



Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship

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Abstract

This article discusses freedom of movement under the lens of shifting boundaries of membership and traces the tension between the political and the economic rationale of European integration. It first reflects on the normativity of free movement and links it to the foundations of modern democratic citizenship. Subsequently, it discusses the role of free movement in the construction of EU citizenship and argues that the genesis in market integration casts a long shadow which hinders EU citizenship's potential to fully display the logic of political and social equality. Under current conditions of huge wealth discrepancies between member states, the prevailing form of horizontal integration necessarily brings about a tension between mobility and solidarity, which in turn creates a barrier for further developing EU citizenship. It is concluded that strengthening an intra-European dimension of solidarity is needed in order to substantiate the right to move as an equal European citizenship right.

1 | INTRODUCTION

Free movement for persons is at the core of EU citizenship. As first introduced in the Maastricht Treaty (1992) it guarantees the right 'to move and reside freely within the Territory of the member states'.¹ Originally emanating as part of the 'four freedoms' constituting the common market the introduction of a European citizenship status expressed the gradual emancipation from this context. At least this was the proclaimed goal: opening-up national boundaries, enlarging bonds of membership and creating a sense of transnational solidarity. But the new status proved to be deeply ambivalent. Wavering between a self-standing and complementary status EU citizenship's

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¹Art. 21, TFEU.

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political determination remained uncertain. In particular with regard to the normative dimension of citizenship, democratic self-determination, the institution of EU citizenship got stuck half way, leading commentators to ask whether what was established is really a 'citizenship' status or rather something else.²

What increasingly comes to light is a tension between the individual and collective dimensions of (EU) citizenship, in particular under conditions of deep economic and cultural disparities between member states. As an individual right, mobility is expected to extend the opportunities and choices for European citizens beyond the confines of national boundaries. However, whilst freedom of movement can provide chances for some, it might place unreasonable demands on others. Mobility might mean leaving your social environment behind, living separated from family and friends. Mobility can turn into an element of commodification when people *have to* move in order to make a living. Moreover, for receiving communities it might mean bearing the 'burdens of hospitality', namely integrating newcomers, dealing with real or perceived dangers of downward pressure on wages and social benefits, as well as sharing space and social resources.³ For all these reasons, under conditions of rising inequality within Europe – among citizens, regions as well as member states – freedom of movement has recently become highly politicised.⁴

This article discusses freedom of movement under the lens of shifting boundaries of membership. EU citizenship in principle enlarges access to rights beyond the limits of national territorial bounded communities. But with freedom of movements as a fundamental right of European citizens it also provokes a conflictual relation with solidarity (as it is currently organised in national welfare states). Solidarity is widely considered a legal principle of EU law. But it is less clear to what extent this principle has a binding character and what it means politically with regard to EU citizenship.⁵ A fundamental element of modern, democratic citizenship is the idea of equal freedom. In the national constellation this idea has pushed towards a normative dynamic of inclusion. But on the European level the dynamics of inclusion have primarily followed an economic rationale. A political process of re-defining claims of citizenship on a pan-European scale has remained limited.

The first section analyses the normativity of free movement and reflects on its relation to citizenship (I.). The second section then turns to the specific construction of EU citizenship and asks to what extent there is currently a necessarily conflictual relationship between mobility and solidarity which makes EU citizenship an easy target for xenophobic polemics (II.). The article continues by drawing attention to structural factors that make the institution of EU citizenship inherently unstable under the current conditions of horizontal integration in the EU (III.). How can the inherent conflict between mobility and solidarity in the EU be avoided? The article closes with a suggestion on how to promote intra-European solidarity as a precondition for further developing the substance of EU citizenship (IV.).

2 | CAN FREEDOM OF MOVEMENT CONSTITUTE CITIZENSHIP?

While national citizenship was traditionally linked to being rooted in a territory, EU citizenship is inherently linked to mobility. This can be explained by its genesis (see section II), but does not exhaust its normative content. This section will therefore briefly reflect on the normativity of free movement and its relation to citizenship.

As an individual right, free movement is not only a *citizenship right* but also a *human right*. As codified in several legal documents, most importantly the *Universal Declaration of Human rights*, the right to move freely within a state,

²A. J. Menéndez/E. D.H. Olsen, *Challenging European Citizenship. Ideals and Realities in Contrast*, Palgrave Macmillan 2019, Chap. 3. Menéndez and Olsen argue that so far EU citizenship lacks fundamental elements of democratic and social citizenship and is still torn between two possible articulations: 'proto-citizenship' and supra-nationality.

³M.Ferrara, 'The Contentious Politics of Hospitality. Intra-EU Mobility and Social Rights', (2016) *European Law Journal*, Vol.22, No.6.

⁴H.Kriesi, 'The Politicization of European Integration' (2016), *The Journal of Common Market Studies* 54 (S1), 32–47.

⁵M.Klamert, 'Solidarität als Rechtsprinzip der Europäischen Union', in M.Knodt/A.Tews (eds.), *Solidarität in der EU*, (Nomos, 2014) 19–39. Solidarity is proclaimed as a value *within* but also *between* member states. In Art. 2, TEU it is invoked as a common value of the member states. Insofar as the *Lisbon Treaty* has included social goals and obligations more broadly, including reference to the *Charter of Fundamental Rights*, it makes social values more explicit than before (A.Farahat/C.Krenn, 'Die Rolle des Europäischen Gerichtshofs in der Eurokrise: Eine konflikttheoretische Perspektive', (2018) *57 Der Staat*, 357–385).

is not only guaranteed for citizens but for everybody who is present on a territory.⁶ In current philosophical discussions the right to free movement is discussed as a general *moral* right. It is supposed to have *instrumental* value insofar as it is a precondition for making use of other rights, such as the right to association or the right to free choice of career or as a precondition for access to material resources. But the right to free movement is also (and foremost) considered to have *intrinsic* value insofar as it is constitutive for understanding what self-determination means. In this perspective, it is intrinsically linked to individual autonomy.⁷

From a historical perspective, the universalistic dynamic of human rights fuelled the normative development of free movement as a citizenship right. Free movement used to be a *privilege* granted by the noble master under feudalism, but once a subject has reached the walled territory of a self-governing city, the feudal master no longer had any jurisdiction over him.⁸ Over the course of time, moving freely within a territory became an important hallmark of modern, democratic citizenship: no authority can force you to ask for permission or hinder you in moving at will from one place to another.

In the cosmopolitan tradition of political thinking the right to free movement is, in general terms, also considered to be a right to move *beyond* states.⁹ Building on this tradition contemporary cosmopolitan positions argue that moving freely on the earth's surface and deciding where to live, independent of state borders, is a general human right.¹⁰ The human right-approach primarily conceives of free movement as a *negative* moral right. It refers to *omissions*: not being hindered by state authorities. If the justification of a general moral right to mobility is thin rather than thick, it is supposed to be shared more broadly.¹¹ But the uncomfortable consequence of perceiving free movement to be a negative right is that it appears as a rather formal right. Adapting Anatole France's famous sentence, a formal right to freedom of movement is nothing more than the rich and the poor man's equal freedom to sleep under the bridge.¹² It abstracts from any substantial inequalities.

In contrast, a *citizenship* status – at least insofar as T.H. Marshall's qualification of modern democratic citizenship is taken as a reference point – entitles a person to a bundle of civic, political and social rights.¹³ As a citizenship right, the right to free movement includes the negative dimension of not suffering any interference. But it means more than that. As an *equal* citizenship right, free movement is not only an individual right but at the same time it is a *common* achievement: it presupposes fellow citizens' willingness to establish and uphold the social conditions of equality,

⁶Art. 13 UDHR, Dec. 10, 1948: 'Everyone has the right to freedom of movement and residence within the borders of each state'. Nevertheless freedom of movement as a human right within states is frequently restricted, e.g. for refugees (for a critical reflection see R. Bauböck, 'Refugee Protection and Burden sharing in the European Union', (2018) *Journal of Common Market Studies*, 56, 141–156.

⁷See A. Cassee, *Globale Bewegungsfreiheit. Ein philosophisches Plädoyer für offene Grenzen* (Suhrkamp, 2016), 218–219.

⁸This is still present in the saying 'Stadtluft macht frei' (F.van Waarden/S.Seubert, 'Introduction: Being a citizen in Europe', in Seubert et al. (ed.), *Moving Beyond Barriers*, (Edward Elgar, 2018), 3; also: J. Carens, *The Ethics of Immigration*, (Oxford University Press, 2015), 226.

⁹Historical roots go back to Kant's foundation of cosmopolitanism, in which the right to move and offer oneself for social and economical interaction is already considered to be a universal human right. Among the huge amount of literature on Kant and cosmopolitanism, see P. Kleingeld *Kant and Cosmopolitanism* (Cambridge University Press, 2012); S. Benhabib, *Kosmopolitismus ohne Illusionen* (Suhrkamp, 2016); S. Seubert: 'EU citizenship and prospects for cosmopolitanism', in Seubert, S./Eberl, O./van Waarden F. (eds.), *Reconsidering EU citizenship. Contradictions and Constraints* (Edward Elgar, 2018), 199–204. The recent *Global Compact for Migration* (drafted by the UN and adopted in Dec. 2018) can be interpreted as a further codification of the legal status of persons moving *beyond* state borders. A precursor is the UN convention on Rights for all migrant workers and their families (1990).

¹⁰J. Carens, n 8 supra. The argument builds on the justification for freedom of movement *within* a state and transfers this justification to the international case. For justification and defense against critiques see A. Cassee, n 7 supra, Chap. 8. Current human rights' justifications of free movement also relate to a critique of 'birthright citizenship', taking issues with current citizenship regime's 'uncomfortable similarity with feudalism': finding oneself in a privileged position just by dint of circumstances (J.Carens, n 8 supra 254). With regard to citizenship it is argued that membership and access to rights should not be restricted by birthright privileges of inclusion (also: A. Shachar, *The Birthright Lottery. Citizenship and Global Inequality* (Harvard University Press, 2009). These justifications stress that at least in principle, access to social positions should not be limited on the basis of birth-related characteristics, but be determined by an individual's actual talents and effort (Carens, n 8 supra 227). As an equality-of-opportunity argument this is supposed to be widely recognised *within* democratic states and should also be applied *beyond* states.

¹¹Cassee n 7 supra 213. Although further rights and duties might be implied, Cassee argues, the justification of a negative right to mobility shall not be made dependent on agreement with these further (probably disputed) claims.

¹²Note that France is referring to the formal equality of *not* being allowed to sleep under the bridge: 'Ils (les pauvres, S.S.) y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain. C'est un des bienfaits de la Révolution', A. France, *Le Lys Rouge*, Calmann Lévy Paris 1894, 118. ('Another reason to be proud, this being a citizen! For the poor it consists in sustaining and preserving the wealthy in their power and their laziness. The poor must work for this, in presence of the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread').

¹³Cf. T.H.Marshall, *Citizenship and Social Class*, (Pluto Press, 1992).

namely solidarity arrangements that substantially underpin formal rights. In this perspective citizenship is situated in the collective practice of a political community which includes ongoing activities of public justification for claims of political and social justice.

Restrictions on free movement continue to exist even *within* a state, under democratic conditions, particularly for those who are dependent on social assistance.¹⁴ Liberal citizenship is often portrayed as duty free¹⁵ – but on close scrutiny this is not the case. There is an implicit duty in being economically self-supporting and not becoming a burden on society in order to enjoy full access to certain citizenship rights. The origin of political citizenship stemming from economic status casts its shadow even in current welfare state regimes; this is especially apparent in the form of a differentiated citizenship which is brought to the fore by those regulations that have increasingly related welfare benefits to a willingness to work.¹⁶ From a democratic point of view, the logic of citizenship is bounded by membership, to which the principle of equality is related: *political equality* in the sense of equal participation in political decision making, but also of *social equality* as substantive equal inclusion.¹⁷ Within capitalist societies the value of social equality is translated in practical terms into policies of decommodification, which aim at freeing citizenship (at least to a certain extent) from market logic (with its value of competitiveness).¹⁸ With respect to freedom of movement, de-commodification (which the welfare state is supposed to provide) can be restricted in two ways: by *not being allowed* to move or by *being forced* to move. Regarding free movement restrictions for welfare dependents, de-commodification is limited insofar as they have to 'earn' their benefits by being available for jobs. On the other hand, the *obligation* to move, being forced to take any job anywhere, is an element of commodification since persons are primarily regarded as factors of production, without any social embeddedness. From this it can thus be concluded, that free movement *per se* is not constitutive for citizenship. If democratic citizenship rights relate to political and social equality and are to protect against commodification, free movement rights protect only insofar as they include the right to move and *not* to move, in other words if moving is a voluntary decision.¹⁹

The EU's free movement regime seems stuck somewhere in between a human rights- and a citizenship rights-regime: it provides *more* than a human rights regime in the sense that mobility across open (internal) borders is guaranteed as a *citizenship* right. This is made possible insofar as the socio-economic order created by the Union's institutions contributed to the emergence of a 'European territory'.²⁰ But at the same time it provides *less* than a (national) citizen regime. In particular regarding decommodification in the sense of emancipating individuals from

¹⁴Free movement for citizens was limited e.g. for the 'wandering poor' in the US until the Roosevelt era, and full equality for poor Swiss citizens was accomplished only in 1975 (C. Schönberger, 'European Citizenship as Federal Citizenship: Studying EU Citizenship through the Federal lens', in D.Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge University Press, 2017), XXVII).

¹⁵Cf. C. Joppke, 'Liberal Citizenship is duty-free' (2017), in M.Ferrara / R. Bauböck (eds.), *Should EU citizenship be duty-free?* EUI Working Papers, RCAS 2017/60.

¹⁶In the German case, there is an obligation to register with the authorities for recipients of 'Hartz IV'. Restrictions to free movement can be seen in the obligation to be personally available ('persönliche Verfügbarkeit') which is translated into a duty of daily checks of the letter box. Absence of more than three weeks has to be reported to the 'Job Center'. The question of receiving social assistance abroad has led to polemic public debates (e.g. the 'Bild-Zeitung'-campaign against 'Florida-Rolf' 2003). For a shift in the welfare state discourse from a language of benefits to a language of 'earned entitlements', see L. Morris, 'An emergent cosmopolitan paradigm? Asylum, welfare and human rights' (2009) *The British Journal of Sociology*, 60 (2); C. O'Brian, "'I trade, therefore I am': Legal personhood in the European Union' (2013) *Common Market Law Review*, 50 (6), 1643–1684; also S. Seubert, 'Antinomies of European Citizenship', in J. Mackert / B. Turner (eds.), *The Transformation of Citizenship*, (Routledge, 2017).

¹⁷The principles according to which membership should be defined and the boundaries of the demos should be drawn form the subject of lively debate in political and legal theory (see e.g. R. Bauböck, *Democratic Inclusion*, Manchester University Press, 2018). In addition, the extent of social equality separates different accounts of democracy: libertarian, liberal or socialist. For a discussion of formal and substantive equality, see H. Dean, 'EU citizenship and 'work': tensions between formal and substantive equality', in S. Seubert/O. Eberl/F. van Waarden: *Reconsidering EU citizenship* (Edward Elgar, 2018).

¹⁸Within welfare state theory the concept of (de)commodification is a subject of debate (cf. Wolfgang Streeck, 'Competitive solidarity. Rethinking the European Social Model', in K.Hinrichs/H.Kitschelt/H.Wiesenthal (eds.), *Kontingenz und Krise*, Campus-Verlag, 2000). Critics argue that social protection arrangements cannot be opposed to 'the market' in a general sense since part of what social protection does is enable the market itself. Nevertheless, the extent of decommodification can be a distinguishing criterion for various welfare state arrangements. For a recent discussion see R.Claasen/A. Gerbrandy/S.Princen/M.Seghers, 'Four models of Protecting Citizenship and Social Rights in Europe: Conclusions to the Special Issue 'Rethinking European Social Market Economy'', (2019) *Journal of Common Market Studies*, 57 (1), 159–174.

¹⁹This is controversially debated in F. de Witte/R.Bauböck/J.Shaw: 'Freedom of movement under attack: Is it worth defending as the core of EU citizenship?' (2016), EUI Working Papers, RCAS 2016/69 (reprinted in R.Bauböck (ed.), *Debating European Citizenship*, (Springer Open, 2019).

²⁰L. Azoulay, 'From Member State to Union Territory', in D. Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights*, (Cambridge University Press, 2017), 202; see also: L. Azoulay (2017) 'EU law as a way of life', *Common Market Law Review* 54, 360.

market dependence it has remained limited. With regard to social equality, EU citizenship provides only 'thin' rights as will be discussed in the following section.

3 | THE TROJAN HORSE OF THE MARKET: FREE MOVEMENT AND EU CITIZENSHIP

Freedom of movement for persons is one of the 'four freedoms' – freedom of goods, services, capital and labour – that form the basis of EU law.²¹ The genesis of European integration in market integration has influenced the conceptual core of EU citizenship: It is the internal market that provides the frame for this arrangement. As a consequence, EU citizenship continues to be a disputed concept. The fact that the moving EU citizen ought to be economically self-supporting has given rise to the criticism that EU citizenship is nothing more than a 'market citizenship'²²: actualising the right to move is to a large extent dependent on economic conditions (being a worker or being economically independent). Being an EU citizen opens the door for border crossing,²³ but it does not grant an unconditional right to residency. Legal residency is dependent on being economically self-supporting.²⁴ Hence, the right to move appears primarily as a right to be economically active, to seek employment or run a business, across the Union.

On the other hand, with the introduction of this right the European Union has sent out a promise: it signals that its constitutive elements are no longer just the member states. It raises expectations of establishing a direct link to the Union's citizens. Despite its origins in market integration, the concept of *Union Citizen* has been continually expanded since its introduction. To a large extent this resulted from judicial activism by the European Court of Justice (ECJ), which pushed from an initially market-related citizenship towards an understanding of rights that are not directly linked to market activity. With reference to the 'non-discrimination principle' (see p.9 below) the rights relating to EU citizenship have been gradually expanded to non-economically active persons (students, pensioners, job seekers).²⁵

It is frequently concluded that EU citizenship is helplessly caught up in the tension between political and economic logic.²⁶ On the one hand, a *citizenship* status was introduced which raised the expectation of a democratic venture, while the actualisation of rights is to a large extent dependent on economic status. On the other hand, the economic logic was not adapted 'all the way down': The rationale behind the free circulation of goods – the European common market place – was not applied in the political realm. It has been perfectly well understood that free movement of *persons* is a different issue, in that it affects the *people's* social composition. The internal movement and residence of *persons* would have suggested a common European membership policy, but to date there is still an absence of communitarisation in granting citizenship or even a harmonisation of member state naturalisation policies. Apart from a common market, this would have created a common *social space* in which the citizenship logic could have been fully displayed. Instead, the citizenship logic with its principle of (political and social) equality is to a large extent in the EU still restrained by an economic logic. The problem with 'market citizenship' is that those who are most in need of protection from commodification are unlikely to benefit at all

²¹C. Barnard, *The Substantial Law of the EU: The Four Freedoms*, (Oxford University Press, 3rd edn, 2010).

²²M. Everson, 'The Legacy of the Market Citizen', in J. Shaw / G. More (eds.), *New Legal Dynamics of European Union*, Oxford University Press 1995; N. Shuibhne, 'The Resilience of EU Market Citizenship' (2010) *Common Market Law Review*, 47 (6), 1579–1628.

²³At least insofar as the member states are obliged to abide by the Schengen border codex (which lays down that border controls are allowed only temporarily and by way of exception). Border controls within the Schengen area necessarily affect the free movement of EU citizens.

²⁴Council Directive 2004/38/EC of 29 April 2004.

²⁵This is interpreted as an attempt to re-embed the European market, although with limited success (S. Buckel, *Welcome to Europe: Die Grenzen des europäischen Migrationsrechts*, transcript, 2013, Chap. 5.3). Others criticize the Court's activism as (democratically problematic) constraint on policy making (e.g. S. Schmidt, *The European Court of Justice and the Policy Process*, Oxford University Press, 2018, 12).

²⁶For this critique cf. J. Weiler, 'To Be a European Citizen: Eros and Civilization', Working Paper Series in European Studies, University of Wisconsin-Madison 1998.

from EU citizenship rights.²⁷ Insofar as the EU is structurally biased in favour of 'market-making' rather than 'market-correcting' policies, citizenship also tends to be decoupled from collective self-determination.²⁸ The result is a protection of the market from the citizen rather than the other way around. Dimitry Kochenov describes these arrangements as 'our agreement with hell': relegating EU citizenship to the role of an element within the internal market context has been a disaster for the concept's meaning as well as its impact, he argues, and calls for a broader construction of personhood in EU law.²⁹

The debate about opposing political and economic logics raises questions about EU citizenship's substance. Critiques argue that since free movement alone is not sufficient to constitute citizenship it is necessary to make the connection to fundamental rights, in particular equal political and social rights, more explicit. The issue of substance is not only highly controversial, but also vitally important for the further development of a meaningful citizenship regime in the EU.³⁰ According to the Treaties, EU citizenship does not substitute for national citizenship, but is derivative and complementary.³¹ The main content is thus not a complete scheme of political status and social protection, but a right to equal treatment by other political communities. As expressed in the 'non-discrimination principle'³² no EU citizen in any EU member state shall be put in a position more disadvantaged than that of a national citizen or a third country national. By relating to national citizens, this right to equal treatment constitutes a *relative* status of equality for EU citizens: relative to the level of protection in the respective member state. With regard to *substance* this status is ambivalent: it guarantees equal treatment in the national domain but allows for unequal levels of protection on a European Scale. This concerns social rights in particular, but also affects civil and political rights.³³

The principle of non-discrimination expresses an idea of *horizontal integration*: Member states mutually open up their citizenship regimes. For defenders of this arrangement 'horizontal equality' among the member states for 'movers' is 'the main thrust of EU citizenship': they can expect to be treated on an equal footing and be integrated in the host society.³⁴ The expansion of rights conversely expects national citizens to share resources: benefits and services, space and infrastructure. In order to be covered by EU law, a Union citizen must first use his/her right to free movement and cross a border. Subsequently, the (social) rights to which he/she has access do not come – vertically – from the European level. Rather it is the member states that are responsible for horizontally underpinning the rights of EU citizens. As will be argued in the following it is this logic of the horizontal integration model that under current conditions creates a tension between mobility and solidarity, with resulting uneasy consequences for EU citizenship.

²⁷Currently this is particularly true for mobile employees from Eastern Europe (see the *fair mobility*-initiative of the *Deutsche Gewerkschaftsbund* (DGB) <http://www.faire-mobilitaet.de>). It is also true for workers in the so called 'new economy' who are trapped in semi-formality as underemployed or with casual contracts (cf. K. Abraham, *Labor in the New Economy* (University of Chicago Press 2010).

²⁸A. Sangiovanni, 'Solidarity in the European Union' (2013) *Oxford Journal of Legal Studies*, 33 (2), 224. For arguments about a 'joint-decision trap' and 'negative' vs. 'positive integration' see F. Scharpf, 'Legitimacy in the multilevel European polity' (2009), *European Political Science Review*, 1:2.

²⁹D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator', in D. Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press, 2017), 41. He argues for taking free movement seriously as the fundamental individual right of EU citizens and turning it from a formal to a substantial right.

³⁰According to the European Court of Justice (ECJ) citizenship is "intended to be the fundamental status of nationals of the Member states". But as, say, Pavlos Efteriadis criticizes, it is a paradox that the Court derives rights from a fundamental status that does not yet exist (cf. P. Efteriadis, 'The Content of EU citizenship' (2014), *German Law Journal*, 15 (5).

³¹Art.20, TFEU, further: S. Besson/A. Utzinger, 'Towards European Citizenship', (2008) *Journal of Social Philosophy*, 39 (2), 185–208.

³²Art.18, TFEU.

³³Cf. M.-P. Granger, 'The protection of civil rights and liberties and the transformation of Union Citizenship', in Seubert et al. (eds.), *Moving Beyond Barriers*, Edward Elgar 2018, 182–187. Nevertheless, the non-discrimination principle expresses a move beyond the economic rationale: As Dagmar Schiek points out, non-discrimination of *persons* in the host state contrasts with the country-of-origin principle applied to the free movement of *products*. It can thus be interpreted as an important element of decommodification: since persons are not considered as a commodity traded across borders, they enjoy the right to equal treatment in their host state (D. Schiek, 'Perspectives on Social Citizenship in the EU', in D. Kochenov (ed.): *EU Citizenship and Federalism. The Role of Rights*, (Cambridge University Press, 2017), 355–356.

³⁴C. Schönberger n 14 supra, xxviii.

4 | BOUNDARIES OF MEMBERSHIP: MOBILITY AND SOLIDARITY IN TENSION

Despite the critique of providing only thin and formal rights, framed along the market dispositive, it is widely acknowledged that EU citizenship has triggered a transformative dynamic, which lies in opening-up national boundaries and gradually shifting the basis of access to rights according to a principle of residency.³⁵ *Juridically* citizens of other member states are then no longer 'foreigners' but fellow-EU citizens. Although this does not necessarily mean that they are *socially* perceived as such – one has good reasons to be sceptical about that – it makes possible new forms of inclusion.³⁶ EU citizenship grants not only political rights, the right to vote and stand for office in local and European elections, but also to a certain extent social rights. The shift to a residence-principle for access to rights brings about a dual opening-up ('doppelte Entgrenzung'): *who* is entitled and *where* is an entitlement received. One might interpret this negatively as a loss of sovereignty, or conversely in positive terms as the emergence of a European political and social realm.³⁷ In any event, it means that the nation-state is no longer the last and only authority that grants access to rights.

The mutual opening of national boundaries blurs formerly clear demarcations between nationals/members and non-nationals/foreigners, 'ins' and 'outs'.³⁸ The value of horizontal integration can be seen in citizenship regimes' mutual recognition, which supports critical re-assessment of one's own national identity and thus contributes to transforming the social construction of membership. Once people are making use of their individual mobility rights they build up new transnational economic and social ties. This potentially transforms the composition of the European *demos*, in that they become more plural and diverse, and this eventually leads to a new political, pan-European identity.

According to Floris de Witte, EU-citizenship can be interpreted as a way of dealing with the moral and legal insufficiencies that domestic political systems produce in the context of a common market, based on the free movement of not only goods but also *persons*. Traditional national arrangements barely take into account the relationship between citizens across borders exercising their free movement rights. With their strict demarcations they tend to be structurally insensitive in this regard. The EU implicitly expresses 'three claims of justice', thereby mitigating deficiencies within national communities: *first*, by allowing for free movement extending the capacity of citizens to live good lives beyond their own member states, *second*, by providing rights to equal citizenship via the non-discrimination principle on the basis of residence, and *third*, by being sensitive to how EU citizenship claims affect domestic redistributive justice.³⁹

Following such a description, economic integration in the EU contributes to changing the modus of solidarity in a transnational direction and the introduction of EU citizenship is the appropriate expression of this development. But the assumed 'claims of justice' raise empirical as well as conceptual concerns. As to the first claim, freedom of movement is supposed to provide individuals with opportunities to leave unfulfilling conditions and look for

³⁵Cf. R. Bauböck, 'The Three levels of Citizenship within the European Union', (2014) *German Law Journal*, 15 (5), 751–763; J. Shaw, *The Transformation of Citizenship in the European Union* (Cambridge University Press, 2007).

³⁶The discrepancy between the juridical claim and the social construction of membership is well expressed in the popular view that EU citizens are 'strangers seeking a better future who knock at the doors of "our" *Folkhemmet* without invitation, but with a legal right to enter' (M. Ferrara, n 3 supra, 800).

³⁷Sozialpolitischer Anspruchsraum', M. Eigmüller, 'Die Entwicklung des Europäischen Rechtsraums als sozialpolitischer Anspruchsraum: Raumdimensionen der EU-Sozialpolitik', in U. Jureit /N. Tietze (eds.), *Postsoveräne Territorialität* (Hamburg, 2015), 268. For a detailed analysis of access to social rights for different categories of EU citizens see M. Seeleib-Kaiser, 'Citizenship, Europe and Social Rights', in Seubert et al. (eds.), *Moving Beyond Barriers*, (Edward Elgar, 2018). Despite this opening-up, member states have been particularly careful to keep enough room for discretion to avoid alleged abuse of social assistance. Legal residence is restricted for those who are likely to become 'a burden on the host country's social assistance system' or a threat to public security and public health (EC, Memo/1/1041 (http://europa.eu.rapid/press-release_MEMO-13-1041_de.htm)). The German welfare state's restrictive response is analysed in B. Werner, 'Das Europäische Freizügigkeitsregime als Herausforderung für die nationalen Sozialsysteme: Reaktionen des deutschen Wohlfahrtsstaats und die Folgen', (2017) *Politische Vierteljahresschrift*, 58, Jg. 4.

³⁸D. Kostakopoulou, (2018) 'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to protect EU Citizens', *Journal of Common Market Studies*, DOI: 10.1111/jcms.12683, 6–9, J. Lacroix, 'Is Transnational Citizenship (still) enough?' In: D. Kochenov/G. deBurca/A. Williams (eds.), *Europe's Justice Deficit* (Hart Publishing, 2015).

³⁹F. de Witte, *Justice in the EU. The Emergence of Transnational Solidarity* (Oxford University Press, 2015), 51–59.

potentially more meaningful, more prosperous lives elsewhere. This might not only give them a chance to improve their lives materially, but also transform and enlarge thinking, question usual beliefs, broaden perceptions and ultimately modify views. It might mean that people are able to 'expand their conception of the *good life*'.⁴⁰ Whilst this ethical description of free movement rights certainly grasps an important aspect of its transformative social dynamics, at the same time it tends to play down the systemic dynamics of markets operating between societies with huge discrepancies of wealth and prosperity. Leaving one's country is often less an ethical choice but a material necessity. The focus on individual rights rather than socio-economic structures tends to conceal that under the particular conditions of a common market without common social policy, labour continues to be treated primarily as a factor of production. Freedom of movement, and consequently EU citizenship, conveys very different meanings for different categories of persons. Apart from individual social status, the most influential variable in this regard is the different 'worth' of national citizenship as far as the substance of rights is concerned.⁴¹

Concerning the second claim, a shift to residency as the basis for citizenship rights is indeed an important transformation which addresses the structural insensitivity of national rights regimes. It has the potential to increase political and social inclusion under conditions of transnational mobility (which the European Union is aiming to support). Residence-based access to rights contributes to the democratically fundamental principle of congruency: those who are subjected to norms should also be entitled to have a say in their making.⁴² Conversely, as has already been mentioned, in its current shape EU citizenship gives only a *relative* level of protection. Since the substance of rights varies immensely between the member states, even a minimum standard of *equal* European citizenship rights is currently far from realised. Furthermore, under conditions of wealth disparities, moving is not a mutual give and take. The expectation of reciprocity certainly stood behind the original idea of horizontal integration: 'I admit you into my place and treat you as a fellow citizen, if you pledge to do the same if I come to your place and ask to be treated as a fellow citizen'. But horizontal integration has very different effects between societies that are relatively equal in social, cultural and economic conditions, as opposed to those that are not. In asymmetrical constellations mobility becomes one-sided (there are 'receiving' and 'sending' countries), which gives rise to politicisation of distributive issues. In the absence of pan-European strategies for addressing these asymmetries, the non-discrimination principle tends to be hollowed out by restricting access to rights. Currently this works through restrictive interpretations of legal residency requirements (integration requirements, say) for 'migrants', in other words EU citizens on the move.⁴³ It also works through withholding equal treatment by allowing *posting* of workers. People moving as *posted workers* cannot claim equal treatment individually by relying on their Treaty rights. Posting is framed as expression of their employer's freedom to provide *services*.⁴⁴ But after the Southern as well as Eastern enlargement, for many workers from poorer countries posting was and still is the only way to move into Western labour markets. The EU insufficiently protects and enforces the equal treatment guarantee – so decisive for social citizenship – particularly in cases of conflict, when freedom of movement is politicised in the member states.⁴⁵

This problem relates to the third 'claim of justice'. De Witte explicitly values the horizontal integration model because it is sensitive to domestic redistributive justice. It is supposed to be 'contextual' insofar as the 'development of justice in the EU remains sensitive to its own limits and does not stretch domestic commitments of solidarity too

⁴⁰F. de Witte, n 39 supra, 59.

⁴¹The second dimension of opening up – *where* the entitlement is received (see above p.10) – is de facto heavily stratified: in the case of exporting social benefits from member states of origin, the benefits that, say, citizens of East and South European countries can export are actually very low, thus their freedom of movement remains a formal right that is very significantly restricted, cf. C. Bruzelius/C. Reinprecht/M. Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship', (2017) *Journal of Common Market Studies*, 55 (6), 1239–1253.

⁴²Cf. D. Held, *Models of Democracy* (Stanford University Press, 2006), 262–267; J. Habermas, *Faktizität und Geltung* (Suhrkamp, 1992), 151–165. Note that the residence-principle is not applied 'all the way down', though: EU citizenship gives voting rights for communal and European, but not *national* elections.

⁴³All EU member states have some kind of 'habitual residence test' but what constitutes the benchmark of habitual residence varies between states. Since it is not defined under EU law guidance is vague. See B.Anderson, I.Shutes, S.Walker, 'Report on the rights and obligations of citizens and non-citizens in selected countries', bEUcitizen Project Deliverable 10.1., 39–43, <https://doi.org/10.5281/zenodo.11346>.

⁴⁴See for the respective case law: Case C-438/05 *International Transport Workers Federation, Finish Seamen's Union v Viking Line* (2007) ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (2007) ECR I-11767.

⁴⁵According to Dagmar Schiek it therefore falls prey to the critique that EU citizenship rights can be of 'practical use only for the *beati possidentes*' (D. Schiek, n 33 supra, 357). Waves of free movement politicisation as well as member state discretions for restrictions are discussed in C. Roos, 'The (de) politicization of EU freedom of movement: political parties, opportunities, and policy framing in Germany and the UK', (2018) *Comparative European Politics*, <https://doi.org/10.1057/s41295-018-0118-1>.

far'.⁴⁶ He agrees that EU citizenship remains substantially thin, but interprets this as a strength rather than a weakness: EU citizenship is a 'procedural citizenship' that entitles its holder to nothing more (but also nothing less) than access to the variety of communitarian solidarity arrangements existent in the different member states.⁴⁷

While this 'contextual approach' acknowledges sensitivity to the social and cultural preconditions of national welfare systems, it has less to say regarding wealth disparities *between* member states. This raises problems since, as de Witte himself points out, there is a fundamental asymmetry between the institutional arrangements that produce and stabilise norms of justice (that have remained on the national level) and the nature of the relationships between citizens that give rise to claims of justice (which increasingly take place across borders). What has evolved in the EU so far is a 'tiered concept of justice', but this tiered concept is inherently unstable: Having no competences of its own to underpin EU-citizenship rights substantially, EU law is parasitic upon the existence of domestic welfare entitlements.⁴⁸ This instability underlines the necessity for addressing the appropriate framing of solidarity and the political preconditions which can in even stronger terms facilitate its possible transformation on a pan-European scale.

5 | PROMOTING INTRA-EUROPEAN SOLIDARITY

It is a widely accepted philosophical view that obligations of justice arise in an enduring system of social cooperation. Traditionally this is interpreted as living under a common constitution in a single, relatively closed society.⁴⁹ In the process of European Integration the EU was not merely 'constitutionalised' (at least in a positivistic sense). The common market and common currency have also established patterns of social cooperation, increasing interdependencies between member states and citizens. This suggests that claims of justice within the European system of cooperation are also changing and increasingly transcend the national realm.⁵⁰ Whether this is indeed the case remains an empirical question. Currently the EU is haunted by new forms of conflict which shift from regulatory to redistributive issues.⁵¹ As these new re-distributive conflicts are highly conflictual, it becomes painfully obvious how ill-equipped the EU is to deal with such issues *politically* on a transnational, European scale. Although the process of economic and monetary integration has established systemic relationships of interdependence, a discourse of justice barely expands beyond the structures of the nation-state. Indeed, quite to the contrary, the current crisis has led to tendencies for re-nationalisation; this has seen national governments pushing towards making the non-discrimination principle more restrictive, leading to the exclusion of non-nationals from welfare entitlement.⁵² There is a lack of public debate about these transformations and apparently a fear amongst political elites, to 'grab the horns and ride the bull'.⁵³

Questions of justice demand a mediating process that is structured through political institutions and in which communicative power can encompass what is socially connected to transnational socio-economic conflicts and social groups.⁵⁴ But, as is frequently pointed out, so far the EU lacks the democratic and institutional preconditions for

⁴⁶F. De Witte, n 39 supra, 212). His 'relational approach' is guided by the question of which exact social commitments warrant access to which social benefit. This argument is based on an assumption that it is the 'daily, quotidian social interaction between citizens and their communal reproduction of social norms within a certain territory' that generates commitments of solidarity and warrants access to welfare rights entitlements (ibid, 129). A problem that de Witte himself considers is that in practical terms this might lead to endless case law in which judges have to consider the character of a particular social benefit as well as the kind and depth of social interaction a person claiming access can prove (ibid.: 138). The 'temporal proxy solution' used in Directive 2004/38 might be rigid but it has the advantage of avoiding such interrogations.

⁴⁷F. de Witte, n 39 supra, 130–139.

⁴⁸F. de Witte, n 39 supra, 51.

⁴⁹J. Rawls, *A Theory of Justice* (Harvard University Press, 1999 (1971), 7–8; for a critique of this view, e.g. I.M. Young, *Global Challenges* (Polity Press, 2007).

⁵⁰With reference to Durkheim see R. Münch, *European Governmentality: The Liberal Drift of Multilevel Governance* (Routledge 2010).

⁵¹F. Scharpf, 'After the Crash: A perspective on Multilevel European Democracy', (2015) *European Law Journal*, 21 (3), 384–405; M. Dawson/F. de Witte, 'From Balance to Conflict. A new Constitution for the EU', (2016) *European Law Journal*, 22 (2), 204–224.

⁵²This is not only a feature of today's right wing populism but a rhetoric that has also moved to the political centre. The EU's free movement system is frequently described as having a 'destructive potential' (B. Werner, n 37 supra, 509).

⁵³R. Bauböck, 'Grab the horns of the Dilemma and Ride the Bull', in R. Bauböck (ed.), *Debating European Citizenship* (Springer Open 2019), 31. An example is the dispirited election campaign of the Social Democratic Party (SPD) in the last German Bundestag-elections 2017.

⁵⁴H. Brunkhorst, *Das doppelte Gesicht Europas*, Suhrkamp 2014: 168–171.

legitimately producing norms of justice: it still operates on the basis of a double depoliticised decision-making process, *institutionally* as well as *substantially*.⁵⁵ But instead of moving towards a new common ground, the 'Masters of the Treaties' deliberately – or of necessity (due to lack of consensus) – tolerate a political lacuna. This is problematic, because it leaves inherently *political* questions concerning the further development of European Citizenship to the Courts, which cannot substitute for democratic will formation. Attempts to do so would unavoidably damage the legitimacy of their judgements. Although judicial treatment can (and should) play an important role for conflict resolution in a multilevel system,⁵⁶ limits for judicial activism are obvious and cannot cover up the depth of the malaise. The Treaties can be regarded as the EU's formal 'constitution', but this constitution is biased: it hinders the proper balance between the economic and the social in European law.⁵⁷ Seen from this angle, a political debate on the substance of EU law would by necessity imply a debate on institutional reforms that seek a new balance between national and intra-European solidarity. Finding such a balance will be crucial for the future of free movement as a European citizenship right.

Conceptually, political solidarity can be conceived as a commitment (based on reciprocal trust as well as self-interest) that derives from shared democratic practices in which citizens can deliberate over their common interests.⁵⁸ In this understanding, political solidarity is a function of democratic processes rather than a pre-political given. Solidarity potentials are not only politically *constructed*, but also constantly framed and re-framed. In the EU promoting intra-European solidarity will thus involve a process of transnational norm-building. Such a process is dependent on institutional arrangements ensuring that conflicts are framed along social rather than national cleavages.⁵⁹ In contrast, a depoliticised modus of decision-making and a lack of open democratic deliberation contribute to a misframing of justice, reinforcing national closure rather than pan-European reframing.⁶⁰ In this situation the ECJ has recently been criticised for adapting its jurisdiction: in the application of Union law it protects solidaristic rights granted under *national citizenship* in order to shield these ties from erosion by virtue of mobility rights granted under *Union citizenship*.⁶¹ The Court tends to be primarily sensitive to functional arguments for stabilising national solidarity systems instead of evaluating their appropriateness, normatively, in a pan-European perspective. This critique also applies to decisions in the *Council*. A striking example is the deal the UK achieved at the Council Meeting in February 2016,

⁵⁵*Institutionally* insofar as it is a technocratically initiated process, monitored by the European Commission, in which national executives determine the course of EU politics, *substantially* insofar as the scope of EU politics is limited by the European Treaties (Brunkhorst, n 54 supra, Dawson/de Witte, n 51 supra).

⁵⁶According to Anuscheh Farahat and Christoph Krenn, the ECJ was not prepared to deal with the new kind of conflicts. They explain the role of the Court on two levels: First, *procedurally* the Court should interpret criteria for jurisdiction in a way that opens up a deliberative space so that, for instance, the democratic law-giver of a member state is asked for justification of measures taken for dealing with the crisis. This would secondly, and *materially*, enable the Court to take care of minimal standards in social rights: exhausting the *Lisbon Treaty* which has included social goals and obligations more broadly, including reference to the *Charter of Fundamental Rights*, (cf Farahat/Krenn, n 5 supra, 372–384). Farahat/Krenn critically discuss in how far the ECJ failed to play this part in the financial crisis (by claiming not to have jurisdiction) when asked to check decisions by the Council and the Commission on deficit reduction and social cuts. By engaging in a *preliminary ruling procedure* it could have helped the inquiring national court with a proper answer.

⁵⁷Issues that should be a matter of ordinary legislation (such as a decision of political majorities for one or the other economic policy) are predetermined in the Treaties – a development that e.g. Dieter Grimm criticises as 'over-constitutionalization' (D. Grimm, *Europa ja – aber welches? Zur Verfassung der Europäischen Demokratie*, C.H.Beck, 2016). It is rather a *fragmented* constitutionalisation insofar as it extends primarily over the economic dimension. The 'Maastricht criteria' already privilege currency stability over criteria for social stability, this continues in the 'Stability and growth pact' (1997) and also in the measures taken for crisis management ('European Fiscal Pact'), cf T. Piketty et al., *Für ein anderes Europa. Vertrag zur Demokratisierung der Eurozone*, (C.H. Beck, 2017). For a critical reflection of the role of law in the process of European Integration see also F. de Witte, 'Interdependence and Contestation in European Integration', (2018) *European Papers*, 3 (2), 475–509.

⁵⁸J. Habermas/S. Gabriel/E. Macron 2017: 'Europa neu denken', (2017) *Blätter für deutsche und internationale Politik*, Heft 4 (based on the Symposium *Which future for Europe?*, Hertie School of Governance, March 16, 2017), 42; J. Habermas, *Zur Verfassung Europas* (Suhrkamp, 2011), 76–82; O. Eberl, 'Transnational European Civic Solidarity', in S. Seubert/O. Eberl/F. van Waarden (eds.), *Reconsidering EU citizenship. Contradictions and Constraints* (Edward Elgar, 2018).

⁵⁹Fostering political debate and eventually open conflict without at the same time addressing the question of appropriate institutions might lead to political rupture rather than increased legitimacy (see F. de Witte, n 57 supra, 506).

⁶⁰For the idea of 'frame-setting' see N. Fraser, 'Reframing Justice in a Globalizing World', in *Scales of Justice* (Polity Press, 2008).

⁶¹de Witte n 39 supra, 211. For a critique of the ECJ's partial roll-back from previous (more expansive) interpretations of EU citizenship rights see N. Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) *Common Market Review*, 52 (4), 889–937. She detects a hegemonic attribution of supremacy to secondary law vis à vis the Union's legal order. This strengthens the discretion of national law, in particular with regard to social rights. The ECJ's dependence on national legitimization and enforcement resources is a plausible reason for this development (C. Roos/L. Westerveen, 'The conditionality of EU freedom of movement: normative Change in the discourse of EU actors', paper presented at the *ECPR General Conference*, Hamburg 2018).

preceding the Brexit Referendum. If the UK had remained in the EU the Cameron Government would have been allowed to initiate an 'emergency break mechanism', making possible severe restriction for access to social rights by non-national citizens.⁶² The third 'claim of justice' – leaving competences in welfare policies with the nation-states (see above) – increasingly seems to turn into a claim of *injustice*. And probably the normative deficit is ultimately not even likely to offset alleged functional gains: Defending the supposed sensitivity to domestic redistribution – not overtaxing the solidarity potential of national citizens – might in turn (via attacking mobility rights) nourish anti-European affects and destabilise the normative foundations of EU citizenship and European integration in general.

For a context such as the EU, in which the social and economic spheres are decoupled, protection of different national 'communitarian solidarity arrangements' – frequently framed as 'protection of diversity' – might well mean preserving power asymmetries between member states. In the absence of EU-wide solidarity arrangements, the free movement regime allows relatively well-off countries to profit from the free movement of labour without taking appropriate responsibilities for the social dimension of European citizenship. Against this background, it is doubtful whether the existing practice of *horizontal integration* embodies a form of solidarity which is sufficient to address the challenges of political and social justice in the EU.

Consider solidarity as an institutionally mediated *reciprocity arrangement*: it relates individuals and social groups within a society.⁶³ Existing welfare states can be differentiated according to the variants of reciprocity norms they have developed. These norms are shifting between two poles, namely balanced and generalised reciprocity, or as expressed in institutional terms, between *insurance* and *assistance*. In the former case the equivalence of provisions and counter-provisions ('Leistung/Gegenleistung') is the decisive factor. Balanced reciprocity aims to minimise inter-personal redistributive effects as much as possible. As such, it is in moral terms relatively undemanding. The other pole, generalised reciprocity, abstracts from the 'tit for tat' logic of calculated returns. It is embodied in transfer programmes based on a logic of 'care' – considerably resource-intensive and morally highly demanding.

Put against this picture, it appears that the current system of horizontal integration in the EU gives access to the insurance-type rather than assistance-type of reciprocity. It largely excludes the morally demanding forms of reciprocity since access to social *assistance* is highly restricted. What is promoted is the insurance-type of reciprocity which is politically rather uncontroversial.⁶⁴ As long as horizontal integration excludes full access to the reciprocity arrangements of the respective welfare system (including assistance), EU citizenship continues to mirror the wealth disparities between states and remains thin. Conversely, the alternative of substantiating EU citizenship rights on the basis of the existing logic of horizontal integration *only* would clearly mean overburdening national welfare systems with responsibilities for redistribution that ought to be addressed on a European level. What is needed for a balance between national and intra-European solidarity is a middle way that breaks with these false alternatives. An appropriate model of solidarity must take into account that the EU is a multilevel polity, but nevertheless a Union with a social purpose. It should therefore, on the one hand, institutionally enable political debate about normative standards and objectives of social protection arrangements at EU-level and should also take responsibility for enforcing them. But this, on the other hand, doesn't mean that these objectives ought to be provided by the EU itself all the way down. As in the model of horizontal integration provision can be left to the member states when it is at the

⁶²Notwithstanding that (former) EP-president Martin Schulz had warned that the European Parliament would not accept attempts to undermine the principle of non-discrimination for EU citizens' access to social benefits and also the *European Commission*, in an unofficial position paper, had drawn red lines (cf. S. Eckert, 'Domestic Contestation of Free movement: Brexit, Schwexit and Beyond', paper presented at the *ECPR General Conference*, Hamburg 2018; A. Sangiovanni, Non-discrimination, in-work benefits and free movement in the EU, (2017) *European Journal of Political Theory*, 16 (2).

⁶³For this characterisation see S. Lessenich/S. Mau, 'Reziprozität und Wohlfahrtsstaat', in Adloff, Frank/Mau, Steffen (eds.), *Vom Geben und Nehmen. Zur Soziologie der Reziprozität* (Campus Verlag, 2005); S. Mau, *The Moral Economy of Welfare States. Britain and Germany Compared* (Routledge, 2003).

⁶⁴Empirical data suggest that mobile EU citizens tend to pay more in tax and social security contributions than they receive in benefits. They tend to be net contributors to the costs of public services which they use in the host state. In particular, with regard to non-contributory benefits, mobile EU citizens account for a very small share of recipients (M. Ferrara, n 3 supra, 798; M. Seeleib-Kaiser, n 31 supra, 169). Member states certainly differ with regard to the share of non-contributory benefits. This played a role in the British Brexit referendum (C. Roos, n 45 supra). Studies by the European Commission nevertheless conclude that there is no statistical relationship between the generosity of the welfare system and the inflows of intra-EU migrants (M. Ferrara, n 2 supra, footnote 17).

same time ensured that their substantive development is supported so that they are able to fulfil their key functions. The EU thus mandates its member states to attain certain (minimal) social rights but instead of leaving the question of means for social policies to the member states *only* it also takes care of the fiscal basis for fulfilling this function (e.g. by providing sufficient space in the EU budget).⁶⁵ This proposal would imply a reconfiguration of the EU's economic constitution, in particular a readjustment of the four freedoms as 'liberalization imperative' and a revaluation of EU-fundamental rights in a comprehensive sense.⁶⁶

6 | CONCLUSION

With reference to *perceived* public opinion, there is currently a tendency to emphasise the need for national closure rather than further opening-up in order to guard against the erosion of national solidarity arrangements.⁶⁷ But empirically it is an open question whether or not European citizens really take a critical stance towards free movement and have a de facto preference for discrimination against non-nationals. It would seem like a hasty conclusion, particularly in light of survey data that report 81% support for free movement among EU citizens.⁶⁸ It also conflicts with findings that report tangible demonstrations of solidarity between European citizens.⁶⁹ Rather it signals a vacuum with regard to the appropriate *normative* framing and political institutionalisation of solidarity in the EU.

Strikingly, political debates on 'welfare tourism' and 'abuse' of free movement rights are dominated by the perspective of *receiving* countries and tend to leave the social costs of free movement for *sending* countries aside.⁷⁰ The challenge is thus to build a new frame of reference for obligations of justice beyond the national, based on the interdependencies which have already been (deliberately) created by the member states. Currently the overall system fails to distribute the benefits and burdens of social and economic cooperation in the EU fairly. By joining the Union, member states have agreed to pursue a common enterprise, but in so doing they have also accepted considerable risks: they have opened up their markets and their societies to the pressure of competition and have lost their financial sovereignty in the integrated currency area of the Euro.⁷¹ The financial crisis has shown that this inherent risk might even lead to dissolution of the Euro. It has brought to light the problem that the redistributive consequences of the common market and the common currency are supposed to be worked through and compensated primarily on a national level. This arrangement provokes anti-European resentments and potential for re-nationalisation.

⁶⁵This proposal for a middle way can be seen as situated in between the 'Guarantor of Social Rights Model' and the 'Protector of Citizens Model' proposed by R.Claassen et al. as two of four models of protecting citizenship and social rights (n 18, *supra*, 165–166).

⁶⁶For a critique of the four freedoms as 'liberalization imperative' see M.Hoepner, 'Grundfreiheiten als Liberalisierungsgebote? Reformoptionen im Kontext der EU-Reformdebatte', (2017) *MPIfG Discussion Paper* 17/10. Whether this means 'ending the assumption of their indivisibility', as A.Menéndez and E.D.H. Olsen suggest, is another issue (Menéndez/Olsen 2019, 182). Currently we witness pressure to restrict freedom of movement for persons in particular from those countries that want to renegotiate their relations with the EU: Switzerland and the UK. They want to profit from the free movement of *goods* and *capital* without having to accept *people* who are moving. This would lead to open markets without the possibility of ensuring legal protection. In the current constellation this would be a severe step backwards for a European citizenship regime. Rather free movement ought to be defended as a EU citizenship right, i.e. be defended in the sense that it follows a different logic than the market dispositive.

⁶⁷A recent example of political pressure to restrict access to social rights is child allowance for EU migrant workers. Already in 2013 a group of member states (Austria, Germany, the Netherlands, and the UK) have started an initiative against 'abuse' of freedom of movement (see letter of the Ministers of the Interior to the EU Council president, https://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf)

⁶⁸Cf. European Commission's *White paper on the Future of Europe*, issued in March 2017 on the basis of Eurobarometer data 2016.

⁶⁹For this interpretation on the basis of data from the Socio-Economic Panel (SOEP) 2015 see M. Eig Müller, 'Beyond the Crisis: The societal effects of the European transformation' (2017) *European Law Journal* 23. See also J. Gerhards et al. who measure support for pan-European welfare policies in three EU member states (J. Gerhards et al., 'Do European citizens support the idea of a European welfare state? Evidence from a comparative survey conducted in three EU member states', (2016) *International Sociology*, 1–24, DOI: 10.1177/0268580916662385.

⁷⁰An example is seen in proposals to compensate those countries with high inflow of EU migrants for their additional costs (A. Sangiovanni, n 28, *supra*, 249; M. Ferrara, Kick-off Contribution: 'Should EU citizenship be duty-free?' in M. Ferrara / R. Bauböck, (eds.), *Should EU citizenship be duty-free?* (2017) *EUI Working Papers*, RCAS 2017/60 (reprinted in R.Bauböck (ed.), *Debating European Citizenship*, (Springer Open, 2019). But do the social costs of moving for sending countries - labour drainage, 'care-chains' and EU-'orphans' - not rather suggest that sending countries are those in need of compensation? See e.g. M.Luppi/R.Oomkens/J.Gal, 'Precarious migrant care workers in Italy, Israel and the UK', in T.Knijjn/M.Naldini (eds.), *Gender and Generational Division in EU citizenship*, Edward Elgar, 2018.

⁷¹For an analysis of these risks and an approach towards a three-dimensional theory of solidarity see A. Sangiovanni, n 28, *supra*.

A constellation in which mobility and solidarity are necessarily in tension creates a huge barrier for further developing the potential of European citizenship. As argued above, strengthening an intra-European dimension of solidarity is needed for substantiating the right to move as an equal European citizenship right. This presupposes a re-framing of justice on a pan-European scale, a task which cannot simply be left to the agenda of an enlightened judiciary. It is a political process which ought to be pushed forward by European government leaders to win support among European citizens – in particular since the latter seem already more advanced than expected. In a context where the politicisation of free movement becomes toxically mixed with a populist discourse on loss of immigration control, the constant shying away from addressing this issue risks losing the normative fundamentals of European citizenship.

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