity: Some Reflections on the Future of Europe', *Praxis International*, 12 (1): 1–19.

2 For full accounts of this thesis, see: Kochenov, D. (2014), 'EU Citizenship without Duties', *European Law Journal* 20 (4): 482–498; Kostakopolou, D. (2004), 'European Union Citizenship: Writing the Future', *European Law Journal* 13 (5): 623–646.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_42

trans-national views of European citizenship, and point to an alternative view that I shall call inter-national.

As Andrea Sangiovanni has observed in his contribution, Ferrera's declared grounding for his proposals beg the question of why the vast majority of citizens of the different member states, who do not themselves take advantage of freedom of movement, should view further European integration and the creation of social solidarity at the European level as desirable in the first place. Although Ferrera does not articulate his reasoning explicitly, the implicit rationale would appear to be the two standard functional and moral arguments that are habitually offered for an ever closer Union. The functionalist case contends that in an interconnected world, the only way to take advantage of the economic benefits globalisation brings while managing its costs is through scaling up beyond the nation state. The moral case involves a form of cosmopolitanism, whereby the argument holds that if we are to treat all individuals as of equal moral worth we must likewise remove those political boundaries that entail treating them unequally. Both these arguments certainly need to be taken seriously. Whether they can only be adequately or appropriately addressed by a scaling up of political authority to the regional level or beyond is another matter.[3]

Given these arguments, the obvious question to ask is why we should take national citizenship seriously at all? As Joppke contends, surely the moral argument in particular suggests we should avoid either pandering to nationalism in the short term or replicating its exclusionary characteristics at the supranational level in the long term? One reason arises from the fact that, for all their faults, democratic nation states, such as those that are members of the EU, provide the most effective political systems so far devised for rendering governments accountable to the governed in ways that encourage these governments to pursue policies aimed at treating the governed with equal concern and respect, and thereby securing their rights. *Pace* the transnational de-dutifyers, individual rights claims are likely to go unheeded without some political and legal authority capable of upholding them consistently and coherently over time. Meanwhile, that authority will only be likely to uphold these rights in an impartial and fair way if suitably constrained to do so, with the most effective constraint being to subject rulers to a system of equal influence and control by the ruled. As a result of such a set

[3] For a discussion of these two views, see: Bellamy, R. (2015), 'Between Cosmopolis and Community: Justice and Legitimacy in A European Union of Peoples', in S. Tierney (ed.), *Nationalism and Globalisation: New Settings, New Challenges*, 207–232. London: Hart.

up, citizenship becomes the 'right to have rights'.[4] Indeed, it could be argued that it is only within such a context that rights can be either effectively or legitimately claimed.[5] For it is only through participating, on the one hand, in a scheme of social and economic cooperation capable of supporting expenditure on a suitable public infrastructure needed to secure rights; and, on the other hand, within a scheme of political cooperation through which individual rights can be claimed, justified and agreed to on equal terms to others, that a system of rights that is fair and sustainable can emerge. The duties that arise from involvement in these two schemes may have gained a romantic, nationalist colouring, yet as Andrea Sangiovanni notes they are for the most part prosaic – paying taxes, treating others with civility – not least by accepting the rules of the political game, and acknowledging the obligation to treat others with equal concern and respect.

The transnational view tends to overlook the role democratic states have had and continue to have in generating rights not only for their citizens but also for those citizens of other countries who may temporarily move to visit or work there. They treat them as self-evident moral properties of individuals that apparently can be met spontaneously.[6] Many proponents of the transnational view among legal academics have also been overly sanguine about the judicialisation of the EUs transnational citizenship provisions, which has largely occurred as an extension of the *lex mercatoria* of the single market.[7] As Susanne Schmidt remarks in her contribution, the deployment of litigation by market actors gains a false legitimacy from exploiting the terminology of citizenship rights. For it allows those actors with an economic interest in further market integration – the majority of which are enterprises rather than individuals – a privileged venue that is biased against, and often inaccessible by, the immobile majority, undermining the relative political equality offered by democratic citizenship.[8] Nevertheless, transnational critics are right to note that many of these same states have been, and

---

4 See: Bellamy, R. (2001), 'The "Right to have Rights": Citizenship Practice and the Political Constitution of the EU', in R. Bellamy and A. Warleigh (eds.) *Citizenship and Governance in the European Union*, 41–70. London; New York: Continuum

5 Bellamy, R. (2012a), 'Rights as Democracy', *Critical Review of International Social and Political Philosophy*, 15 (4): 449–471.

6 For a detailed critique see: Bellamy, R. (2015), 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights', *European Law Journal* 21 (4): 558–565.

7 Bellamy, R. (2015b), see above.

8 Isiksel, T. (2016), *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*. Oxford: Oxford University Press, 142–143.

still can be, great sources of injustice for those individuals and whole peoples they have dominated either directly, through colonisation and war, or indirectly, through exploitative trade deals, and who they continue to exclude through various immigration policies.

In this regard, the supranational solution might seem superior because it can overcome the possibility of domination and exclusion simply by being more inclusive of who is a citizen. Yet, as Ferrera acknowledges, establishing anything coming close to such a social and political system at the national level required a long period of political struggle facilitated by mass conscription in war, which gave ordinary people a degree of leverage over those whose wars they were obliged to fight – not least in prompting the establishment of social insurance and ultimately the granting of universal adult suffrage. Meanwhile, a degree of bonding sufficient to agree upon and abide by collectively binding decisions was facilitated not only by boundaries delineating among whom they were made and to whom they applied, as Ferrera reports, but also by a common history, culture and language. These latter features in particular may belong to the romantic attachments that Joppke deplores as reactionary throw-backs, but they served a functional purpose in facilitating the operation of democracy as a mechanism for the public realisation of the equal status of citizens. For to achieve that result, citizens must be able to air their disagreements and deliberate in ways all can see are fair and addressed to their common concerns, all of which assumes a public sphere and shared interests. As the events currently unfolding in Catalonia indicate, where these features are deemed to be lacking, then large numbers of people are likely to be willing to exercise their liberal rights to freedom of speech and association to militate for a political community that can embody them and can only be prevented from doing so through coercion.

Such factors make a rapid shift to supra-nationalism unlikely if not unfeasible *a priori*. Even if achievable, however, it may also be undesirable. There are a plurality of reasonable ways of combining and pursuing the goods that give value to human lives, and even among liberal democracies there can be found a variety of economic, social, legal and political systems. Within a large, socially and culturally diverse political unit, the risk of common policies being inefficient and inequitable increases, along with the prospect of majority tyranny over consistent minorities. Finally, just as in a domestic political system, checks and balances between different institutions can be important for ensuring that individuals and groups of individuals all get treated with equal concern and respect in the making and implementation of collective policies, so a collaborative system of mutually checking and balancing states can operate in a similar manner.

Against this background, an alternative characterisation of Ferrera's proposals holds that they comprise not transitional steps aimed at easing and

promoting a gradual shift towards the development of a European supranational citizenship but as components of an inter-national European citizenship designed to supplement rather supplant national citizenship in response to the functional and moral arguments reported above. Such a status forms part of a more general international arrangement aimed at promoting equality of concern and respect between the citizenship regimes of its constituent member states, not least by facilitating the movement of citizens between these different regimes. Within an interconnected world, the national citizens of democratic states can be regarded as having obligations not to dominate the national citizens of other democratic states, not least by undercutting their capacity for self-government. They also have joint obligations to address problems that can only be tackled through collaboration and that involve harms and injustices that almost all moral systems regard as such. These include the prevention of the most egregious infringements of basic human rights, and the need to tackle global poverty and avoid a climatic catastrophe. A feature of such an arrangement is that it does not seek to subsume national citizenship regimes within a more encompassing supranational regime but rather to facilitate their effective and legitimate operation through cooperation and the mutual regulation of their interactions.

I have argued elsewhere that to a large, if imperfect, extent the EU conforms to this kind of arrangement,[9] not least through its decision making involving the normative logic of a two-level game whereby governments reach consensual agreements as the representatives of their respective peoples, from whom these agreements must be capable of winning their acceptance over time. I call such an arrangement a form of 'republican intergovernmentalism'. Union citizenship likewise can be assimilated to this account as a form of inter-national citizenship. Inter-national citizenship has two main aims. On the one hand, it addresses both the functional and the cosmopolitan critiques of national citizenship regimes by allowing citizens to move freely between these regimes without discrimination on grounds of nationality so far as access to employment or short or long-term residence is concerned. On the other hand, though, it remains justified to maintain the viability and diversity of these citizenship regimes and the solidarity among national citizens that make them possible. After all, they remain the source of the rights that mobile citizens move to enjoy. That can involve rules limiting immediate access to certain social benefits in the case of individuals who have yet to find employment and contribute to them. It would also justify giving a vote only in local as opposed to national elections for those unwilling to become national citizens and to commit to the future sustainability of

[9] Bellamy, R. (2013), 'An Ever Closer Union of Peoples: Republican Intergovernmentalism, Demoi-cracy and Representation in the EU', *Journal of European Integration* 35 (5): 499–516.

the citizenship regime. Finally, it would entail the possibility – as suggested by Ferrera – for states that are a party to this arrangement to collectively agree on some indemnification for those national citizens who lose out. Note that in this conception of citizenship the source of rights is strictly speaking provided by the contracting states that agree to this arrangement and fulfil the obligations necessary to their realisation rather than any supra-national entity *per se*. Hence, it is logical that the entitlement to access this status stems from being a citizen of one of the contracting states. Moreover, the rights associated with an 'inter-national' conception are 'isopolitical' rather than 'sympolitical'. The policies that Ferrera proposes can all be offered on this account on 'isopolitical' grounds – as part of the mutual recognition and associated duties of the citizenship regimes of the member states.

As I remarked, this account fits the existing citizenship provisions relatively well, at least once the relevant directives are taken alongside the rights enumerated in the Treaties. As Schmidt notes, it has been the reading in of an aspirational, transnational, account of citizenship by the Court post *Grzelczek* that has distorted the justified balance between the rights of European citizenship and their duties towards (as well as of) national citizens that lies at the heart of this status. Similarly, though Ferrera tackles a genuine and pressing issue in an innovative and imaginative way, I believe his approach will have not only more appeal but also a better justification through being grounded in an inter- rather than a supra- national account of European citizenship.

Grab the Horns of the Dilemma and Ride the Bull

Rainer Bauböck

EU citizenship was conceived almost by stealth through the jurisprudence of the European Court of Justice. When the Maastricht Treaty officially announced its birth, it was quickly dismissed as either 'little more than a cynical exercise in public relations'[1] or as a 'pie in the sky'.[2] No longer: Today EU citizenship is hotly contested in public debates in nearly all of the member states. At the heart of this debate is the tension between free movement and social protection. The contributions published in this forum mirror the arguments heard in public arenas at a much higher level of analytical reflection. But what they somehow do not seem to reflect is the heat of the debate. By this I do not mean that scholars should shout insults at each other when they disagree. What I mean is that they should put more emphasis in their analyses on political contestation and participation as core indicators for the salience and strength of democratic citizenship.

I find myself almost entirely in agreement with Maurizio Ferrera's nuanced and well-considered analysis and policy proposals. I agree both with his diagnosis that the burdens created by free movement in Europe threaten to undermine national welfare regimes. There are *perceived* burdens that erode political support for European integration and *real* burdens that put strains on local communities and less skilled 'stayers' in the destination as well as the origin countries of mobile EU citizens. I agree also that there is no magic solution for the free movement–social citizenship dilemma, but that building a 'social pillar' of EU citizenship and fortifying it with some 'prosaic duties' (Andrea Sangiovanni) would help to blunt the sharp edges of the dilemma to a certain extent.

Yet I think the dilemma is even sharper than Ferrera and most of our authors acknowledge. The 'permissive consensus' that allowed EU integra-

1 Weiler, J.H.H. (1996), 'European Citizenship and Human Rights', in J. A. Winter, D. M. Curtin, A.E. Kellerman & B. De Witte (eds.), *Reforming the Treaty on European Union: The Legal Debate*, 57–68. The Hague/Boston: Kluwer International.

2 Jessurun D'Oliveira, H. U. (1995), 'Union Citizenship: Pie in the Sky?', in E. Rosas (ed.) *A Citizens' Europe: In Search of a New Order*, 58–84. London: Sage.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_43

tion to make sometimes steady and sometimes halting progress without ever retreating is in shatters today. It may be relatively easy to convince the Commission of the incremental improvements proposed by Ferrera, but it seems much more difficult to imagine sufficiently broad policy coalitions involving member state governments that would endorse them. My conclusion will be that bolder proposals for strengthening EU citizenship are worth fighting for, and that in a much more politicised environment they need to be addressed directly to European citizens in attempts to win their support and votes.

I arrive at this conclusion by focusing on two preliminary questions that must be answered before we can discuss *how* to strengthen EU citizenship. The first one is, as pointed out by Frank Vandenbroucke and Andrea Sangiovanni, that we need to know *why* we ought to do so. My answer will differ somewhat from theirs. I think that normative reasons to embrace EU citizenship are largely contextual and contingent, but this does not mean that they lack force. The second prior question is *what* it is that we want to strengthen. This is a question about the nature of EU citizenship, its potential and limits. I argue that the derivative, multilevel and transnational construction of EU citizenship is full of tensions, which creates a need for political rather than purely judicial or technocratic solutions.

A European community of destiny

For Vandenbroucke, free movement 'means that EU citizens share an opportunity set, which is much larger than the opportunity sets offered by separate national labour markets'. Following Rawls, Vandenbroucke regards equal access to opportunities for all citizens within a polity as a basic principle of justice that is lexically prior to the difference principle, which requires that social inequalities are justified only if they improve the position of the worst-off. This line of reasoning supports giving general priority to free movement where it conflicts with redistributive and regulatory welfare policies, although, according to Vandenbroucke, such conflicts are not inevitable.

Let us assume this liberal view of justice is sound and correctly applied. Why should it then stop at the borders of the EU? Should liberal states not be required to seek to expand their citizens' set of opportunities by concluding reciprocity-based agreements on free movement also with third countries? Switzerland and Norway are already involved in such arrangements with the EU. Why not extend them to Canada, Australia and New Zealand? In fact, reciprocity-based free movement arrangements have existed, prior

to EU accession, between the UK and Ireland and, independently of the EU, between Australia and New Zealand as well as between several South American states. Moreover, a rapidly increasing number of individuals enjoy today free movement with full access to national labour markets without any coordination between the states involved simply because they possess several nationalities. The point is that, although free movement is the core right of EU citizenship, it is not necessary to form a political union with a common citizenship in order to realise the goal of expanding opportunity sets through international freedom of movement.[3] In Paul Magnette's terminology introduced by Ferrera, the isopolitical goal of free movement does not require the construction of European Union citizenship, which is to a significant extent sympolitical. So the normative argument for free movement alone cannot explain why EU citizenship needs to be strengthened. What we need first is a clearer idea about what kind of polity the EU is or ought to become. The right balance between free movement and social citizenship depends on our answer to this question.

For Sangiovanni freedom of movement is not a sufficient answer to why citizens should support the goal of a stronger EU citizenship. While free movement expands every citizen's choice set and range of opportunities, it is also politically contested – as the Brexit referendum has clearly demonstrated – and can entail significant costs for local communities and citizens who are – often involuntarily – insufficiently mobile. For Sangiovanni, 'the best response will appeal to a broader conception of social justice for the European Union.' This is indeed an important step towards answering the normative question. Duties of solidarity and social justice in a union explain better why citizens *ought* to support adding a social pillar or contributory duties to the present content of EU citizenship.

Yet I am not sure this answer is sufficient. As with Vandenbroucke's argument, there is a nagging question raised by global justice theorists: Why should duties of solidarity and social justice stop at the EU borders? First, we live in a world in which states are interconnected and people are interdependent to an extent never seen previously in human history. Conditions for reciprocity-based solidarity are therefore present not only within the EU but on a global scale. Second, disparities in income and wealth are far greater between the EU and Africa than within the Union. Does the EU therefore have a duty to expand the opportunities of African citizens and to include

[3] See Bauböck, R. (2014), 'Migration and the Porous Boundaries of Democratic States', in S. Leibfried et al. (eds.), *The Oxford Handbook of Transformations of the State*, 516–531. Oxford: Oxford University Press.

them in its conceptions of social justice by offering membership to their states?

Unlike Vandenbroucke's argument from free movement that is by its very nature expansive, the social justice argument could also lead to the opposite conclusion. In a multilevel union of states, citizens can raise the question – and many of them do – why social justice at the level of the Union should take priority over social justice at the national level in cases where the two conflict with each other. If, as John Rawls thought, social justice is a matter of fairness and reciprocity among *citizens* involved in a comprehensive scheme of cooperation rather than among human beings per se, then it seems *prima facie* an open question whether the Union ought to add social justice elements to its free movement-based citizenship or should instead let member states strengthen their national schemes of social citizenship and enable them to do so even at the price of some territorial closure.

In my view, the question within which political unit free movement and social justice ought to be realised and reconciled with each other requires an entirely different answer. The European Union has a claim to be supported by its citizens as such a unit – *in addition* to the state whose nationals they are and *in addition* to their duties of global justice – because of the historical context in which Europe finds itself today. The EU is not a response to normative requirements of justice beyond the nation-state; it is a response to the conditions for democracy in Europe.

The two most basic conditions for democratic self-government are the prevention of external domination (through war, colonialism or economic domination by external actors) and internal domination (through authoritarian political rule or political domination exercised by powerful economic groups). The European Union was born out of the desire to make war between European states impossible and its expansion to Portugal, Spain, Greece and the former communist states was driven by the desire to prevent forever the return of authoritarian rule in Europe. Threats of internal and external domination of European democracies are, however, still very much present. Today they take the shape of an authoritarian transformation of democracy through right wing populist parties in power and of external economic domination through powerful corporations. The shrinking demographic, economic and military weight of Europe in the world should not be regarded as *per se* a problem for stabilising democracy, but it provides a strong reason for European states to pool their resources when addressing external threats.

These are normative reasons why European states have formed the Union and should want to maintain and strengthen it. They are further reinforced by the commitments they have made to each other when deepening integration with each round of amending the European Treaties. And they are supported by rational self-interests to avoid the costs of exit. As Brexit illustrates, these costs are very high – not because Michel Barnier tries to drive them up, but because of the external conditions the EU states are exposed to and because of those internal conditions that they have created together. The latter conditions explain why staying outside is not as costly as leaving. The European Union has in this – prosaic and not at all romantic – sense become a community of destiny. The citizens of such a community have particularistic reasons to enhance its social cohesion and strengthen its democratic legitimacy. And these are reasons that can be communicated in public debates.

I need to register here a disagreement with Richard Bellamy whose commitment to democracy as a mechanism for the public realisation of the equal status of citizens I fully share. Bellamy says that 'to achieve that result, citizens must be able to air their disagreements and deliberate in ways all can see are fair and addressed to their common concerns, all of which assumes a public sphere and shared interests'. Bellamy thinks these conditions are not sufficiently present in the EU to motivate citizens to support trans- and supranational European citizenship. And he invokes the Catalan secession crisis to illustrate the point. 'Where these features are deemed to be lacking, then large numbers of people are likely to be willing to exercise their liberal rights to freedom of speech and association to militate for a political community that can embody them and can only be prevented from doing so through coercion.'

In contrast to this view, I think that the Brexit and Catalan crises serve to demonstrate that there are in fact sufficiently strong public spheres and shared interests at the level of the encompassing EU and Spanish polities and that separatism is the wrong response to the current predicaments. In both Britain and Catalonia, exiteers and unionists represent(ed) about half of the respective populations. Under such conditions, the reasons why one side wins and the other side loses in a referendum have little to do with deeply rooted collective identities or shared interests of *all* citizens of the polity and a lot to do with the hard-to-predict outcomes of political campaigns. Moreover, the arguments why Britain would be better off outside the EU and Catalonia outside Spain can be demonstrated to be wrong by pretty overwhelming evidence. What drives such separatism is a politics of resentment

rather than of the common good. In response to perceived and real grievances, the politics of resentment advocates closure or separation at the price of severely damaging the interests of the citizens it claims to represent.

Bellamy is right that the argument appealing to shared interests must be won in the public sphere, but he is wrong to think that these conditions are absent when it comes to European citizenship. European citizens share interests in reducing external and internal threats to democracy; they have committed through their representatives to create a political and not merely economic union; and they are today exposed to public debates in which European issues are at the centre of controversy and discussed simultaneously across Europe.

The DNA of EU citizenship

Let me now turn to the second preliminary question that is not addressed in Ferrera's essay: What is EU citizenship? Art. 20 (1) TFEU says: 'Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' This is the DNA of EU citizenship that determines both its potential evolution and its limits. EU citizenship is derived from member state citizenship rather than the other way round. And since it is additional and not substitutive, it adds another layer to national citizenship.

The potential of this construction is that it transforms nationals into multiple citizens whose rights, duties and political memberships are determined not only by their state, but also by a political union of which their state is a member. The construction adds even a third level below the state when it gives non-national EU citizens the right to vote in municipal elections in their host member state. As I have argued elsewhere, EU citizenship encompasses thus at least three levels, each of which has a distinct rule for determining membership. At the national level citizens are determined by circumstances of birth (through descent from citizen parents or birth in the territory) or naturalisation procedures; at the Union level, citizenship is derived from national membership; and at the local level, it includes (or ought to include) all residents in the municipality.[4]

The principles for determining local and national citizens are independent from each other and create thus a potential for conflicts over who counts as a citizen. When 'sanctuary cities' protect undocumented migrants against

[4] Bauböck, R. (2014), 'The Three Levels of Citizenship Within the European Union', *German Law Journal* 15 (5): 751–764.

deportation, they oppose their own principle of including all residents to the state's power to exclude non-citizens from admission and residence in its territory. By contrast, the derivative nature of EU citizenship is meant to secure that no such conflict can arise. EU citizens are not those who reside in the EU territory, but all those and only those who are nationals of a member state. Yet a potential for conflict emerges through Art. 20(2) that defines those rights that EU citizenship adds to those of national citizenship. Foremost among these is free movement. When the Court of Justice of the European Union (CJEU) defends immediate access of EU job seekers to employment-related social benefits in other member states, it upholds an expansive interpretation of free movement against the attempts of states to protect their distinct social citizenship regimes through territorial closure. Conflicts of this kind are inevitable in any multilevel democracy. They are pervasive also in consolidated federal states, but there federal courts operate as the ultimate arbiters and interpreters of a constitution that regulates the division of competencies between levels of government. In the EU, the Court interprets instead treaty-based citizenship rights agreed to by states with distinct constitutions and welfare regimes. Such constitutional pluralism[5] makes a union of states fundamentally different from a federal state.

Conflict over citizenship is institutionalised and, as Susanne Schmidt and Richard Bellamy point out, it cannot always be authoritatively resolved by the CJEU. The court is thus often seen as acting politically when it moves forward with daring declarations that 'EU citizenship is destined to become the fundamental status of nationals of the member state.'[6] It followed up when telling member states that they have to take EU law into account when depriving nationals of their citizenship[7] and have to grant legal residence to EU citizen children of undocumented migrants even if their EU citizenship has not been activated through cross-border movement.[8] Yet precisely because the CJEU is acutely aware of having to fill political lacunas left open by the legislature, its expansionary moves in matters of citizenship have been regularly followed by retractive 'clarifications'.[9]

---

5 See Weiler, J. H. H. (1999), *The Constitution of Europe.* Cambridge: Cambridge University Press.

6 Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve, (2001) C-184/99.

7 Janko Rottmann v Freistaat of Bayern (2010) C-135/08.

8 Ruiz Zambrano v Belgium (2011) C-34/09.

9 Shirley McCarthy. v Secretary of State for the Home Department (2011) C-434/09; Murat Dereci and Others. v Bundesministerium für Inneres (2011) C-256/11; Elisabeta Dano and Florin Dano v Jobcenter Leipzig (2914) C-333/13.

The institutionalisation of conflict over citizenship creates a strong potential for politicising EU membership rights and statuses also in the legislative branch of the EU (i.e. the Council and Parliament) and the public arenas of member states that has so far been kept at bay. Brexit (and potentially also Scottish and Catalan secession attempts) could unlock the cage. When this happens, those who want to promote European integration should not be caught unprepared but lay out and explain their visions to citizens and voters instead of acting merely as advisors to the Commission.

I tend to think therefore that we need now not merely pragmatic incrementalism but also bold ideas how to develop EU citizenship further in ways that are compatible with its multilevel DNA. This is why I proposed putting on the agenda a direct EU income tax that would create incentives for EU citizens to hold EU legislators politically accountable for their use of tax money and that would introduce a social justice dimension into EU citizenship if such a tax were progressive.[10] In order to become politically feasible, such a tax must not be added to current national contributions to the budget but diminish them, which would also make the conflict between net contributor and net recipient governments less poisonous. I am perfectly aware that such a proposal requires Treaty change[11] and is not a vote getter, but if it is integrated into a coherent political platform for strengthening EU citizenship it might stand a chance to find also sufficient electoral support. Which pollster would have predicted before the victories of van der Bellen in Austria and of Emmanuel Macron in France that one could win elections on an unabashedly pro-EU programme in member states whose citizens are among the most Eurosceptic ones?

Yet the constitutional DNA of EU citizenship also sets limits to what kind of animal it can eventually become. Julia Hermann refers to the idea – without endorsing it explicitly – of 'a European Republic, in which there are no nation-states anymore, but only regions, cities, and – most importantly – citizens.' This is the old notion that Europe must eventually become a federal state – a persistent trope among supporters of European integration that shows a lack of imagination with regard to alternative forms of political community that do not imitate the nation-state template. Such a

[10] See Bauböck, R. (2017), *Still United in Diversity?* The State of the Union Address, Florence, 5 May 2017, available at https://stateoftheunion.eui.eu/wp-content/uploads/sites/8/2017/05/The-State-of-the-Union-Address-by-Rainer-Bauböck.pdf.

[11] Treaty change would be necessary if an EU tax were to apply to all member states instead of being introduced through enhanced cooperation among a group of them, such as the Euro group.

'provincialisation' of member states and their citizenship could not come about gradually by transferring ever more competencies to the Union; it would require at some point a radical break. While there is no hard and fast distinction between pooling and transferring internal sovereignty, creating a European republic or federal state would mean that at a specific date member states lose their external sovereignty as independent members of the U.N. and the international state system. It is not impossible to imagine historical conditions under which some states may be ready to abolish themselves in this way. In the history of the U.S., Switzerland and Germany, i.e. quite some time before the consolidation of the international state system, it took civil and international wars to trigger the move from confederation to federation.[12] If these are the conditions for realising a federal European Republic, then this is hardly a dream worth dreaming.

Martin Seeleib-Kaiser explicitly refers to the U.S. and German examples when spelling out some of the implications of a federalist project: 'For EU citizenship to become truly a fundamental status it is necessary to overcome the differentiation between economically active and non-active EU migrant citizens and finally abolish the residence requirements.' What he fails to mention is that establishing priority for federal citizenship in the post-Civil War 14th amendment to the U.S. Constitution and in unified Germany after 1871 entailed a radical downgrading of the U.S. states and German Länder whose citizenship henceforth was derived from federal citizenship rather than the other way around. If this were really the destiny of EU citizenship, then the member states have every reason to reject it and the power to do so as masters of the Treaties.

In contrast with the other authors in our debate, Bellamy devotes much attention to the nature of EU citizenship. For him, it is inter-national, rather than trans- or supra-national. I find this terminological choice somewhat confusing. It is the citizenship of independent states that is international by nature. Citizenship is not only a domestic legal status that comes with certain rights and duties; it is first of all a mechanism for allocating individuals to states based on reciprocal international recognition of states' right to determine their own citizens and of their personal jurisdiction over these citizens, including to a certain extent also those residing abroad. In contrast to the citizenship of EU member states, citizenship of the Union is not (yet) international in this sense. It is not a legal status that depends on recognition

[12] See Schönberger, C. (2005), *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht* [Europe's federal citizenship in a comparative perspective], Tübingen: Mohr Siebeck.

by third countries. The right of EU citizens to seek diplomatic and consular protection by other EU states in third countries where the state whose nationals they are is not sufficiently represented creates a potential claim for international recognition but it is far from obvious that third countries are bound to accept this claim.[13]

Bellamy interprets also the concept of 'transnational citizenship' in a way that hardly matches academic debates. For Bellamy, transnational seems to be synonymous to postnational. However, the ample literature on transnationalism in migration studies has used this concept instead to refer to the increasing salience of links between emigrants and their states of origin, i.e. a phenomenon that expands the reach of national identities and citizenship beyond the states' territorial borders instead of creating a new type of postnational political community. Again, it is primarily the citizenship of independent states that has become transnational in this sense, for example through toleration of dual citizenship or granting voting rights to expat citizens. Yet EU citizenship too was from the very beginning constructed as a transnational status, since most of its rights are activated through cross-border activities, while it is the member state of origin that determines who possesses the status and who can enjoy transnational rights within the Union.

My disagreement with Bellamy is, however, probably not merely terminological. Transnational citizenship is also transformative for national citizenship. This is true in the international arena where states increasingly claim extraterritorial jurisdiction, promote nation-building projects beyond their borders and mobilise their diasporas as an economic, cultural and political resource. The potential for inter-state conflict has not yet been tamed by a corresponding evolution of international legal norms. Political theory also has not kept up with developments and remains largely stuck in a dichotomy between domestic and global conceptions of justice or democracy that fails to take into account the increasing salience of transnational political spaces and phenomena that straddle this distinction. Nowhere has the transformative potential of transnational citizenship been greater than in the EU, where freedom of movement has triggered not only a need for top-down regulatory coordination, but also bottom-up adaptation of welfare regimes and social citizenship in the member states.

The transnational nature of EU citizenship greatly enhances the potential for conflict over the determination or specification of citizenship rights and

---

[13] See Moraru, M. B. (2015), *Protecting (unrepresented) EU citizens in third countries. The intertwining roles of the EU and its Member States*. PhD thesis, European University Institute, Florence.

duties that is already inherent in a multilevel structure where union citizenship is derived from national citizenship.

Politicising the struggles over EU citizenship

Thinking about *why* we ought to strengthen EU citizenship and *what* the EU citizenship is that should be strengthened pushes me to always the same conclusion. We can no longer rely on European nation-states to provide sufficient protection for democratic citizenship; nor can we rely on a functionalist teleology that pulls European states towards merging into a federal European republic. Both of these perspectives are out of tune with the way the European Union has evolved over time and the way it has constructed its citizenship.

Finally, we can also not rely on the EU as a guarantor of the rule of law and a correspondingly thin liberal citizenship at European level that secures free movement and non-discrimination and leaves it to the member states to sort out their social citizenship problems. Pace Christian Joppke, the EU is no longer just a regulatory regime. It has become a fiercely contested political arena that is not just located in Brussels, Luxembourg and Strasbourg, but is staged today in every national capital and election campaign.

Liberals tend to think of democracy as being only instrumentally valuable in order to maintain the rule of law that secures individual freedom. Liberal egalitarians regard it also as the political regime that offers the best chances to implement distributive regimes that promote social justice. Yet most liberals fail to give serious thought to what is necessary in turn to maintain democracy so that it can deliver these goods.

I have suggested above that the strongest justification for EU integration is that it protects the external and internal conditions for democracy in Europe. Internally, democracy is hard to sustain over time if citizens no longer believe that governments enjoy input legitimacy derived from being authorised through democratic elections and if citizens no longer share a sense of solidarity and special duties among co-citizens. These beliefs are better supported by theories that regard democracy as having not only instrumental but intrinsic value because it realises the ultimate value of popular self-government – albeit in necessarily imperfect ways.

If liberals abandon this idea it will be picked up by nationalist populists. This may not happen in good times where a permissive consensus allows the liberally minded elites to pacify citizens through what Ernest Gellner called

the Danegeld of economic growth.[14] But once output legitimacy becomes weaker in times of economic crises and straightjackets, input legitimacy will be the question around which political forces are mobilised.

Europe is in this situation right now. The social deficits of European citizenship have contributed to deepening an emerging cleavage between mobile and static populations that is reflected in political attitudes towards openness and closure.[15] Ferrera's fine-tuned proposals how to combine a robust defence of free movement with European social protection policies show that the dilemma is not necessarily a tragic one. The very complexity of Europe's constitutional order creates opportunities for experiments and social policy inventions of this kind. Ferrera suggests at the end of his essay that a vision is needed to guide also incremental reforms. I think that maybe even more is needed now. The dilemma is a political one and needs to be addressed in the political arena. By mobilising a politics of resentment among immobile citizens, populists have seized one of its horns and use it as a weapon against the EU. Those who want to strengthen the European Union and its citizenship should not commit the error to seize the other horn and appeal only to the minority of mobile Europeans. The answer to the EU citizenship dilemma must be to grab both of its horns and to risk a rough ride on the back of the bull. This is what a woman in ancient Greek mythology did. Her name was Europa.

[14] Gellner, E. (1983), *Nations and Nationalism*. Oxford: Blackwell.

[15] See Bauböck, R. 'The new cleavage between mobile and immobile Europeans' in Part II of this book.

Why Adding Duties to European Citizenship Is Likely to Increase the Gap Between Europhiles and Eurosceptics

Theresa Kuhn

Citizenship is not only a legal device to determine who is member of a political community and hence has both civic rights and duties. It has also always been a tool to integrate its members and strengthen a sense of collective identity and political legitimacy. With this integrative power in mind, Maurizio Ferrera proposes to add both a social dimension and some duties to European citizenship that should strengthen the social bonds across the EU. His proposals are innovative and intriguing, and have triggered a wide array of very insightful reactions in this forum debate. Rather than reacting to each of these policy proposals, I will focus on the proposed duties as they most closely relate to my research interests. I will then make two alternative proposals that target the stayers and try to mitigate the gap between winners and losers of European integration.

In short, Ferrera suggests to add both civic and financial duties to European citizenship. This makes a lot of sense as people often fail to appreciate the goods and services they get for free and start caring for a common good once they have to contribute to it. Let me explain why I nonetheless doubt that these duties will have the effect that Ferrera is hoping for. Rather than strengthening a sense of European identity across the board, these duties risk widening the gulf between pro-European citizens and those opposing European integration. We are currently witnessing the emergence of an increasingly important fault line in European politics between highly educated, mobile Europhiles, and lower skilled, immobile Eurosceptics who see themselves as (and sometimes are) the losers of European integration.[1] Let me discuss how the duties proposed by Ferrera have different implications for Europhiles and Eurosceptics and hence have unintended consequences for European collective identity.

[1] Hooghe, L. & G. Marks (2017), 'Cleavage theory meets Europe's crises: Lipset, Rokkan, and the transnational cleavage', *Journal of European Public Policy* 25 (1): 109–135; Kuhn, T. (2015), *Experiencing European integration. Transnational lives and European identity*. Oxford: Oxford University Press.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_44

Ferrera proposes to introduce the possibility of paying a voluntary, earmarked contribution to 'Social Europe' on national tax forms. The rationale behind this proposal is that such a contribution could make the EU more salient and visible, and by paying into such a fund, citizens could be 'nudged' into caring and feeling responsible for the European Union. Similar mechanisms have been thought to contribute to nation building, and experiments in behavioural economics indeed support the expectation that individuals become more caring once they contribute to a common good. One has to ask, however, who will be the European citizens that are ready to pay a voluntary contribution to 'social Europe'. Very likely, this is the group of Europeans that is already convinced of the benefits of European integration. Recent studies on redistribution across the European Union show that citizens with cosmopolitan values are most willing to share resources with other Europeans, and they are most likely to support international redistribution in the EU.[2] Eurosceptics, however, most probably refrain from paying such a contribution, and will therefore also fail to develop the sense of responsibility and ownership through their contribution that Ferrera is hoping for.

Ferrera further suggests introducing an EU civilian defence and civic community service, again with the hope that taking part in such a service will instil some sense of community. In fact, such initiatives exist already. Over the past 20 years, 100,000 young people aged 17–30 have participated in the European Voluntary Service.[3] Moreover, the newly created European Solidarity Corps provides a unique platform for young Europeans and organisations that wish to get involved in projects related to European solidarity. These are great initiatives, but will Eurosceptic youth be willing to participate? While I am not aware of any studies on the European Voluntary Studies, research on Erasmus exchange programmes is informative. While an Erasmus experience has the potential to foster European identity,[4]

---

[2] Kuhn, T., H. Solaz & E. Van Elsas (2017), 'Practising what you preach: How cosmopolitanism promotes willingness to redistribute across the European Union', *Journal of European Public Policy* online first, https://doi.org/10.1080/13501763.2017.1370005; Bechtel, M., J. Hainmueller & Y. Margalit (2014), 'Preferences for International Redistribution. The Divide over the Eurozone Bailouts', *American Journal of Political Science* 58 (4): 835–856.

[3] European Commission (2016), *European Voluntary Service 20 Years!*, available at http://europa.eu/youth/sites/default/files/evs_factsheet_and_impacts_apr_2016.pdf

[4] Mitchell. K. (2015) 'Rethinking the "Erasmus effect" on European identity', *JCMS: Journal of Common Market Studies* 53 (2): 330–348.

students who take part in such an exchange are already more pro-European than their peers before going abroad.[5] Moreover they primarily interact with other Erasmus students rather than the (immobile) local students. Such a self-selection might contribute to the widening gulf between Eurosceptics and Europhiles: People open to European integration self-select into participating in European voluntary services and into paying voluntary contributions. By doing so, they strengthen and reaffirm their pre-existing support for European integration, and are increasingly surrounded by like-minded, equally mobile individuals, while Eurosceptics remain in their own country and in their own Eurosceptic circles.

To sum up the argument so far, all these proposals primarily address those Europeans who are already European-minded and self-select into transnational interactions and European engagement. I suggest addressing the Eurosceptics, but in a somewhat different way than Ferrera. He proposes to compensate the stayers by means of an EU fund to ease the impact of mobility. Joppke has already pointed out that by doing so, European policy makers might reify and legitimise populist resentments by portraying movers as perpetrators and stayers as victims. One way to deal with this concern could be to frame these transfers differently. For example, rather than speaking of a 'compensation for losers', one could offer a 'mobility bonus' to those regions (and their residents) that are able to attract large shares of EU migrant workers. These bonuses could be earmarked for investments into activating unemployed residents. Consequently, those Europeans who usually tend to see themselves as losers of European integration might feel that they benefit from being part of a winning region. My other concern about such a 'compensation' policy is that it might 'nudge' stayers into the wrong direction. If intra-European mobility indeed fosters European identity, and pro-European citizens self-select into mobility, then we should provide incentives for stayers to overcome their reservations and move around rather than giving them a premium for staying at home. This is a very difficult endeavour, and the Erasmus Plus Programme already tries to reach out to a broader cross section of society beyond university students.

Finally, given the widening gap between mobile and immobile Europeans, the answer to Euroscepticism might not lie in promoting more mobility across European member states but in addressing the increasing socio-economic divides and opening up the resulting 'echo chambers' within

---

[5] Wilson, I. (2011), 'What Should We Expect of "Erasmus Generations"?', *Journal of Common Market Studies* 49 (5): 1113–1140.

countries. By trying to engage in a dialogue with Eurosceptic co-nationals, Europhiles might be able find to better answers than by repeating the Europhile mantra.

Enhancing the Visibility of Social Europe: A Practical Agenda for 'The Last Mile'

Ilaria Madama

The contributions in this Forum have addressed many 'big issues' about EU citizenship, but have paid much less attention to the 'catalogue' of suggestions Ferrera has made in order to "add stuff" to EU citizenship and to make it more visible and salient. I would like to focus on these proposals, all going in the direction of strengthening the social dimension of integration. As widely acknowledged in the literature, social policy institutions have historically served key political functions for state and nation building purposes in Western countries,[1] including in federal systems, where social citizenship – as noted also by Seeleib-Kaiser in this volume – has been used as an element to foster unity.[2] Within the EU's multi-level framework, the possibility to exploit the legitimating and credit claiming potential of supranational social programmes for polity-building and maintenance is undermined by two elements: on the one hand, the small size of the EU social budget and, on the other hand, the indirect way of functioning of supranational programmes that makes EU measures and funds scarcely visible to citizens.

According to the 2017 Flash Eurobarometer on C*itizens' awareness and perceptions of EU regional policy,*[3] EU actions to promote social and economic development are largely unknown to respondents, with more than 63

This text has been written in the context of the RESCEU Project (Reconciling economic and social Europe), www.resceu.eu), funded by the European Research Council (Advanced Grant no. 340534).

1 Cf. Flora, P. (1999), 'Introduction and Interpretation', in P. Flora, S. Kuhnle & D. Urwin (eds.), *State Formation, Nation-Building and Mass Politics in Europe: The Theory of Stein Rokkan*, 1–91. Oxford, U.K.: Clarendon Press.

2 Obinger, H., S. Leibfried & F. G. Castles (eds.) (2005), *Federalism and the Welfare State: New World and European Experiences*. Cambridge, U.K.: Cambridge University Press.

3 Eurobarometer (2017), Flash Eurobarometer 452. Report: Citizens' awareness and perceptions of EU regional policy, available at http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/79239.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_45

per cent never having heard of any EU co-financed project to improve the area they live in.[4] The average value however conceals significant variation across countries: if 80 per cent of respondents have heard about EU's regional support in Poland, the share drops to 40 per cent in Italy, 27 per cent in France and 25 per cent in Germany, sinking to a modest 16 per sent in Austria and 14 per cent in Denmark[5].

These figures somehow confirm that little credit goes to the EU directly for its own efforts and spending in the social sphere. This does not come as a surprise. A broad strand of implementation studies has documented how the translation of higher level policies and goals into street-level actions is subject to a 'variety of disjunctive influences'.[6] This issue becomes even more relevant in federal and multi-level polities, in which higher-level policies are more at risk of getting unravelled at the frontlines,[7] as street-level providers are not direct arms of the supranational level. The so-called last mile problem (the final link of the implementation chain) has a political dimension as well. The level of government/political authority that controls the last mile has an incentive to "capture" as much political credit as possible, even if resources (legal and/or financial) come from higher levels.

Some of the proposals suggested by Ferrera would work as antidotes against this syndrome, enhancing the EU's visibility for end-recipients at the terminal phase of the implementation chain. The current situation is more advanced on this front than Ferrera acknowledges. EU institutions (especially the European Commission) are aware of the last mile problem and have in fact already made several attempts to foster the visibility of EU's

---

4 Regional policy is endowed with 351.8 billion euros and accounts for approximately a third of the EU budget for the current 2014–2020 budget cycle. It co-finances (primarily through the ESF, the ERDF and the Cohesion fund) projects to promote job creation, competitiveness, economic growth and citizens' quality of life.

5 These findings partly reflect the diverse relevance and size of EU financing across countries, but still there is no strong correlation between level of awareness and per-capita EU funding.

6 Cf. May, P. J. & S. C. Winter (2007), 'Politicians, Managers, and Street-Level Bureaucrats: Influences on Policy Implementation' *Journal of Public Administration Research and Theory* 19 (3): 453–476 (p. 454).

7 Cf. Keiser, L. R. (2001), 'Street-Level Bureaucrats, Administrative Power and the Manipulation of Federal Social Security Disability Programs', *State Politics & Policy Quarterly* 1 (2): 144–164.

action at the points of actual delivery. I will illustrate this with the example of the Fund for European Aid to the Most Deprived (FEAD), a new EU social program that was launched in March 2014 with the aim of confronting the most severe forms of material deprivation by providing non-financial assistance to the most needy.

The FEAD, in brief

The assistance provided by the FEAD takes primarily the form of food, clothing and other essential stuff, accompanied by advice and counselling to help beneficiaries to re-integrate into society. The FEAD may also finance stand-alone social inclusion activities, which are designed to strengthen most deprived people's skills and capacities to help them overcome the situation of difficulty they face.[8]

Participation in the programme on the side of member states is mandatory and its governance model rests on a multi-level approach. Member states are required to prepare national Operation Programmes (OP), illustrating the domestic strategy for implementing the Fund during the 2014–2020 period. They can opt for two different OP types: OP I – covering primarily food aid and basic material assistance, complemented by social inclusion measures; and OP II – dedicated to stand-alone social inclusion measures.

Overall, the programme was endowed with 3.8 billion euros from the EU budget. In addition, member states have to top up the allocation through national co-financing.[9]

Despite the steering role played by European and national managing authorities in the management of the programme, the actual implementation of the measures at the street level primarily relies on partner organisations, i.e. civil society organisations such as food-banks and charities, that are in charge of the actual distribution of assistance and the provision of social inclusion measures.

[8] See European Commission (2015), *The Fund for European Aid to the Most Deprived (FEAD) – Breaking the vicious circle of poverty and deprivation*. Luxembourg: Publications Office of the European Union.

[9] The minimum co-financing rate is set at 15 per cent of eligible public expenditures, but it can be reduced up to 0 per cent for member states with temporary budgetary difficulties.

In the context of this Forum's discussion, the FEAD experience is interesting in two main respects. First, the FEAD Regulation[10] details a number of requirements that, at the very end of the implementation chain, street-level providers have to comply with. These include the requests that 'during the implementation of an operation, the beneficiaries of funding and partner organisations shall inform the public about the support obtained from the Fund by placing either at least one poster with information about the operation (minimum size A3), including about the financial support from the Union or a Union emblem of reasonable size, at a location readily visible to the public. This requirement shall be fulfilled, without stigmatising end-recipients, at each place of delivery'; and 'any document, including any attendance or other certificate, concerning an operation shall include a statement to the effect that the operational programme was supported by the Fund.'[11] This is a relatively explicit strategy precisely aimed at claiming some symbolic and thus political credit at the end of the last mile.

Second, the European Commission has made special efforts to strengthen awareness, as well as its reach over front-line partners, by financing the creation of a community of stakeholders, grouping together EU-level NGOs and EU institutions, partner organisations – in addition to national managing authorities. Within the activities of the FEAD Network, the European Commission organises face-to-face meetings and has created a social media platform to boost virtual interactions. In this case, the political goal is not only credit claiming, but more ambitiously that of establishing direct links between the supranational level and the social and 'civic' grass roots.

How compliant are local authorities and delivering agencies with these new regulatory provisions? How effective are they in raising awareness, enhancing visibility, generating symbolic credit? We do not have any empirical answer yet, these are, however, very relevant and intriguing questions for future research.

An EU Social Card?

Introducing an 'EU Social Card' aimed at easing citizen access to services, as envisaged by Ferrera, could be another promising strategy. It would be a small *riforma col cacciavite* (to use an Italian metaphor: a simple fix made

[10] Regulation of the European Parliament and of the Council no. 223 /2014.

[11] Art. 19 of the Regulation of the European Parliament and of the Council no. 223 /2014.

with a screwdriver, with limited cost and high effectiveness) to make the social dimension of EU citizenship more visible and tangible. The EU has already introduced a *European Health Insurance Card* (EHIC), which entitles to medical treatment – on a par with nationals – in health emergencies as well as for pre-existing conditions while travelling through Europe. In February 2016, a pilot project for an *EU Disability Card* has been launched and it is meant to enable mutual recognition of disability status between EU Member States, making it easier for persons with disabilities to travel to other EU countries. There is also a *European Professional Card*, aimed at simplifying professional qualification recognition procedures for workers moving to other EU countries.[12]

These three initiatives provide tangible benefits only if there is a cross-border element – in Ferrera's terminology they are isopolitical instrumental facilitators. Ferrera rightly highlights, however, the need to empower and make more visible the stakes of European citizenship also for the stayers. Many contributions to this Forum have addressed Ferrera's proposals from a normative perspective. Some have raised doubts about the very fact that stayers may bear material burdens in the wake of mobility. The essential point, however, is that stayers – especially if low-educated and low-skilled – do *think/feel* (it is both a belief and an emotional reaction) that they indeed suffer some penalty. These beliefs/feelings may be normatively or factually unwarranted. But they exist, as profusely documented by empirical research. And they are politically relevant facts, closely linked with the rise of Euroscepticism. I agree with Ferrera that it would be politically sensible to de-activate the disruptive potential of these orientations through some EU programme dedicated to (or including) those citizens who, for any reason, do not exercise free movement and risk to find themselves in a situation of economic difficulty. Again, the EU is already moving in this direction, with a novel initiative aimed at addressing the up-skilling of low-qualified people.[13] The programme targets adults with weaknesses in basic skills, knowledge and competences, who therefore are more likely to face a higher risk of unemployment, a higher incidence of poverty and social exclusion. In 2016 there were 63 million people – almost a quarter of the Union population

[12] See European Commission (2017), *EU Citizenship Report*, available at http://ec.europa.eu/newsroom/document.cfm?doc_id=40723.

[13] Cf. Council Recommendation of 19 December 2016 on Upskilling Pathways: New Opportunities for Adults, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOC_2016_484_R_0001.

aged 25–64 – with at most lower secondary education. A *Skills Guarantee*, the official name of the Commission's proposal,[14] could really kill three birds with one stone: providing a concrete support to the most vulnerable (normative rationale), making the EU economy more competitive via an enhanced human capital (functional rationale), and bringing the stayers closer to (i.e. more loyal and supportive of) the European Union as such: a political rationale well worth pursuing.

[14] European Commission (2016), *A New Skills Agenda For Europe*, COM(2016) 381 final, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0381&from=EN.

Towards a 'Holding Environment' for Europe's (Diverse) Social Citizenship Regimes

Anton Hemerijck

Maurizio Ferrera has written an important and timely response paper to Rainer Bauböck's call to 'add stuff' to EU citizenship. Standing on the shoulders of the equally perceptive and nuanced ideas on citizenship rights by T.H. Marshall, Ferrera ventures to explore the political space for raising, in an incremental fashion, elements of 'social' citizenship to the level of the EU, in full recognition of the overriding significance of the member states as the principal providers and guardians of highly diverse welfare benefits and services. Ferrera, like Marshall before him, believes that social citizenship does not only provide individuals with an elementary right to economic opportunity and security, through poverty relief, universal access to health care and education, labour market services, unemployment, sickness and old age insurance, but that social citizenship also encourages a sense of community membership and belonging, referred to by Marshall as sharing 'to the full in the social heritage and to live the life of a civilised being according to the standard prevailing in society'.[1] It is this sense of moral integrity and community loyalty, historically an important (by-)product of national welfare state building, that the EU sorely lacks. More perversely, it has been argued, among others by Fritz Scharpf and Wolfgang Streeck,[2] that the intricate connection of EU citizenship to free movement in the internal market and, for the Eurozone, budgetary rules setting limits to discretionary fiscal reflation in times of demand-deficient unemployment, in effect undermines national welfare state capacities to maintain social citizenship achievements, won over decades of national political struggle for the improvement of people's life chances and the protection of vulnerable citizens – the aged, the sick, the unemployed – from economic, social and political marginalisation.

1 Marshall, T. H. (1963), *Sociology at a Crossroads and other Essays*. London: Heinemann, 74.

2 Scharpf, F. W. (2002), 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* 40 (4): 645–670; Streeck, W. (2014), *Buying Time: The Delayed Crisis of Democratic Capitalism*, New York: Verso.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_46

Bauböck's rejoinder to Ferrera's opens by explicitly acknowledging that EU citizenship was conceived 'by stealth' by the Court of Justice of the European Union (CJEU) in the slipstream of the Maastricht Treaty. The political objective at the time was to seal the internal market with the single currency. As these institutional breakthroughs were negotiated at a time when the 'supply side' revolution in economic theory was riding high, their architects generally believed that the Single European Act (SEA) and the Economic and Monetary Union (EMU), and associated budgetary rules, would force member states to keep their 'wasteful' welfare states in check. Indeed, the primacy of internal market, together with the prohibition to revert to currency devaluation in times of mass unemployment for the Eurozone, constrained national social citizenship regimes, 'by stealth'.

Frank Vandenbroucke's post-hoc legitimation, with reference to John Rawls, prioritising 'fair equality of opportunity' over the 'difference principle' of distributive justice, implicitly assumes a well-delineated European polity that is able to work out an explicit compromise between these two principles. The EU is not really a political union in terms of democratic self-determination, although it is currently experiencing growing pains to that effect. Its borders change with each wave of enlargement and now it is confronted with a first case of withdrawal. It is tragically ironic that the United Kingdom, whose governments in the past have been the strongest force behind the internal market and enlargement and very vocal in scorning Europe's social dimension, has decided to leave the EU on the sentiment that open markets have gone too far. More to the point, the deepening of European economic integration of the 1990s was never presented as an explicit citizenship regime change to national electorates. Market integration and the liberalisation of public services was the EU's primary *raison d'être* – think of the Bolkestein directive. Leaders at the time of the Maastricht Treaty sold the internal market and the currency union as a way to enlarge the economic pie for domestic welfare redistribution. Writing in the late 1990s, Fritz Scharpf already conjectured for the then 16 EU member states that regulatory competition, especially in the area of corporate taxation, was impairing the economic viability of national welfare states, while (welfare) migration, under the EU's freedom-of-mobility rules, would damage their political viability.[3] We know that Scharpf's dystopia of ruinous competitive social dumping has not come true for two important reasons. The first is that most of the successful European economies, according to the Global Competitiveness Index of the World Economic Forum (2014), are

[3] Scharpf, F. W. (1999), *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.

high-spending welfare states, including, Finland, Germany, the Netherlands, and Sweden, with levels of social spending hovering between 25 per cent and 30 per cent of GDP. At a minimum, the evidence that high social spending does not per se hurt competitiveness, presses us to consider the quality rather than the quantity of social spending in trying to better understand the relation between welfare provision and economic prosperity in rich democracies.

The second reason is that the deepening of the internal market has been accompanied by a considerable expansion of EU cohesion policy, breakthroughs in social security coordination and important secondary legislation and CJEU jurisprudence, referred to by Suzanne Schmidt, on health and safety, anti-discrimination, equal pay and equal treatment, part-time and temporary work, and parental leave, modelled generally after the better performing countries rather than the lowest common denominator. But with the latest 2004 and 2007 waves of enlargement, in conjunction with the Eurozone fallout of the global financial crisis, magnifying asymmetric shocks without any measure of burden sharing or collective re-insurance, trapping Eurozone debtor countries in 'bad' economic and socially imbalanced equilibria,[4] we have to sadly acknowledge that Scharpf was pretty much on the mark.

In the current predicament, electorates continue to hold national politicians accountable for socio-economic (mis-)fortune, not EU institutions. With political accountability bound up with popular welfare states, it is particularly difficult to renege on established social contracts in hard economic times. In addition, the failure to resolve the euro crisis at the supranational level has increasingly been met by rising Eurosceptic domestic pressures to water down ruling governments' commitments to European solutions, especially in the politically sensitive policy areas of welfare provision. It therefore comes as no surprise that today anti-EU right-populist parties are the most ardent defenders of the post-1945 social contract for 'natives' only, proclaiming that retirement at 65 can be sustained through protectionism, a ban on migration and by bidding farewell to the internal market and the single currency. On the other hand, Eurozone crisis management hardly departed from the deeply entrenched worldview, anchored in the Maastricht Treaty, that generous welfare provision harms competitiveness. Fiscal conservatives, including Northern social democrats, have championed intrusive cost-containment in exchange for fiscal bailouts, in the Eurozone periphery, to make up for a lost decade in 'structural reform'. Mario Draghi, being

[4] De Grauwe, P. (2011), 'The Governance of a Fragile Eurozone', *CEPS Working Document* no. 346, Brussels: CEPS.

interviewed by the *Wall Street Journal* at the height of the Eurocrisis in early 2012, similarly declared the 'European social model' as 'long gone'. Between right-populist welfare chauvinism and on-going calls for overnight fiscal consolidation, a 'political-institutional vacuum' has emerged at the heart of the European project. Even if populist parties do not enter office, to the extent that they successfully portray a nostalgic image of a national welfare paradise lost as a result of globalisation and mass migration promoted by the EU, mainstream parties, in- and outside of government, face severe difficulties in claiming credit for making national welfare states more future proof through improvements in family welfare in return for a higher pension age.

The Juncker Commission has taken on an ambitious number of social policy initiatives, including the Youth guarantee, the ErasmusPro initiative for cross-border initiatives, the New Skills Agenda for Europe, the European Pillar of Social Rights,[5] the Social Scoreboard for assessing progress towards a social 'triple A' for the EU. Most of these initiatives are being pursued in a seemingly uncoordinated manner, without an overall ideational framework or policy paradigm. What's more, time and again, concerns about inequality, poverty and mass (youth-)unemployment are relegated to 'auxiliary' status and remain subordinated to the Six-Pack (2011), the Fiscal Compact (2012) and the Two-Pack (2013),[6] prescribing balanced budgets irrespective of urgent needs. As a consequence, and in spite of the post-crisis lip service paid to social investment by the European Commission, the 'default' policy theory of market liberalisation, balanced budgets, hard currency, and welfare retrenchment has not been questioned.

With high (youth) unemployment, rising poverty and inequality as the breeding grounds for xenophobic populism and Brexit-type political contingencies, the EU and its member governments have to break with the 'permissive consensus' of relegating social policy to the jurisdiction of the nation state, under the proviso of 'subsidiarity', and market and currency regulation to the EU, as if this conjured up a 'happy' equilibrium. It does not. And here lies, as Maurizio Ferrera makes crystal-clear in his essay, the fundamental *political* reason why adding 'social' stuff to EU citizenship can no longer be dismissed as wishful dreaming. Indeed, a transformative turn, in the conceptualisation of Paul Magnette, from the 'isopolitical' citizenship right of free movement and the destabilising externalities of the Treaty to the

[5] European Commission (2017), *The European Pillar of Social Rights*. Brussels: Publication Office of the European Union.

[6] European Commission (2013), *Toward Social Investment for Growth and Cohesion – Including Implementing the European Social Fund 2014–2020*. Brussels: Publication Office of the European Union.

'sympolitical' re-confirmation and enlargement of EU social citizenship, is imperative. The isopolitical limitations of EU action in the social domain have to be confronted on two fronts: 1) in terms of political priorities threatening the very legitimacy of the European project, and 2) in terms of sound comparative evidence of how dynamic social policies can help achieve prime EU political objectives of growth, jobs, competitiveness and social inclusion.

Before we move forward, there is an important caveat to be discussed. The effective delivery of social citizenship rights implicates state steering capacity, not merely regulation. Civil rights, rights to property and respect for the rule of law are operationally precise and can, as such, more easily be enforced. However, today the European Commission is unable to retroactively uphold the Copenhagen accession criteria, which Hungary and Poland accepted when joining the EU, for the likes of Viktor Orban and Jaroslaw Kaczynski, further weakening thereby the legitimacy of the EU in many member states with strong commitment to the rule of law. Social rights, defined in terms of substantive need, are of a different breed altogether. The right to a minimum income, which is in the words of Marshall 'not proportionate to the market value of the claimant', obliges the political community to interfere with and modify the distributive consequences of cyclical and volatile market processes. This requires 'positive state capacities',[7] both in terms of 'bending' market processes through taxation and compulsory social insurance contributions and also through provision of benefits and service delivery, which the EU, as a mere regulatory regime, in the words of Christian Joppke, lacks by deliberate intention. Consequently, the question of 'how much' is good enough, and 'what kind of benefits and services' are required, on behalf of 'what categories of (deserving) citizens', and 'at whose expense' are fundamental political questions, which, for the time being, cannot be settled at the level of the EU.

I am in full agreement with Maurizio Ferrera's diagnosis of the post-crisis EU social malaise, imbalance and contradictions and the need for the 'sympolitical' change of heart that he suggest. When it come to policy proposals, Ferrera opts essentially for a 'compensatory approach' that aims at de-activating the (perceived) disintegrative dynamic of EU civil citizenship undermining domestic social citizenship regimes, by focusing on policy

[7] Genschel, P. & M. Jachtenfuchs (2017), 'From market integration to core state powers: the Eurozone crisis, the refugee crisis and integration theory', *Robert Schuman Centre for Advanced Studies Working Paper 2017/26*, Florence: European University Institute.

support for the so-called 'stayers', those who do not exercise free movement rights. Ferrera wants to empower them through services and benefits that help to mitigate the disruptive effect of EU economic integration on national labour markets and welfare regimes.

Ferrera's proposals immediately beg the questions of 'who to compensate?'; 'for what exactly?', 'how much?', 'through which kind of benefit or service?', and 'who is to pay?' for the new policy provisions. And 'what about other losers?', such as countries suffering a brain-drain of their college graduates under conditions of high youth unemployment, reinforced by the Eurozone austerity reflex? I am also doubtful, at this current juncture, that we will really be able to identify and measure the bewildering complexity of the negative externalities at play through improved policy-evaluation, as suggested by Julia Hermann. And whether 'adding stuff' through a compensatory enrichment of EU social citizenship would strengthen a European sense of community is another open question. Although I concur with the general sympolitical re-direction of the substantive initiatives Ferrera puts on the table, I would rather pursue a more roundabout gradualist route to EU social citizenship progress, whereby the EU would assertively back and bolster the problem-solving capabilities of semi-sovereign national welfare states, rather than compensate perceived losers from economic integration. Rather than moving towards a broader Social Union, as suggested by Andrea Sangiovanni, I plead for an EU support for national solution that allows the nation states to better perform their welfare functions of social protection and social promotion in their highly diverse domestic jurisdictions. If successful, EU support for national welfare provision could very likely reinforce popular loyalty to the EU as a common possession of a union of welfare states. But I am not sure whether it is essential for the EU to claim political credit, as Maurizio Ferrera intimates. In this respect, I guess, I am in-between Ferrera's supranational stance of and Richard Bellamy's international position.

In my monograph *Changing Welfare States*,[8] I coined the notion of an assertive 'holding environment' as a quintessential EU support structure for (active) welfare states to prosper in the single market and the currency union. The notion of a 'holding environment' refers to a zone of resilience based on shared values and a common purpose, matched by competent institutions, in times of painful adaptation. The function of a 'holding environment' is to mitigate stress and thereby uphold the integrity of national

[8] Hemerijck, A. (2013), *Changing Welfare States*. Oxford: Oxford University Press.

welfare states, but also to maintain pressure to mobilise rather than overwhelm domestic reforms with only disciplinary intrusion, and to back up progress on tough problems with light at the end of the tunnel. The 'holding environment' for sustainable welfare provision, contrasts sharply with the notion of the single market and the single currency as intrusive welfare state 'disciplining devices'. There is important progress underway. In terms of shared values, the presentation of a European Pillar of Social Rights by the European Commission is an important step forward in comparison to the more ambivalent 'social market economy' ambition laid down in Articles 2 and 3 of the Lisbon Treaty. The Social Pillar recommendation of the Commission sets out 20 key principles, defined in terms of rights in support of fair and well-functioning labour markets and welfare systems. The Social Pillar, likely to be endorsed by the European Council at the Social Summit for Fair Jobs and Growth in Gothenborg on 17 November 2017, is a good example of the articulate translation of the latent commitment to social solidarity that the EU member welfare states, in spite of their many differences, share in terms of key principles without interfering deeply with the division of labour between member states, social partners and the EU. All in all, the 20 principles cover a well-balanced portfolio of 'fair-playing-field' social and employment regulatory provisos, including equal treatment, gender equality, work-life balance, health and safety, minimum wages and social security rights. The latter comprise unemployment benefits, old age pensions, social protection and health care. Significant attention, moreover, is devoted to 'capacitating' social rights, such as the right to essential service, inclusive education and training over the life course, active labour market policy support, childcare and family benefits, the inclusion of people with disabilities, long-term care, and housing assistance. These echo the 2013 *Social Investment Package for Growth and Social Cohesion* of the Barroso Commission, urging EU Member States to advance post-crisis welfare reform strategies that help '*prepare*' individuals, families and societies to respond to the changing nature of social risks in advanced economies by investing in human capabilities from early childhood through old age, rather than pursuing policies that merely '*repair*' social misfortune after moments of economic or personal crisis. The Pillar principles, articulated as rights, can come to serve as a reference framework to fundamental values that the EU and the member states share. As such, the Pillar may well enhance a sense of community membership. However, for an effective sympolitical 'holding environment', European initiatives that make a contribution to strengthening the problem-solving capabilities of national welfare states, it is quintessential to ensure that the Pillar is not an empty shell. More tangible EU institutional support is called for to uphold and back up the integrity of national welfare states.

Back in 1999, Fritz Scharpf had the ingenious idea of introducing an EU agreement on not reducing overall social spending relative to GDP, so as to pre-empt ruinous competition among European welfare states, leaving the member states at liberty to decide on levels of benefits and services, modes of delivery and financing techniques through national democratic processes, but not for the purpose of economic competition. If such a rule had been adopted at the time, to be sure, the social and political consequences of some bailout programs administered by the Troika of the EU, the ECB and the IMF would have been less socially disruptive, especially in the case of Greece. A more recent proposal for the Eurozone is to introduce a 're-insurance scheme' for national unemployment insurance systems. The idea is that unemployment insurance is a core feature of national welfare states with a highly effective macroeconomic stabilisation component and with uptakes increasing during downturns when resources are constrained by the need of fiscal consolidation. A pan-Eurozone unemployment re-insurance scheme would provide more fiscal breathing space for countries asymmetrically affected by the downturn, which in turn could trigger faster and stronger recovery (see also Vandenbroucke's contribution).

My own proposal is to discount social investment policies from the fiscal criteria of the Stability and Growth Pact (SGP) and the Fiscal Compact in order to create the necessary fiscal space within a bound of 1 to 2 per cent of GDP for the coming decade. Inspired by the 2013 *Social Investment Package*, I have come to develop an operational taxonomy of three interdependent and complementary social policy functions for further empirical analysis and assessment: (1) easing the flow of contemporary labour-market and life-course transitions; (2) raising and upkeeping the quality of the *stock* of human capital and capabilities; and (3) maintaining strong minimum-income universal safety net *buffers* for micro-level income protection and macro-economic stabilisation in support of high employment levels in aging societies. In this taxonomy, the buffer function is primarily about securing adequate and universal minimum income safety nets but is also able to stabilise the business cycle against economic shocks. Next, the stock function concerns the development, upgrading and upkeeping of human capital and capabilities over the life course with wider bearings, relating to the provision of 'capacitating social services', bringing under one roof adjustable bundles of professional assistance in parental counselling, pre-school, care for the elderly, including skill enhancement and training services in case of unemployment, family-care and housing support. The flow function, finally, is about improving and easing gender-equal access to employment over the

lifespan, making sure that unemployed workers can return to work as fast as possible through active labour market policies and job matching so as to 'make labour market transitions pay' and equalize work-life balance for men and women. The available evidence suggests that integrated stock, flow and buffer policy mixes increase the returns on human capital in terms of employment, growth, generate higher tax bases and more inclusive economic security, and mitigate inequality, (child-)poverty, welfare dependency, and even crime.[9]

If we consider the three policy functions in terms of a viable division of responsibilities between the EU and the member states, then clearly the function of social security buffers, as the core function of the modern welfare state, jealously defended by domestic political actors, should remain in the remit of the national welfare state. If France and Italy, through democratic processes, agree to spend most fiscal resources on pensions, this may not be wise in the light of adverse demography, but there is very little that a supranational organisation can do, except to advocate that sustainable buffers are in the long run best served by investing in future productivity. The flow function, concerning labour market regulation, collective bargaining, work-life balance and gender equality with a aim of fostering adaptable family-friendly employment relations and careers in the knowledge economy, can be well served by mutual learning and monitoring processes of open coordination, engaging national administrations and relevant EU expert committees and the social partners.[10] The experience of the crisis, especially the Eurozone austerity reflex, has resulted in a public investment strike, most unfortunately in the area of human capital stock capabilities, lifelong education and training, with significant negative consequences for future growth, employment and productivity in knowledge economies facing adverse demography.

If the European Union is considered the trade union of the next generation, as Mario Monti allegedly intimated, then surely the EU, with a youth unemployment rate close to 50% in Spain and Greece, is not doing a good job in terms of interest representation and collective action. Granting more fiscal room for manoeuvre (within bounds) to countries that experience excessive social and macroeconomic imbalances would enable them to

---

9 Hemerijck, A. (ed.) (2017), *Uses of Social Investment*. Oxford: Oxford University Press.

10 Zeitlin, J. (2011), *Transnational Transformations of Governance: The European Union and Beyond*. Amsterdam: Amsterdam University Press.

secure sustainable financing of education and skills upgrading before the ageing predicament becomes truly overwhelming. Exempting such investments from SGP deficit requirements would render greater fiscal space to member states that opt for social investment reform, without trampling on Eurozone fiscal rules. For countries struggling to commit to a balanced budget without abandoning their domestic social commitments such exemptions could foster immediate gains in early childhood, female employment, improved work-life balance and reduced levels of early school leaving with positive medium-term outcomes in employment, educational attainment and ultimately pension cost-containment resulting from higher levels of employment.

Domestic reform ownership is crucial. That's why the initiative for proposals lies with national actors. Italy and Spain could opt for the creation of immediate (and primarily female) jobs by making huge investments in high quality childcare centres. France could pursue a radical improvement of its system of vocational education and training based on the Finnish and German examples, while Belgium, the Netherlands and Slovenia could ramp up their rather regressive lifelong learning arrangements. At the same time, discounting human capital stock investments should be closely monitored through the European Semester in terms of effective alignments with labour market regulation and employment relations that help to ease labour market and life course transitions for individuals and families and facilitate strong (universal) social security reform across Euro-member states.

Beyond incentivising domestic social investment reform ownership through positive – carrot rather than stick – conditionality, there is a real need to streamline the EU budget to further leverage social investment returns in the European Social Fund (ESF), the Youth Employment Initiative (YEI), the Youth Guarantee, the European Globalisation Fund (EGF), and the European Fund for Strategic Investments (EFSI), known as the Juncker Plan, by giving priority to mitigate cross-border externalities and to positively foster resilient European welfare states.

Looking ahead, Europe is in dire need of a growth strategy that is economically viable, politically legitimate and seen as socially fair. Given the magnitude of the hangover from the sovereign debt crisis and the dismal experience of social investment reform in Southern Europe prior to the Euro crisis, there are no quick fixes. The EU must, however, break with the policy legacy of relegating social investment reform to being a 'handmaiden' to isopolitical citizenship only – wise to pursue when the economy expands,

but prohibited when the chips are down. Only then can social citizenship rights become embedded in a sympolitical 'holding environment' that commits, bonds and integrates the EU and the member states to the shared welfare commitment of civilised living in the EU.

Imagine: European Union Social Citizenship and Post-Marshallian Rights and Duties

Dora Kostakopoulou

Writing in 1959, Ortega y Gasset noted that 'reality is not closed and reduced to the past and the present, but holds open the frontier of the future in which the real will be something that has yet to come into being.'[1] Ferrera and the other contributors in this forum have opened up a debate on the future of EU citizenship and argued for its 'renovation' in the light of rising Euroscepticism and nationalist centrifugalism in the member states. Ferrera shares Bauböck's diagnosis that EU citizenship has not met its integrative potential. While renovation is not always innovation, Ferrera has laid down the path for innovative thinking about the (future) content of EU citizenship and for the introduction of 'soft' citizenship duties which would strengthen the ties that bind EU citizens. I am in favour of 'soft' as well as 'hard' EU citizenship duties and I argue here that EU citizenship is not, and cannot be, duty free.

My argument is developed in three steps; namely, I discuss a) why EU citizenship is not duty-free, b) why it cannot be duty-free and c) what kinds of explicit duties it could incorporate in the future. I should mention at the outset that I fully share Ferrera's call for a social EU citizenship and the addition of citizenship duties. But, like Joppke, I disagree with the justification provided and with Ferrera's confinement of duties to EU citizens. In addition, it seems to me that we might wish to rethink the functionality and the effectiveness of providing 'instrumental resources (money, benefits, infrastuctures and so on) that could make EU citizenship more salient, visible and tangible for wide constituencies' (Ferrera). It might be preferable to draw on normative principles and the values of the EU in order to provide a compelling justification for the development of an EU social citizenship (see Sangiovanni and Bauböck) and for the addition of EU citizenship duties. The social dimension of EU citizenship must be grounded on values, and not on money. Material benefits and instrumental means create an impression that the EU should be 'purchasing' the loyalty of EU citizens, more often than not do not guarantee a long-term identification with

[1] Ortega y Gasset, J. (1959), *Man and Crisis*. Ruskin House, London: G. Allen and Unwin, 210.

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_47

'Europe' – this is confirmed by the Pro-Leave votes in Wales in the UK's 'Brexit' Referendum on 23 June 2016 – and cannot be a substitute for the incorporation of durable and meaningful social citizenship rights and duties into the EU citizenship provisions.

EU Citizenship is not duty-free

EU citizenship does not encompass duties for individual citizens, but it is not duty-free. It contains a number of implied duties on the part of the member states (and their authorities) and the EU institutions designed to ensure the implementation of EU citizens' rights (i.e., mobility rights, political rights, the right to diplomatic and consular protection when travelling abroad and the rights contained in Article 24 TFEU). Article 20 TFEU and the subsequent articles state clearly that 'citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties' and that they shall have the rights to move and reside freely, to vote and to stand as candidates in elections to the European Parliament and in municipal elections in the member states of residence, to enjoy diplomatic and consular protection abroad and to non-judicial means of redress, such as those stated in Article 24 TEFU. The word 'shall' implies categorical duties on the part of the member states to respect and to realise EU citizens' rights. In addition, the principles of non-discrimination on the ground of nationality and equality underpin and justify EU citizens' 'civil rights', the right to equal treatment in the member state of residence and political rights. The European Union, on the other hand, has the duty to observe the principle of equality of its citizens in all its activities (Article 9 TEU). EU citizens 'shall receive equal attention from its institutions, bodies, offices and agencies' (Article 9 TEU). While all this is true, Ferrera is proposing a different kind of dutiful action and participation. He would like to see: a) the empowerment of stayers through facilitating initiatives and a partial compensation for the negative externalities produced by free movers; b) an increase in the visibility and salience of EU citizenship by *inter alia* strengthening its social dimension and c) the introduction of EU citizens' voluntary financial contributions for Europe and civic duties. Such reforms would strengthen the integrative function of EU citizenship and sustain bonds of solidarity. I am in favour of both (b) and (c), but, like Joppke and Kuhn, I have several reservations about (a) which are outlined below.

Why EU citizenship cannot be duty-free

One does not have to graft the Marshallian paradigm of civil, political and social rights onto EU citizenship in order to justify the need for a social EU citizenship. Nor does one have to compare national and European citizenships in order to conclude that EU citizenship remains relatively underdeveloped in comparison to its national counterpart. Citizenship rights (and duties) can only be exercised in freedom and dignity and the latter necessarily involves a social welfare dimension. Without it, the free exercise of rights loses its meaning since the abstract, autonomous individual remains unshielded from the contingencies of imposed vulnerability.

The Court of Justice of the European Union (CJEU) has emphasised the need for the protection of vulnerable EU citizens and has justified the extension of the principle of equal treatment to the field of social assistance in the member state of residence on a number of grounds; namely, contribution (for active economic actors), authorised residence, one's sufficient degree of integration or his or her 'real link' with the host society or the employment market and permanent residence. Job-seekers' allowances and other benefits have also been justified on the basis of an anticipated contribution-based solidarity and the need to facilitate a job-seeker's integration into the employment market and his or her active participation in it.[2] More importantly, those who assess whether a mobile Union citizen has a real link to the host society or the domestic employment market are the member states' authorities – not the EU.

True, the politicisation of free movement in the UK and other member states has accentuated concerns about the preservation of national welfare systems which have already been hit by the sovereign debt crisis and years of austerity, but it, nevertheless, remains the case that claims about welfare tourism in the EU in the main are unsubstantiated empirically. Ferrera acknowledges this. But he also draws attention to the war of narratives and discourses in certain member states and the uneasiness about 'the burdens of solidarity' or the 'social impact of mobility' in certain areas. As a remedy, he proposes the creation of an EU fund to ease the impact of mobility and for other measures to empower the stayers (an EU social card and universal

[2] See, for example, Case C-224/98 Marie-Nathalie D'Hoop v Office national de l'emploi [2002] ECR I-6191; C-138/02 Brian Francis Collins [2004] ECR I-2703; Joined Cases C-22/08 and C-23/08 Athanasios Vatsouras v Arbeitsgemeinshcaft (ARGE) Nurnberg 900 and Josif Koupatantze v Alrbeitsgemeinschaft (ARGE) Nurnberg 900, Judgement of the Court of 4 June 2009.

transferable vouchers). But such a proposal entails risks. Joppke has accurately articulated them. It would legitimise the 'demonology of European populists'; it would 'divide the European citizenry into two unequal halves, movers and stayers'; and it would depict 'mobility as harmful and staying as virtuous'. All these are important considerations. To these, I would add that mobility is not cost free for 'free movers' and that 'uprootedness' and settlement in another member state are not easy, straightforward and risk free processes. Everything has its price. The sad predicament and unacceptable experiences of xenophobia and discrimination of EU citizens settled in the United Kingdom following the Brexit referendum of 23 June 2016 confirm this. In addition, the EU citizenship provisions do not reflect the full panoply of rights that 'stayers' derive from EU law. One could briefly mention their access to services of general economic interest, consumer rights, anti-discrimination rights, equal pay as well as to the rights protected by the EU Charter of fundamental rights.

If we wish to make 'Europe' a bit better, we would need to transcend the logic of 'winners' and 'losers'. Whatever one's mobility status, class origin, gender, race, ethnicity, nationality, religion, sexual orientation, ability or disability and age, the kind of trust and solidarity that exist in communities of strangers is based on institutions that promote rights and welfare for all. This form of trust and loyalty expands the potential radius of solidarity and is often more durable because it is not based on narrow perceptions of self-interest or short-term calculations of one's contributions or misperceptions about 'others' (i.e., non-nationals) and their role and contributions to society. In this respect, instead of justifying a stronger social dimension of EU citizenship and social duties on the basis of a fair (or fairer) mobility agenda, it would be preferable to support the EU social pillar[3] and a social citizenship agenda. This leads me to the final point about what kinds of duties EU citizenship could include.

What kinds of EU citizenship duties and who should be the duty-bearers?

Since the European Union is a multi-layered polity comprising of 'its peoples' (Article 3(1) TEU) and the member states (and their authorities), there is no need to confine future citizenship duties to EU citizens. Indeed, one could envisage a 'variable geometry' of duties addressed to Union

[3] European Commission (2017), *The European Pillar of Social Rights*, available at. https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

institutions, the member states and to EU citizens. With respect to EU citizen duties, Ferrera's proposals of introducing some voluntary contribution for 'Europe' and a pan-European civil service for young people are meritorious. Kuhn has also mentioned the newly created European Solidarity Corps (operational on 7 December 2016) and Seeleib-Kaiser supports the introduction of a European Minimum Income Scheme. I endorse all of the above. President Juncker has also displayed leadership in commencing a discussion, and an action plan, on the social dimension of Europe. The European Pillar of Social Rights will be proclaimed jointly by the European Parliament, the Council and the Commission at the forthcoming Gothenburg Social Summit on 17 November 2017. Some of the 20 key principles of the Pillar would be an excellent addition to the existing provisions of EU citizenship. These do not differentiate between movers and stayers. Their addition would make EU citizenship an institution relevant to all EU citizens.

Let us imagine an EU citizenship with explicit references to social protection (Principle 12), minimum income to ensure dignified living (Principle 14), access to health care (Principle 16), assistance for the homeless and the combatting of homelessness (Principle 19), protection of health and safety at work (Principle 10) and the right to fair wages and protection from dismissal (Principles 6 and 7). Such social citizenship rights would reflect Bauböck's suggestion of 'grabbing both horns of the dilemma' and 'risking a rough ride on the back of the bull'. But it would also show that the 21st century EU citizenship, like the early 1990s TEU's version, encompasses vision. It directs our lives with due regard for humane and dignified living, so that in view of it we may live and cooperate with others.

Besides social citizenship rights and duties, one could also envisage the addition of other citizenship duties. For instance, the draft text on Union citizenship included an environmental right and duty: 'citizens should have a right to enjoy a healthy environment coupled with an obligation to preserve and protect it'. Writing in the 1990s, I argued that a clause could be inserted in Part 2 TFEU stating that 'all Union citizens have an obligation to display solidarity with other Union citizens and nationals of third countries. This obligation entails respect for each person's dignity and the rejection of any form of social marginalisation'.[4] More recently, I have argued that 'possible social citizenship duties that might find their way into the TFEU's provisions on EU citizenship in the future are: a) a duty addressed to both the member states and the Union to promote the equal standing of all citizens

[4] Kostakopoulou, D. (1996), 'Towards a constructive theory of citizenship in the European Union', *Journal of Political Philosophy* 4 (4): 337–358.

in the EU by taking all possible measures to promote labour market participation and to fight poverty, homelessness and social exclusion; b) a duty on the part of the member states and the Union to promote inclusive access to the resources, rights and opportunities needed for participation in the democratic life of the Union; and c) an institutional equality duty applying to all levels of policy-making.'[5]

The EU would also benefit from the incorporation of the right to good administration which is enshrined in Article 41 of the EU Charter of Fundamental Rights into the EU citizenship provisions, thereby extending the scope of the corresponding duty-bearers to the member states (and all public bodies). According to Article 41(2) of the EU Charter this right includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file and the obligation of the administration to give reasons for its decisions. Given that most of the decisions that affect EU citizens (be they movers or stayers) are taken by the authorities of the member states, it is difficult to understand why only EU institutions should have the obligation to observe good and fair administration. Article 41(3) of the Charter also gives every person the right to 'have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the member states'. Similarly, all public bodies in the member states should be bound by the same obligation. Freedom cannot be separated from dignity and the rule of law and the making of decisions by public bodies in the member states without giving an opportunity to those adversely affected to be heard or without a clear and adequate reasoning epitomises disrespect for citizens and contempt for procedural legality.

Looking forward

This interpretation also reveals a post-Marshallian template for EU citizenship. I am certain that scholars, policy-practitioners, civil society representatives as well as the readers of this forum will have more ideas about future EU citizenship rights and duties. Instead of devoting precious time, energies and resources to wasted frictions and unnecessary quarrels, let us welcome the future and reflect on the proposals and the thoughts expressed by Ferrera and all the other contributors in this forum. Free movement and equal

---

[5] Kostakopoulou, D. (2014), 'European Union citizenship rights and duties: civil, political and social', in E. Isin & P. Nyers (eds.), *Routledge Handbook of Global Citizenship Studies*, 434. London: Routledge.

treatment (the civil dimension), political participation (the political dimension) and social protection (the social dimension) are important for the development of the self and the flourishing of societies. One cannot promote one dimension and restrict or overlook the others; all are implicated in practice and interact with one another. Similarly, rights cannot exist without duties, be they explicit or implied, perfect or imperfect. An EU citizenship that reflects the values of the EU (Article 2 TEU) and the goals of the European integration project (Article 3 TEU) must have both.

Why the Crisis of European Citizenship is a Crisis of European Democracy

Sandra Seubert

In his detailed reflections Maurizio Ferrera engages with pressing issues about the future of European integration. He starts from the observation that there is considerable disappointment about the actual effect that EU citizenship has had in the last 25 years since its introduction. This is a quite modest description for the fact that the rise of right wing nationalism and Euroscepticism seems to indicate severe doubts about the functionality and the legitimacy of the existing EU institutions and the project of European integration in general. In the economic and subsequent sovereign debt crisis tacit consent for the course of integration has evaporated. The EU increasingly influences the everyday life of citizens without at the same time increasing its legitimacy to do so. What can EU citizenship bring about in this situation?

The populist attacks against Europe can be interpreted as a result of the current lack of democratic and social integrative sources. Ferrera convincingly analyses the characteristics and flaws of EU citizenship, in particular regarding its social dimension, and proposes an agenda of reform to enhance the integrative function. He convincingly diagnoses the shortcomings of EU citizenship in its 'isopolitical' dimension but is rather reluctant to draw more radical conclusion of reform in the 'sympolitical' dimension. In what follows I will take issues with some general assumptions of his argument about enhancing social citizenship and reflect on the necessity and nature of democratic reforms.

Why social citizenship?

Ferrera reconstructs the historical process of a nationalisation of citizenship – its success in creating boundaries and bonds and demanding loyalty in exchange for protection – but mentions the main characteristics of *democratic* citizenship only implicitly: the promise of equality and freedom under self-given laws. In its current shape the EU might just be too far away from this promise, so any allusion to it seems overly risky and comes close to opening a Pandora's box. But by taking up the language of citizenship this

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_48

box is already opened anyway. The association of the idea of citizenship with the European Community promised its transformation into a polity whose constituent elements are no longer only the member states. Has the EU 'overstretched' itself with this promise? Ferrara's argument for strengthening the integrative function of EU citizenship rests on the assumption that the introduction of social rights as entitlements enhanced the salience of citizenship in the (national) past and is likely to do that in the (European) future. While he concedes that much has changed since 'Bismarckian' times – welfare states have been retrenched and changed in their logic of providing assistance – his general intention is to revive this idea: 'adding stuff', i.e. using instrumental resources such as monetary benefits in order to make EU citizenship more salient, visible and tangible in order to 'directly empower' European citizens. My concern is that this short-cut might not be successful unless European citizens envisage the European project as their voluntarily chosen common concern. Ferrara describes his strategy as realistic but this also means that it follows up on a problematic logic that has driven European integration so far: to win support by delivering tangible advantages for particular groups.

No doubt: no political citizenship without social citizenship. Political participation must not appear as a class or status privilege (if it is supposed to be democratic). But if citizenship is about authorising the laws one is subjected to, its normative core is about *empowerment* rather than protection. Citizenship is not a status that the enlightened monarch, in this case the European leaders (or an avant-garde judiciary as Susanne Schmidt argues), can bestow on subjects. Citizenship is about the development of a political subjectivity and a practice through which free and equal individuals collectively take their fate into their own hands. Enhancing EU citizenship would thus mean: moving away from the current focus on protecting rights – even if they are no longer primarily the rights of economically active 'mobile' citizens and include the socially disadvantaged – and putting the political agent who wants to influence the conditions of his/her existence at the centre.

Countering anti-European politics

Christian Joppke suggests that it might be a categorical mistake to apply the citizenship concepts to the EU in the first place, since the EU is a regulatory regime rather than a 'protection racket'. We have every reason to be suspicious if EU citizenship is supposed to conceal this. Absolutely true, but

doesn't this suggest another conclusion? The division of labour between economic, regulatory policies as European issues, on the one hand, and social, labour market and redistributive policies as national issues, on the other hand, is currently deeply contested. With every new step of integration, in particular with regard to Economic and Monetary Union, transnational interdependence has been growing, creating a need for political debate and discretion which is at odds with the depoliticised intergovernmental mode of decision-making in the EU.[1]

The crisis of European democracy and the crisis of European citizenship go hand in hand. Detached from political space the European citizenry is left without clear addressees for dealing with social and political conflicts. The EU is not yet perceived as an (emerging) context of justice. The framing of justice has for a long time been gripped by a 'Westphalian political imaginary', which means it has been restricted to the modern territorial state.[2] Indeed, what is needed is a 'broader conception of social justice in Europe' (Andrea Sangiovanni). In the current institutional set up, taking on the pan-European perspective of a Union citizen is systematically discouraged. What a European democracy demands is a transnational coding of social conflicts, a border-crossing articulation and deliberation in order to make them visible and understandable as transnational economic or cultural lines of conflict.[3] But what we witness instead is a resurrection of national stereotypes. Since the cosmopolitan, pro-European elite has difficulties in convincingly explaining why membership in this Union is worth promoting, disadvantaged citizens from prosperous member states tend to be in favour of putting an end to European integration, whereas less well-off citizens in the Union's deficit countries demand redistributive policies *within* the Union which most of their prosperous counterparts are likely to refuse.[4] It becomes

---

1 Offe, C. (2015), *Europe Entrapped*. Cambridge; Malden, MA: Polity Press, 25–28.

2 Fraser, N. (2008), *Scales of Justice. Reimaging Political Space in a Globalizing World*. Cambridge; Malden, MA: Polity Press, 12.

3 E.g. contrary to public representations it is not Germany as a whole that is 'Export Master', but certain regions, in particular in the South-West, whereas e.g. Northern Italy is comparatively more productive than East Germany.

4 It is remarkable that left-wing protest movements in debtor states such as Spain or Greece and the majority of the population in these countries are not 'anti-European' in general and not in favour of an exit from the EU, but rather against austerity policies which they identify primarily with Germany. Exit options are rather articulated in the relatively well-off member states. For an instructive differentiation of the Northern European New Right, a Central-East

painfully obvious that European citizens are not yet members of a solidly political Union, but that they are still primarily members within a Union of states, where national interests are played off against each other.

There is a fatal *misframing* of social conflicts along national rather than social cleavages. How can this misframing be broken up? A politicisation of European issues is needed. As Rainer Bauböck rightfully stresses: The dilemma of EU citizenship is a political one and needs to be addressed in a political arena. In the institutional architecture of the EU the European Parliament is the actor that is most likely to articulate and win recognition for transnational social interests. But it cannot be successful without social intermediaries: an active civil society and citizenry that would pass on the conflicts negotiated in parliament to the various democratic publics and *vice versa*.[5] In the long run the future of EU citizenship will depend on how a multilayered governance system such as the EU will be able to balance the different levels of political participation, thereby accommodating principles of political equality, public control and influence on political decisions. 'Liberal de-dutification' (Joppke) is not a particular problem of EU citizenship, but what is a particular problem is the lack of a clear social reference group: a community of citizens who grant each other rights on the basis of reciprocity. The challenge lies in the construction and legitimation of new frames of reference for the deliberation of social and political conflicts. This is indeed a *republican* project but different from the one that Richard Bellamy envisages. Bellamy argues in favour of a complementary status rather than a fundamental status of all EU citizens on the basis of a protection of "diversity". His idea of 'republican intergovernmentalism' is concerned with promoting equality of concern and respect between the different citizenship regimes of the EU's constituent member states. But in a context such as the current EU, in which social and economic spheres are decoupled, 'protection of diversity' might well disguise power asymmetries and lead to a conservation of wealth disparities and inequalities.

European defensive nationalism and a Southern European, pro-European and pro-refugee New Left, see Kriesi, H. (2016), 'The Politicization of European Integration', *The Journal of Common Market Studies* 54 (S1): 32–47.

[5] See also the proposal by Thomas Piketty et al. for a parliamantary assembly of the euro-zone which is supposed to be combined of members of the EP and members of national parliaments (Hennette, S., T. Piketty, G. Sacriste & A. Vauchez (2017), *Pour une Traité de democratisation de l'Europe* [Treaty for the democratization of Europe], Paris: Le Seuil).

Coping with the crisis demands effective coordination of economic and financial politics But the peoples of the member states cannot be expected to give up creative power at the national level without a clear substitute on the transnational level in sight. That is why the answer to the crisis is unavoidably connected to issues of European democracy.

Regaining the Trust of the Stay-at-Homes: Three Strategies

Philippe Van Parijs

I greatly appreciate and warmly welcome contributions that go far beyond criticism and lamentation and make concrete proposals for improving Europe's state of affairs. We have a plethora of jeremiad rehearses. We need far more people like Maurizio Ferrera with both the courage to stick their neck out and the readiness to learn from their critics—without losing courage.

Two distinctions

I found the framing of the central issue in terms of Paul Magnette's distinction illuminating. Very roughly, the actual and potential exercise of the isopolitical rights granted by the EU (essentially the four freedoms plus non-discrimination) are gradually undermining the member states' capacity to keep effectively guaranteeing to its citizens some of the sympolitical rights they were used to (not least various aspects of physical, socio-economic and cultural security).

This stylised formulation of the central issues fits in with a second distinction adopted by Ferrera: a distinction between two categories of European citizens which I first heard used in this context by Koen Lenaerts, the president of the Court of Justice of the European Union (CJEU). For "movers", the creation and expansion of their EU-wide isopolitical rights can easily compensate the reduced effectiveness of the sympolitical rights granted by their own state. But for the "stay-at-homes"', this is far from obvious and they cannot easily be fooled into taking it for granted. No wonder that some political entrepreneurs identified the juicy slot, with a thriving anti-European populism and a widely felt legitimacy crisis as a result.

All movers

If this is a fair stylised characterisation of the core of the EU's current legitimacy crisis, there are three straightforward strategies one can think of. A first one, arguably the dominant one from the side of the European institutions, consists in trying to convert as many stay-at-homes as possible into

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_49

movers. Those attracted by this strategy presumably feel encouraged by the economic creed that market-driven mobility is good for efficiency, as it enables factors of production to move to those locations where they are most productive.

However, the mobility of workers and of economic activities also produces effect too easily ignored by economists: the dislocation of communities in both the countries of origin and the countries of arrival. Linguistic diversity makes these externalities far more serious on European scale than on national scale. A Europe with a majority of movers would not be a solution. It would be a catastrophe. Ferrera's modest proposal to further extend Erasmus-type mobility beyond a privileged fraction of university students can make sense for several reasons, but this cannot be seen as a first little block of what might provide a structural solution.

Retreat

The second strategy consists in curtailing the isopolitical rights that are the cause of the problem. In an ambitious interpretation, these rights currently include the right for any EU citizen to settle anywhere in the EU and enjoy, whichever member state she settles in, the same sympolitical rights as the citizens of that state. The de facto and largely de jure restriction of these rights to workers, active job seekers and their dependents is arguably required to discourage "welfare tourism" and thereby to protect the effectiveness of the sympolitical rights conferred by national welfare states. In the pre-Brexit-vote negotiation, the UK asked for the possibility of discriminating further, by denying immigrant workers from EU countries access to some in-work benefits. And one of the options many British soft-Brexiteers would be delighted to see accepted is full access to the EU market combined with full control over who is entitled to enter the UK—an option firmly rejected so far by the EU side. I understand the EU's negotiating stance, if only as a requirement for blocking the UK's appetite for further expanding, through cherry-picking, the massive *net* brain drain of half a million highly educated EU 27 citizens currently living in the UK.

However, as a general measure within the EU, would a shrinking of isopolitical rights not be an acceptable option if that is required to regain the allegiance of the stay-at-homes? Ferrera shows little inclination in this direction. No doubt such infringements on the principles of free movement

and non-discrimination would require treaty changes. But with a crisis as deep as the one diagnosed at the start, is there any hope of resolving it with unchanged treaties? More decisively, these infringements would amount to giving up fragments of an extraordinary achievement from which the EU can derive legitimate pride. Free movement and non-discrimination are not only good, up to a point, for economic efficiency. They are also good, *ceteris paribus*, for the sake of social justice, though not if *ceteris* are so far from *paribus* that they end up undermining valuable national sympolitical rights. We should therefore stop pondering more or less radical versions of this second strategy only if there is enough hope from the side of the third one—which, I believe, enjoys Ferrera's preference, as it does mine.

Caring Europe

The third strategy consists in creating or expanding sympolitical rights at EU level or at least in making some existing EU policies that currently operate via member states governments be perceived more like sympolitical rights directly bestowed by the EU. This is how I interpret Ferrera's proposal of a social card, or his idea that, in the distribution of its structural and regional funds the EU should be clearly identified "in the last mile". I am not sure this last idea will do much to assuage the resentment of the stay-at-homes of the richer member states. Surely, they are likely to realise that, if their country is a net contributor to the EU budget, more could and arguably would be done for them, not less, in the absence of EU policies. In at least one of Ferrera's proposals, the EU labelling of the 'last mile' might even be counterproductive: if it is the EU that is seen by locals to pay for the benefits of asylum seekers and refugees, for example, some may indeed think: 'At least we are not paying for them', but others perhaps also: 'It is again for these foreigners that the EU is opening its purse. Nothing for us.'

Whatever problems specific proposals may raise, however, I do agree fundamentally with Maurizio Ferrera that the key to the solution we are seeking is the resolute creation and expansion of EU-level sympolitical social rights. The EU must become a caring Europe and be seen to be one. Proposals such as funds for the retraining of workers hit by 'globalisation', an EU-wide complementary insurance scheme for short term unemployment, Michael Bauer and Philippe Schmitter's proposal of a means-tested Euro-stipend and the proposal of a universal Euro-dividend each have their

own advantages and disadvantages, but they all fit in this category.[1] For the sake of addressing our problem, they are far superior, it seems to me, to inter-state reinsurance systems, as likely to appeal to the technocrats as they are unlikely to enthuse the stay-at-homes.

As a further variant of this strategy, Ferrera's idea of a voucher for lifelong learning also seems to me well worth exploring further, especially if it goes along with making available to all EU citizens some educational resources developed at EU level, starting with the translation softwares developed within EU institutions. Blended lifelong learning—combining the mobilisation of the cognitive wealth of the internet with local critical and creative appropriation—are key to both justice and efficiency in this century. Playing a major role in it is one of the ways in which the EU can become—and be perceived to have become—a caring Europe.

Duties

There was not that much in Maurizio Ferrera's paper about the duties which the title of this debate suggested we would see defended. Certainly a single army and compulsory military service for all European men and women would be a magic bullet for the strengthening of the European identity and thereby for the sustainability of a caring Europe. Largely for good reasons, this is not an option. But a European army should be one, and also conscription into an appropriately designed European civil service. I am in the scientific committee of the initiative that supports the creation of a voluntary civil service open to all Belgians. I am in favour of making it compulsory, and indeed of Europeanising it. But many details in the implementation matter greatly to prevent it from proving counterproductive.

At EU level, just as at the local or the national level, however, the most important civic duties are not legal ones. At all levels, political leaders must become able (again?) to tell their respective peoples: 'Don't ask what your municipality, your state, the Union can do for you, but what you can do for

[1] See Dullien, S. (2014), 'Why a European unemployment insurance would help make EMU more sustainable', *Social Europe*, 3 October 2014, available at https://www.socialeurope.eu/european-unemployment-insurance-help-make-emu-sustainable; Schmitter P. & M. W. Bauer (2001), 'A (modest) proposal for expanding social citizenship in the European Union', *Journal of European Social Policy* 11 (1): 55–65; P. Van Parijs, P. (2013), 'The Euro-Dividend', *Social Europe*, 3 July 2013, available at https://www.socialeurope.eu/the-euro-dividend, and Van Parijs P. & Y. Vanderborght (2017) *Basic Income*, Cambridge (Mass.): Harvard University Press, chapter 8.

them.' For this not to sound ridiculous, leaders must deserve the trust they are expecting. And institutions must be shaped so as to enable them to deserve this trust. From this perspective, institutions that turn the EU into a caring Europe are a must.

Social Citizenship, Democratic Values and European Integration: A Rejoinder

Maurizio Ferrera

This Forum debate has gone way beyond my expectations and hopes. I thought that commentators would mainly address my proposals on enhancing rights and introducing duties. The conversation has instead extended to my diagnosis as well, to the rationale which lies at the basis of my prescriptive ideas. By focusing on starting points, the forum has thus brought into light different perspectives and styles of reasoning around citizenship and even broader political questions. With hindsight, I should have spelled out more carefully my basic assumptions. But there is time to remedy this now – and not just for the sake of this particular discussion. I am in fact convinced that a closer and more systematic dialogue between empirical, normative, legal and social theorists would be a welcome and beneficial innovation, a way to contrast excessive disciplinary perspectivism and the related risks of analytical lock-ins.

I will begin this rejoinder by addressing the disagreement on starting points. I will then move to general issues of democracy, citizenship and social rights. Next, I will revisit my proposals in the light of the critiques and suggestions received. In the concluding section, I will broaden again the scope towards conceptions of justice, political legitimacy/stability as well as towards possible visions about the future of the EU.

Two perspectives on politics: alternative or complementary?

My starting point is empirical-theoretical. I have taken stock of the historical developments which led to the consolidation of national (social) citizenship rights and – based on an extensive scholarly literature – have highlighted the key political function they served for state formation. Social rights expanded opportunities and created an area of equality vis-à-vis certain risks and needs; they connected citizens in a web of reciprocal obligations,

This text has been written in the context of the REScEU Project (Reconciling economic and social Europe, www.resceu.eu), funded by the European Research Council (Advanced Grant no. 340534).

R. Bauböck (ed.), *Debating European Citizenship*, IMISCOE Research Series, https://doi.org/10.1007/978-3-319-89905-3_50

fostered identity and community ties – both having a strong 'bonding' and emotional component.[1] I see EU citizenship as a novel step in this long term development of right-based citizen empowerment. But I suggest that the integrative and legitimating potential of EU citizenship is not only weaker than its national counterparts, but also ripe with potentially divisive consequences, due to its isopolitical nature. I do acknowledge that workers' mobility can bring and has indeed brought substantial economic advantages. But functional arguments and evaluations play a secondary role in my diagnosis. And while I appreciate Richard Bellamy's friendly effort to extract an unarticulated moral view from my reasoning (a form of cosmopolitanism), my own effort has gone in a different direction: analysing EU citizenship as a *political* instrument which – regardless of its functional or normative rationale – can produce (or not produce) political cohesion and stability. My questions rest on a realist conception of politics, conceived as the sphere whose foundational task is to 'keep the community together' (of course under democratic constraints in the cases discussed here) and to look at citizenship in this perspective. Bellamy goes some way in my direction when he defends the nation state (and thus boundaries) in instrumental terms, i.e. as the most effective system and territorial container devised so far for safeguarding responsiveness, accountability and equal rights. But my perspective takes an additional step by asking: what are the empirical conditions of possibility for nation-building (or EU- building) and for the political viability over time of the democratic state (or the Union)? And what role can (EU) citizenship play in this context?

Many commentators have either not captured or not appreciated my empirical perspective. Christian Joppke considers my association between national citizenship and political bonding/loyalty as a 'questionable idealisation' and dismisses 'affectual and normative attitudes' towards state authorities as 'delusional at best'. What is the ground of such a severe takedown? If I understood him correctly, Joppke espouses a state theory whereby the protection logic of national citizenship has mainly served to coat the elementary state function of providing security with 'flowery allegiance and loyalty'. As factual judgements, these statements sound quite daring and farfetched to me. The war-welfare nexus has been indeed highlighted by a wealth of comparative historical works.[2] But even if and when social pro-

---

1 Ferrera, M. (2005), *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*. Oxford: Oxford University Press.

2 The latest and most up to date work is Obinger, H., K. Petersen and O. Starke (eds.) (2018), *Warfare and Welfare: Military Conflict and Welfare State Development in Western Countries.* Oxford: Oxford University Press.

grammes were originally introduced to 'coat' the warfare goals and strategies of the nation state, their 'protection logic' has subsequently acquired an autonomous dynamic, which in most cases started to generate genuine bonding, loyalty and diffuse support. If this is the historical case, I fail to see why puzzling about the integrative potential of EU citizenship should be "a category mistake". It is precisely by using this category that we can single out the political differences between state-building and EU building and identify the limits and constrains of the latter compared to the former.

Joppke criticises my starting point also from a normative point of view, defining as 'retrograde' my remarks about mobility rights being restricted to EU citizens and not (fully) to third country residents. To begin with, this is today a fact, with factual implications that need to be captured and empirically analysed. Second, as aptly noted by Rainer Bauböck, the dimension of exclusion inheres in any concept denoting membership and inclusion. It is true that, from a normative perspective, the balance between inclusion and exclusion must rest on principled justifications. But, again, my metric is realist-political. Citizenship integrates and legitimises political power to the extent that it 'bounds', that it is a recognisable marker of an insiderhood to which certain selective advantages are associated. I am not formulating a value judgement here; I am not saying that things ought to be this way. What I am saying is that we have empirical evidence that citizenship, when operating within a politically bounded space, has a potential to integrate and legitimise. The 'good' in which I am interested is the political cohesion of the EU. In this sense, and only in this, I make a value choice. But it is only a very weak 'value-related' choice *à la* Max Weber. I merely believe that it is interesting and important to raise questions about the viability of the EU, given its undeniable conspicuousness as a political entity and its increasing role in shaping people's life chances. Nothing more or less.

The contrast between the empirical and the normative perspective is best exemplified by Frank Vandenbroucke's and Andrea Sangiovanni's well-articulated contributions. Both outline distinct conceptions of justice for EU solidarity and free movement in particular. And they both embark on this exercise because they deem my reasoning lame (my interpretation), peripheral (Vandenbroucke) or lacking (Sangiovanni) in respect of the more 'foundational' debate about justificatory principles. For them, the basic challenge which I dodge is how to address the question of an ideal (presumably rational and informed) citizen asking, in Sangiovanni's words, 'why should I accept or enhance EU citizenship?'. I concede that my empirical and realist arguments would have little traction indeed were I ever to engage in a philo-

sophical *disputatio* of this sort. But would they remain equally unpersuasive if I engaged in a debate with a real world Europhile politician struggling everyday with the problem of consensus? In this situation, it would probably be the philosopher's view that has little traction and might be considered unfit for pragmatic purposes. It is, indeed, a matter of perspective as well as of interlocutors. I locate myself in the real situation of late 2010s Europe; I notice that the fact of free movement causes the fact of Euroscepticism; I surmise that this dynamic may well jeopardise the political stability of the EU as such; I draw on the toolkit of comparative politics and public policy analysis and suggest that a recrafting of EU citizenship might contain this threat. In addition to my fellow political scientists, my interlocutors are essentially the policy-makers. Yes, I confess: the elite. Not because I am dismissive of 'the people' and cynical about the stylised processes of democratic will formation elaborated by political philosophers. But rather because I think that elites are and should not only be spokespersons of their voters, but responsible leaders as well (remember the polemic between Edmund Burke and his Bristol electors?). And, in my perspective, 'keeping the community together' in the face of pluralism and disagreement (and hopefully building constructively on both) is a key task of responsible leaders.

As self-contained conceptions of EU social justice, I do find Sangiovanni's and Vandenbroucke's arguments coherent and largely convincing (with some caveats, starting from those raised by Bauböck). They have an academic, but also a political relevance, to the extent that they can provide valuable symbolic resources to policy-makers puzzling about problem-solving and consensus-building. But – as both authors obviously know – the public acceptance of these arguments cannot be taken for granted. What can be done if there is disagreement? In the philosopher's perspective, one should probably move up one level and interrogate those philosophical doctrines about political justice, which specialise in principles on how to fairly manage disagreements. This regress *ad infinitum* is however of little use for real world politics and politicians, struggling with conflicts here and now. Without detracting from the importance of principles and normative reasoning, empirical political theory shifts the focus on how institutions and policies relate to system performance and diffuse support. Collective acceptance *for the right reasons* remains a desirable ideal goal and may even result in greater stability. But, in Weber's wake, empirical political theory conceives of legitimation as a more complex property and process, resting not only on *reasons* (normative and instrumental) but also on affectual and traditional *orientations.* It is this mix of motives that allows a real world polity to survive what Ernest Renan called the "daily referendum" on associative life and collective institutions.

The debate has revealed another misunderstanding that I may have inadvertently originated in my initial contribution and that needs to be cleared. Joppke has raised the worry (which has resonated in other comments as well) that my diagnosis and proposals may bring ammunitions to the enemy, i.e. 'populist demonology'. Let me be crystal clear: in acknowledging the fact of Euroscepticism and the profusely documented increase of chauvinist orientations of European voters, I certainly do not imply that one must be indulgent towards such phenomena, not least because of their manipulative character. On the other hand, a mere judgement of fact cannot be accused of buying into the enemy's views. And while I do agree with Dorte Martinsen that researchers should concentrate on fact finding and perhaps even engage directly 'with the tensions described, be they mainly perceived or real', I must be able to use descriptive categories such as 'stayers' or 'movers' and of analysing observable social and political tensions between them without being accused of covert intelligence with the enemy.

The most appropriate and fruitful conclusion of this discussion on fundamentals is a plea for mutual understanding and collaboration between normativists and empiricists. What I have in mind is not just a *modus vivendi*, but the construction of an overlapping consensus whereby: 1) each side makes an effort to acknowledge an equal, if obviously different, theoretical relevance, purchase and autonomy on the other side; 2) both look more closely into each other, especially when normativists make descriptive or causal arguments and empiricists deal with values or undertake political or policy evaluations. To some extent this construction is already under way.[3] I find that it is a challenging enterprise, opening novel avenues of research especially for younger scholars.

Citizenship, democracy and European integration

Magnette's distinction between sympolitical and isopolitical citizenship rights has proven very useful to frame the entire debate. It has also pushed some commentators to focus on the political dimension of citizenship – equal participation rights to democratic self-rule. Sandra Seubert is correct in pointing out that I have not adequately addressed this dimension in my historical reconstruction and diagnosis. The European project, Seubert argues, ought to be voluntarily chosen by citizens who consider it as responding to common concerns. If this is not the case, as noted also by Kostakopoulou, then my proposals would just reinforce the problematic

[3] See Rossi, E. & M Sleat (2014), 'Realism in Normative Political Theory', *Philosophy Compass* 9 (10): 689–701.

logic that has driven European integration so far: buying consensus by delivering tangible advantages for particular groups. Van Middelaar has defined this logic as the Roman strategy of EU consensus building through *panem et circenses* – and without even reaping the full benefits of this.[4]

Does my realist perspective inevitably make me a Bismarckian in disguise or, at best, an elitist and paternalist liberal-democrat? Probably yes, if the starting point is a normative preference for participatory democracy based on individual equality and freedom under bottom-up, self-given laws. But that is not the only possible starting point. When I became a political scientist, I started to appreciate 'Schumpeter's other doctrine', i.e. the so-called competitive theory of democracy, which, in my reading, is not an elitist juxtaposition to the participatory view. It rather corrects the latter by bringing back into the democratic scene the important figure of the (would-be) elected leader and by drawing attention to the electoral logic as such. In the real world, free elections inescapably activate a quid pro quo dynamic whereby *whats* (policy programmes inspired by different values and ideologies) are exchanged for *whos* (votes in support of competing political leaders promising *whats*). On this view, political citizenship confers an equal (if minimal) power resource – the individual vote – which can be spent during electoral exchanges. Democratic rights of political participation logically presuppose civil rights and are in their turn instrumental for the acquisition and defence of social rights. Once the whole package is in place, the famous Marshallian tryptic generates mutual synergies; citizenship not only acquires a self-sustaining equilibrium but becomes a unique instrument for taming and controlling vertical power through the multiplication of the horizontal powers and endowments of citizens, in their various social roles and life situations. The keystone of this system is sympolitical closure. Who gets what, how and when is the result of domestic democratic politics, which produces collectively binding sovereign decisions. Domestic markets – for goods, services, capital and labour – can of course be (made) open. But key national decisions result from citizens' endogenous preferences on how to manage the consequences of openness and define/redefine its boundaries. My conclusion is not dissimilar from Seubert's (democratic empowerment is the core) but on my view the core is derived from empirical, not normative theory.

Gradually, and to some extent creepingly, the EU has lifted the sympolitical keystone. Isopolitical integration has caused increasing cross-system externalities which can no longer be democratically managed at either the national or the supranational level. The EU is today a quite peculiar political

[4] Van Middelaar, L. (2013), *The Passage to Europe, How a Continent became Europe*. New Haven: Yale University Press.

system which defies all our analytical categories. We say it is "far from federal". But in certain policy areas regulatory standardisation linked to free movement has gone way beyond the limits that historical federations (such as the USA or Switzerland) have not dared to trespass. Swiss cantons still enjoy wider margins of residency-based 'discrimination' than EU member states. In the US it is true that 'states cannot select their citizens', especially when it comes to welfare, as Martin Seeleib-Kaiser reminds us. But they can, for example, charge higher fees to out-of-state students applying to state universities and delay residence requests by students for the mere purpose of paying lower fees. The Court of Justice of the European Union (CJEU) has become a hyper-federal watchdog of EU law and its supremacy over national law – with serious social consequences, as correctly highlighted by Susanne Schmidt. Another indicator of hyper-federalism is the extent to which some policy decisions are delegated to non-majoritarian institutions with very wide regulatory autonomy (e.g. as regards state aids, competition, or banking supervision). It is true that this institutional architecture has resulted from 'demoicratic' procedures and decisions in the past (the CJEU was born from the Rome Treaty, the ECB from the Maastricht Treaty, and so on). But the fact is that today such institutions find themselves far removed from the basic form of democratic control: the vote of individual citizens. In some other core areas of state power (e.g. fiscal policy: taxing and spending) we are under the illusion that the EU only rests on intergovernmental coordination. But we use intergovernmentalism as an indicator of inter-nationalism, in Bellamy's sense: a two level game in which national citizens mandate their governments to negotiate inter-national agreements under the implicit assumption that subsequent decisions under these agreements remain responsive and accountable to national citizens. This is no longer the case. Under the reformed Growth and Stability Pact, the Commission's decisions on macroeconomic imbalances or budget deficits (decisions which may have huge consequences for ordinary citizens) can be rejected only through a reverse qualified majority rule, which has been (correctly in my view) equated with 'minority rule'.[5] I am afraid that the EU has long ago ceased to conform to that 'republican inter-nationalist' blueprint praised by Bellamy. And I think this also obtains for the intuitively appealing demoicratic formula of 'governing together, but not as one'.[6] If my diagnosis is correct, in key policy areas the EU has already become a

[5] Daniele, L., P. Simone & P. Cisotta (eds.) (2017), *Democracy in the EMU in the Aftermath of the Crisis*. Berlin: Springer.

[6] According to the famous formula as understood by Nicolaidis. See Nicolaidis K. (2013), 'European Demoicracy and Its Crisis', *Journal of Common Market Studies* 51 (2): 351–369.

powerful 'one', in which some *demoi* (not to speak of some citizens) are more equal than others.

What are the consequences of this opaque regime (that we find very hard to define in terms of democratic theory) for the Marshallian triptych described above? The least that we can say is that the new regime has entirely destructured the coherence of the triptych and heavily undermined its effectiveness and even viability. Strangely enough, this situation has been endogenously generated. Democratic sympolitical decisions have originally authorised isopolitical standardisation of economic and civil rights. Such decisions have also deliberately transferred some sympolitical sovereignty to the supranational level. The latter has gradually undermined the content and quality of domestic social rights. The hands of national citizens have been tied: in certain domains their votes have become ineffective or no longer requested. It is unclear which majorities prevail, in some cases the rules even allow minorities to prevail.

A full account of how we got here is way beyond the scope of this rejoinder.[7] Empirical political theory suggests that to some extent we have been victims of unintended consequences and perverse effects of institutional logics. We should also be careful not to neglect the enormous advantages that integration has produced: not only more aggregate welfare, but also robust safeguards for peace and security. As noted by Bauböck, the EU was born to anchor the post-war system of fragile and shattered democracies. And still today we badly need it to secure the conditions of possibility for democracy in Europe. I would add a second consolation. Political supranationalisation has partly served – especially in certain member states – as a beneficial constraint for irresponsible domestic choices in taxing and spending and as an incentive to engage in responsible strategies of functional and distributive rationalisations. There were important cross-national variations in the coherence and balance of the Marshallian tryptic and some did need significant corrections, especially in terms of financial duties (see below).

The bottom line of my reasoning is, however, that the EU citizenship regime(s) are currently skewed and unstable. Let me then turn to the question of what can be done, focusing on one particular instrument: EU citizenship in its social and duty components.

---

[7] For an updated debate, see Chalmers, D., M. Jachtenfuchs & C. Joerges (eds.) (2016), *The End of the Eurocrats' Dream*. Cambridge: Cambridge University Press.

Caring Europe, my proposals and the 'holding environment'

Agreeing with my diagnosis about a growing tension between stayers and movers, Van Parijs identifies three fundamental strategies of response. The first ('all movers'; we could also call it 'more of the same') consists in 'converting as many stay-at-homes as possible into movers'. Since a total conversion would be obviously impossible, let us say that this strategy should rest on persuading the stayers to internalise the functional and normative rationales of mobility as a collective benefit. But empirical evidence tells us that an increasing number of stayers do not (no longer) buy into that view. The 'all movers' strategy is not a solution, but an aggravation of the political problem. The second strategy is 'retreat', i.e. curtailing those isopolitical rights that cause the problem. I did not discuss retreat in my introduction, but yes, I believe that there is room for some steps in this direction.[8] I fully agree, for example, with Schmidt that limits should be posed to the judicialisation of citizenship. I also think that the mobility regime can be partially reconfigured in a restrictive direction through secondary legislation alone – no Treaty changes needed. The third strategy is 'Caring Europe', which was first submitted to EU leaders in exactly this wording by a group of scholars (myself included) during the UK presidency of the EU in 2005, under Tony Blair.[9] The political rationale of Caring Europe is not Bismarckian. And while this strategy alone cannot remedy the loss of individual democratic control, it can indeed kill three birds with one stone: 1) it can backstop the centrifugal, Eurosceptic dynamics as well as the destabilisation of the Marshallian triptych; 2) it can safeguard the functional and social justice advantages ingrained in free movement; 3) it can contribute to the overall durability of the EU polity by thus preserving the otherwise vulnerable pre-conditions of peace and democracy in Europe (Bauböck's argument).

The Caring Europe strategy has precisely informed my concrete proposals, so let me now revisit them in the light of the debate. Both Seeleib-Kaiser and Ilaria Madama underline that there is already more ground than meets the eye for implementing some of my proposals and that the Commission is well aware of the need to integrate stayers in the mobility and social agenda of the EU. This should at least partly overcome the scepticism of Martinsen who is worried about the lack of time and political support for my proposals to mate-

---

8 Ferrera, M. (2017), 'The Contentious Politics of Hospitality. Intra-EU mobility and social rights', *European Law Journal* 22 (6): 791–805.

9 Giddens, A. (ed.) (2006), *The Hampton Court Agenda: a Social Model for Europe*. London: Policy Network.

rialise swiftly. To a large extent, my proposals merely go in the direction of a political rationalisation of the status quo: reaping all the consensus building potential of those instruments that are already available. One might ask: if it is so easy, why has it not been done already? The answer lies in the level at which such decisions are taken and the interests/views of decision-makers at that level. Making sure that the EU role can be captured at the street level and "in the last mile" or introducing a social card is not today European Council stuff. These nitty gritty provisions are decided by the lower echelons of EU and national bureaucracies, primarily interested in administrative and practical details. Last mile implementation is under the radar of local politicians ready to capture the credit of any *panes* or *circenses* accruing to their voters. The integrative and legitimising potential of my proposals should be brought to the attention of top leaders, those who are ultimately responsible for the EU's stability and durability. The launch of a social card for accessing all the already existing co-funded programmes of the EU that provide advantages to all citizens, whether stayers or movers (as well as the enhancement and greater visibility of the external protection advantages of the EU passport) should be promoted by top leaders and could be done rather easily.

The introduction of a voucher scheme (and I like Theresa Kuhn's idea of using in some way the label 'mobility bonus') and of a universal skills guarantee (maybe also a 'children guarantee') require sympolitical agreement. But the skills guarantee is already on the agenda: it could well be deliberately crafted so as to maximise its visibility to the stayers. Some commentators (Sangiovanni, Vandenbroucke, Hermann, Hemerijck) have rightly noted that mobility may not only generate some losses for the stayers of the countries of destination, but also of the countries of origin (e.g. through brain drain). Here the solution could be an active involvement of the EU in sponsoring 'return mobility' programmes. The Central and Eastern member states have already launched national initiatives in this direction to bring back home the 'drained brains' and to help the relocation of their nationals residing in the UK. EU complements to such initiatives would be a very good idea. A sympolitical consensus on a dedicated EU insurance scheme for mobile workers is more difficult to piece together, I acknowledge this. This proposal has been around for many decades, without attracting the attentions it deserved. What is required here is a shift from functional to political attention, in a context of increasing contention about mobility. A similar (and more demanding) shift is needed also for the possible introduction of an EU fund against cyclical unemployment. Here the obstacles concern not only political consensus building, but also epistemic convergence, given the currently prevailing obsessions about 'moral hazard' on the side of ordoliberal elites and experts. More than a century of experience with mass social insur-

ance against unemployment at the domestic level (initially opposed precisely on moral hazard grounds) should indicate however that there are ways of containing the risk and that the risk itself is not so high after all.

Some commentators have themselves made additional proposals in the logic of a Caring Europe. There is no space to enter into the details and I do share the logic (if not all the details) of such additional suggestions. I would like to briefly comment, however, on the more ambitious strategy outlined by Vandenbroucke and Anton Hemerijck about moving towards a European Social Union of some sort.[10] Under this approach, the core of social sovereignty should remain at the national level, where redistributive issues can still largely (but not entirely) be dealt with via national sympolitical decisions. In Vandenbroucke's contribution, one task of the Union should be to make sure that member states do guarantee (via binding constraints or surveillance?) sufficient social provisions and legal minimum wages for whoever legally resides within their territory. In Hemerijick's contribution, the Union should essentially provide a 'holding environment' for an effective functioning of national social protection systems. If I understand him correctly, Hemerijck espouses a 'softer' overall approach, in the logic of the Lisbon and EU2020 agendas, which now underpin the newly created European Pillar of Social Rights. And he is not sure whether it is essential for the EU to claim political credit for its institutional scaffolding. In addition, he feels half way between the inter-national position of Richard Bellamy and my alleged supra-national position. But as I argued above, supranationalism is already with us, and rather 'hype' in some policy areas. Taking it apart – at least to a certain degree – may be functionally and normatively desirable. But is it institutionally feasible, short of a financial/monetary catastrophe? Brexit is teaching us how difficult it is for member states to disentangle themselves from the EU in ways which are decently reasonable in normative and instrumental terms. In this sense, I fully agree with Bauböck that the EU has become a community of – 'prosaic and not at all romantic' – destiny. It is the famous historical institutionalist argument about the temporal quasi-irreversibility of complex institutions (you cannot put the toothpaste back into the tube once you have squeezed it out). My doubts about Hemerijck's softer and semi-internationalist notion of a socially friendly 'holding environment' (HE) are fourfold. First, would it imply a partial dismantling of the

[10] I have outlined and justified my own position on the European Social Union in Ferrera, M. (2017), 'The European Social Union: a missing but necessary "political good"', in Vandenbroucke, F, C. Barnard & G. Febaere (eds.), *A European Social Union after the Crisis*, 3–46. Cambridge: Cambridge University Press.

supranationalist excesses that we now have (as proposed, among others, by Fritz Scharpf)?[11] Would this HE essentially be a top-down construction promoted by enlightened leaders, technocrats and experts? Is it realistic to expect that HE would reinforce 'loyalty to the EU as a common possession of a union of welfare states' in the eyes of voters already mobilised by anti-EU parties? And finally, how can we manage the dangerous and destructive politicisation that free movement has already triggered off? My modest proposals for the short term are motivated by these latter developments. But also for the long term, I think that we should definitely have a plausible and deliberate legitimation strategy for the EU (even as a holding environment) which will never be effective without at least a modicum of "Roman policies" (i.e. resource transfers).

What about duties?

The question of duties has remained somewhat in the shadows of the debate. In my initial contribution I had myself been cautious and modest on this front. The link between duties, and especially tax paying duties, and legitimacy is complex and full of strains. Many of the existing Eurosceptic parties were born as anti-tax parties. If our aim is to enhance the integrative potential of citizenship, we should tread very lightly on this terrain, adopting, as I suggested, a nudging rather than a binding strategy.

Since Joppke has launched an attack on the very idea that citizenship ought to imply duties, I feel a duty to respond. I understand that in normative and legal theory there is an articulated debate on this issue. I do not enter into this debate but will try to summarise my realist approach, in the hope of making my normativist colleagues aware of the essentials of the empirical theory on rights and duties. The production of political goods (policies and generalised compliance) requires 'extractions' from the members of the territorial community, the most obvious exemplars of which have historically been conscription and taxes. Are these extractions part of the citizenship package? Definitely yes, in my perspective. As the etymology of the term clearly suggests, being a citizen means being a member of a *civitas*, a legally constituted collectivity. Since extractions are a precondition for the survival of the latter, a citizen cannot avoid the duties of membership which inhere in her very status as such. Fulfilling one's duties (which also and predominantly means, in ordinary life, to respect the rights of fellow citizens and the prerogatives of the authorities) is key for the success of the "daily referendum" on the political community. Without gener-

[11] Scharpf, F. (2016), 'De-Constitutionalization and Majority Rule. A Democratic Vision for Europe', *MPIfG Discussion Paper 16/14*.

alised compliance, political stability is at risk. The formal titularity of a right is a precondition for its actual exercise. But the exercise is effective only to the extent that there is both horizontal (on the side of other citizens) and vertical (on the side of the authorities) compliance, i.e. the observance of those duties which are correlative of rights. The correspondence of rights and duties is especially important in the case of social entitlements, which entail financial resources. As mentioned above, in various countries the increasing gap between the actual fruition of social entitlements and tax/contributory duties or compliance (e.g. through evasion or the black economy) has led to acute sustainability problems for the welfare state. To a significant extent, such problems have also resulted from irresponsible political choices, i.e. the conferral of entitlements not underpinned by adequate duties of financial participation.

Why do citizens fulfil their duties? In my perspective, this is immaterial. Some may do that 'for the right reasons', some for habit, custom, romantic affection. As I said above, in real world polities, legitimacy rests on a mix of motives. Is the correspondence between rights and duties the product of a coherent historical trajectory and deliberate strategy? Not at all. Citizenship is a symbol that came gradually to encompass pre-existing national patchworks of rights and duties, got intertwined with the parallel symbol of 'nationality' and turned into a basic status, that of 'having rights to have rights' within a bounded space. The symbol over-emphasised the rights side of membership, but it always implied a second side, i.e. the duty to accept duties.

It is certainly true that the substance of the citizenship package has been gradually extended to all legal residents (with the key exception of sympolitical participation rights). But as long as state boundaries remain a fact, the status of citizenship entails a vertical empowerment vis-à-vis territorial authorities which aliens or denizens do not have and through which citizen can define and redefine the rules of access and the content of the denizenship status itself.

Even if ordinary people do not visualise this clearly, the EU is a bounded territorial collectivity. Although derivative of national citizenship, EU citizenship does confer novel isopolitical civil and social rights and their correlative duties as well as novel sympolitical rights through the European Parliament. As I have argued above, the large majority of citizens are 'stayers'. They have to comply with one class of isopolitical duties (accepting mobile workers as equals in the labour market and welfare state) without de facto exercising the corresponding isopolitical rights. Their capacity to change this situation through sympolitical rule making has been curtailed domestically and is still weak supranationally. I do not share Hemerijck's theory according to which

EU citizenship was adopted to seal the internal market. Historical reconstructions show that the new provisions of the Maastricht Treaty (also) reflected the social and political strategy of EU building of leaders such as Jacques Delors. Whether by design or by failure, the fact is that rather than complementing national citizenship regimes, EU citizenship has ended up destabilising them. My proposals aim at a political rebalancing. In this perspective, I believe that a smart gradual strategy of soft dutification of EU citizenship, initially based on nudging, might have positive and virtuous political effects. Kuhn worries that such nudging would only activate those who are already in favour of the EU. So be it. My survey data show that the share of EU voters that do favour cross national or pan-European forms of solidarity exceeds the share of cosmopolitans.[12] Eurosceptics are extremely vocal, but their numbers oscillate between 15 per cent and 30 per cent, depending on the member state. Pro-EU voters are still a large majority, but this majority is silent and disoriented. Adding stuff to EU citizenship and some nudging for its dutitification could provide, precisely, a focus to coalesce around the Caring Europe agenda.

Conflicts and visions on the future of Europe

Time to conclude. My realist perspective is only loosely related to values. It rests on a Weberian value relation and then emphasises the centrality of instrumental political goods, which have to do with safeguarding 'what is necessary to maintain democracy' (Bauböck) so that it can produce the final goods that free and equal citizens decide to pursue. Do I have a personal normative conception about integration? Yes, I do, and it belongs to the same liberal egalitarian cluster of the explicit or implicit conceptions espoused by most of our commentators.[13] But I have chosen here to keep my reasoning at a meta-level. And at this levels normative conceptions are political 'objects' which contribute to providing a collective sense of purpose that can motivate citizens to belong together. A vibrant intellectual debate on ultimate purposes is very important for institution building and polity maintenance. EU building is a novel experiment in political unification of different national communities, undertaken within a (now) unfavourable historical constellation characterised by an overall de-freezing of the economic, social and cultural patterns of modernity. We perceive a pervasive and foundational change, a general "melting of all that was solid", but we seem unable

[12] Ferrera, M. & A. Pellegata (undated), *Reconciling economic and social Europe. Report on the REScEU Survey*, available at http://www.resceu.eu/events-news/news/can-economic-and-social-europe-be-reconciled-citizens'-view-on-integration-and-solidarity.html.

[13] Ferrera, M. (2014), 'Solidarity in Europe after the Crisis', *Constellations* 21 (2): 222–238.

to define this change in positive terms rather than merely as an ambiguous contrast to the past (post-modernism, post-nationalism, post-democracy, post-materialism, post-capitalism, etc.). Without 'pros-eutopian' (from the Greek *pros*, before us) visions of the future, we should not be surprised about the return of nostalgic and backward looking 'retrotopias' (to use Zygmunt Bauman's metaphor).[14]

I mentioned above Schumpeter's distinction between the 'classical' and the 'other' doctrine of democracy and I have argued that they should be seen as two sides of the same coin, the latter as a 'vertical' correction to the former. I now conclude by recommending an additional correction. Democratic participation and competition must be infused with values. Equal and free participation and proceduralised power struggles among elites only define the perimeters of a playing ground where substantive interests, ideas and values contend with each other. The emphasis on values (on the polytheistic fight among them) as a quintessential element of politics in the sense of *Berufspolitik* is a major legacy of Weber's political theory, including his often misinterpreted theory of democracy. 'Man would not have attained the possible unless time and again he had reached out for the impossible' is the famous Weberian motto concluding his speech on ''Politics as a Profession''. As social scientists (normative and empirical) we can contribute to producing visions of the impossible. But the outreachers ought to be political actors: responsible, pros-eutopian and, I would add, also Euro-phile politicians.

[14] Bauman, Z. (2017), *Retrotopia*. London: Polity.