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Freedom of movement under attack: Is it worth
defending as the core of EU citizenship?

Edited by Floris de Witte, Rainer Bauböck and Jo Shaw

European University Institute
Robert Schuman Centre for Advanced Studies
European Union Democracy Observatory on Citizenship

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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 EUDO forum debate takes on this discussion in two different ways. On 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.

Kickoff contribution and rejoinder by Floris de Witte, Daniel Thym, Richard Bellamy, Päivi Johanna Neuvonen, Vesco Paskalev, Saara Koikkalainen, Rainer Bauböck, Sarah Fine, Martijn van den Brink, Julija Sardelić, Kieran Oberman, Glyn Morgan, Reuven (Ruvi) Ziegler, and Martin Ruhs.

Keywords

Free movement, Union citizenship, migration, Brexit, mobility, emancipation, welfare.

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Kick off contribution
Freedom of movement under attack:
Is it worth defending 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, 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

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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 particular 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 that 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 exclusion that the nation state perpetuates,

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.

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 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.

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

⁴ Dustmann, C. and T. Frattini, T. (2014) ‘The Fiscal Effects of Immigration to the UK’ 124 *Economic Journal*, 563.

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 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.

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

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

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 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

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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.

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.

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 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

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

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.

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

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

⁵ See Kay Hailbronner, K. (2015) ‘Union Citizenship and Access to Social Benefits’, *CML Rev.* 42,1245 (1258-1264).

⁶ See Thym, D. (2015) ‘The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens’, *CML Rev.* 52, 17-50.

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

⁸ See José Menéndez, A. (2014) ‘Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship’, *GLJ* 15, 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 elsewhere¹) what might be called 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

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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) '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), 131-53

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 free movement of citizens between these states in ways that avoid 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 four ways mentioned above. In this regard, the current call among 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 transitional feature destined to wither 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.

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

² For a critique of current EU economic and monetary policies from this perspective, see Bellamy, R. and 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), 257-74.

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.

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 inter-nationality 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 of a

³ I’ve 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), 558-65

⁴ On the ‘democratic disconnect’ in EU policy making, see Richard Bellamy, R. and S. Kröger (2016) ‘The Politicization of European Integration: National Parliaments and the Democratic Disconnect’, *Comparative European Politics* 14 (2), 125-30

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. I would therefore like to advance a more relational understanding of subjectivity in this context.

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-centered, rather than as capable of encountering the ‘Other’ as part of its own emancipation.¹

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

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

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

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 address 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 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 subject-formation, 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 subjectivity. But I would 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 exercise 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’.

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

⁴ E.g. Wiener, A. (1997) ‘Constitution-making and Citizenship Practice – Bridging the Democracy Gap in the EU?’ *Journal of Common Market Studies* 25, 595, 596.

⁵ E.g. Somek, A. (2014) *The Cosmopolitan Constitution*. Oxford: OUP, 160-61.

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

Free movement emancipates, but what a freedom this is?

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 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

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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>

in community initiatives. One need not subscribe to Pierre Rosanvallon's concept of counter-democracy³ 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.

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 citizens⁵ 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 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.

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

⁴ For a discussion see Bauböck, R. (2007) 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', *Fordham L. Rev.* 75, 2393, available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4257&context=flr>.

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

Free movement and EU citizenship from the perspective of intra-European mobility

Saara Koikkalainen*

In his kickoff 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 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

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 % of the respondents supported free movement, even though differences among countries were significant (94 % support in Latvia and 92% in Estonia, while only 64 % in the UK and 66 % 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

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

² Standard Eurobarometer 84, 2015, EC, DG for Communication. First results (Autumn 2015). <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/index#p=1&instruments=STANDARD>

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 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 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.

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, 89-106. DOI: 10.1002/ijpg.246; EUCROSS. (2014) *The Europeanisation of Everyday Life: Cross-Border Practices and Transnational Identifications Among EU and Third-Country Citizens. Final Report*. www.eucross.eu/

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*. 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 2004.

⁷ Koikkalainen, S. & Kyle, D. (2015) 'Imagining Mobility: The Prospective Cognition Question in Migration Research'. *Journal of Ethnic and Migration Studies*. Taylor & Francis Online (7 October) doi: 10.1080/1369183X.2015.1111133

⁸ Flash Eurobarometer 430 2016, EC, DG for Justice and Consumers & DG for Communication. <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/index#p=1&instruments=FLASH>

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 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% 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% who have lived for more than 3 months in another European state and slightly more than 50% who communicate regularly with family and friends across European borders,

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

² John Burn-Murdoch in *FT*, 27 June 2016 (based on data from 382 voting areas).

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 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.

³ Recchi, E. and 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.

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). 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. 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’. Though analysts are still collecting and examining important data about voting patterns, and digesting the results, there is no doubt that migration was a pivotal issue in the national debate (1).¹ 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’. 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.

One of the most noteworthy issues discussed in the EUDO citizenship debate is the growing evidence that there is, as [Rainer Bauböck](#) explains, 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 kickoff 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 into stark relief by the ongoing

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¹ See e.g. this interesting GQR poll conducted for the TUC, June 24-27, 2016. Available at: <https://gqr.app.box.com/s/xb5sfzo19btsn74vawnmu7mn033p1ary>

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. 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. The European Parliament's [website](#) identifies the refugee crisis and the 'heightened terrorist threat' as central challenges to the European free movement zone. The European Parliament states that these 'ongoing challenges have served to underline the inextricable link between robust external border management and free movement inside those external borders and persuaded the Commission to come forward with proposals both to enhance security checks on persons entering the Schengen area and to improve external border management'. 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 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?

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. 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. In effect, both sides were arguing, either explicitly or implicitly, that their position offered the best prospects for keeping refugees and 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 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

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

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 underlying 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.

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

² Waldron, J. (1998) ‘Participation: The Right of Rights’, 98 *New Series* 307, 322.

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

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

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 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 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 cast 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 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 Steel 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

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

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 researchers² showed how the debate about benefit tourism 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 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

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; Sardelić, J. (2016) ‘The Position And Agency Of The ‘Irregularized’: Romani Migrants As European Semi-Citizens’, *Politics*.

³ 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> (Accessed: 29th September 2016).

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

⁵ Available at: <https://www.gfmd.org/recent-migration-roma-europe-claude-cahn-and-elspeth-guild> (Accessed 29th September 2016).

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

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 Discrimination⁷ 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 labour⁸ 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 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

⁷ Available at: http://ec.europa.eu/justice/fundamental-rights/files/factsheet_eurobarometer_fundamental_rights_2015.pdf (Accessed: 29th September 2016)

⁸ Available at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/forced_labour_and_uk_immigration_policy._status_matters_1.pdf (Accessed: 29th September 2016).

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 requires defence, both within the Europe and at the frontier. Within Europe, we are witnessing Brexit, the Swiss vote to limit 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

In democratic societies, great emphasis is placed 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, 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, how they communicate and to whom and which job they do. 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 in support of a cause.

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 immigrations 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 worshipping, 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

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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. But 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 than that.

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 pick up on this and ask "whose freedom of movement is worth defending?" If the EU is not to forever remain a gated community, we should at least take note of 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 move? Floris de Witte distinguishes between "mobile" and "immobile" citizens; a distinction that [Rainer Bauböck](#) picks up on. The question becomes how can the "immobile" 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 the option of moving. It is also that the people who stay are exercising the same basic liberty as the people who move: 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. One does not have control of one's movements if one is forced 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 restrictions, 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 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 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 defense 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 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 center. 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 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](#). 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

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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 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 Baubock 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) 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).

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 depend 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 (European Economic Area) Regulations 2006 which implement the Citizens Directive. Nevertheless, while the UK government (July 2016 statement) '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, EU Citizens Resident in the UK (Right to Stay) Bill, and a Rights of EU Nationals motion) as well as public campaigning (see here and here) 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) 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 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).

In contradistinction, their right to 'participate in the democratic life of the Union' (Article 10(3) of the Treaty on European Union) 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 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* 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*

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ratio (concerning disenfranchisement of prisoners, discussed here) 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).

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, excluded from voting in the EU referendum pursuant to the 15 year of non-residence bar) 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* 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* 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] ‘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. 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 and Italy 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. 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) caused a degree of discomfort; hence, doubts could be raised as to the propriety of e.g. *en masse* waiver 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 State? This seems like the UK government’s ‘bargaining chips’ or ‘cards’ strategy 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.

Dawson and Augenstein argued elsewhere 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), a ‘*demoicracy*’ a-la Nicolaïdis? 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 such, they will benefit from the LTR Directive (as amended in 2011 to extend its scope to beneficiaries of international protection) and from the Right to Family Unification Directive. 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 they 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) number of signatories to the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level are committed to residence-based enfranchisement on the local level and among the EU-27, eleven states permit TCNs to vote in local 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 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.

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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 that focuses on international labour migration; European and 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 policies 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 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 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 defense 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 centered 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.

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.

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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 be 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 politics 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% 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%, while, say, Stoke-on-Trent would vote with 69.4% 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. 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 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, indispensable 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 indispensable 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 indispensable 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 Päivi 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 £9000 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 Päivi 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 Paivi 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 make 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.

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