UvA-DARE (Digital Academic Repository)

Inclusion and Exclusion in the European Union

Collected Papers, ACELG 5th Annual Conference, November 2015

Schrauwen, A.; Eckes, C.; Weimer, M.

DOI

[10.2139/ssrn.2835345](https://doi.org/10.2139/ssrn.2835345)

Publication date

2016

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Schrauwen, A., Eckes, C., & Weimer, M. (Eds.) (2016). *Inclusion and Exclusion in the European Union: Collected Papers, ACELG 5th Annual Conference, November 2015*. (Amsterdam Law School Legal Studies Research Paper; No. 2016-34), (Amsterdam Centre for European Law and Governance Research Paper; No. 2016-05). Amsterdam Centre for European Law and Governance. <https://doi.org/10.2139/ssrn.2835345>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

INCLUSION AND EXCLUSION IN
THE EUROPEAN UNION – COLLECTED PAPERS

Annette Schrauwen

Christina Eckes

Maria Weimer

Jean-François Durieux

Sandra Mantu

Paul Minderhoud

Eleanor Spaventa

Bart Vanhercke

Jonathan Zeitlin

Amsterdam Law School Legal Studies Research Paper No. 2016-34

Amsterdam Centre for European Law and Governance Research Paper No. 2016-05

Inclusion and Exclusion in the European Union

**Collected Papers
ACELG 5th Annual Conference
November 2015**

Annette Schrauwen, Christina Eckes & Maria Weimer (eds.)

Authors: Jean-François Durieux, Sandra Mantu, Paul
Minderhoud, Annette Schrauwen, Eleanor Spaventa,
Bart Vanhercke, Jonathan Zeitlin

ACELG Working paper 2016-05

[Amsterdam Centre for European Law and Governance](#)
September 2016

The papers in this collection were originally presented at the 5th Annual Conference of the Amsterdam Centre for European Law and Governance on 20 November 2015.

September 2016

© the individual authors

Address for correspondence

Prof. Annette Schrauwen
University of Amsterdam
Amsterdam Centre for European Law and Governance
P.O. Box 1030
NL – 1000 BA Amsterdam
The Netherlands
Email: a.a.m.schrauwen@uva.nl

Information may be quoted provided the source is stated accurately and clearly.
Reproduction for own/internal use is permitted.

Content

Inclusion and Exclusion: Introduction

Christina Eckes, Annette Schrauwen, Maria Weimer

A Moment of Closure

Jean-François Durieux

Socializing the European Semester: Moving forward for a 'Social Triple A'

Bart Vanhercke & Jonathan Zeitlin w/ Astrid Zwinkels

What is Left of Union Citizenship?

Eleanor Spaventa

Solidarity (Still) in the Making or a Bridge Too Far?

Paul Minderhoud & Sandra Mantu

Citizenship: A Balancing Exercise?

Annette Schrauwen

Inclusion and Exclusion

Introduction

Exclusion in the European Union has many different faces. It lies at the very core of identity formation, in which the self is contrasted with 'the other'. It also has many different consequences. Constructing individuals, groups or even nations as 'the other' is a means to build a supposed justification for economic and social exclusion, lack of solidarity and denial of self-determination.

This collection of policy papers is based on the fifth annual conference hosted by the *Amsterdam Centre for European Law and Governance* at the University of Amsterdam on 20 November 2015. Against the backdrop of sustained austerity measures, the on-going financial crisis, and the refugee crisis, the annual conference addressed the themes of inclusion and exclusion in the EU. At the time of the conference, the campaigning for the UK referendum on EU membership had not yet started but solidarity within the EU, immigration to the EU and migration within the EU had already been flagged as the dominant issues in the debate. At present, we know the majority of the UK population voted to leave the EU; yet this has not reduced the level of disenchantment with immigration and free movement in the EU. Questions about redistribution and solidarity are only being raised more forcefully.¹ An exploration of the legal and political aspects surrounding these themes therefore remains a timely and necessary endeavour. The present collection offers a number of short papers discussing concepts, such as exclusion and refugee, as well as both legal and policy developments in the area of immigration, social policy and free movement.

The theme of inclusion and exclusion begs the question of how the EU deals with 'the other'. The EU's discomfort with the 'other' became visible with the physical closing of borders in 2015. The refugee crisis has highlighted many shortcomings in the EU asylum system, which has been qualified as hostile to refugees. In his contribution Jean-François Durieux discusses possible explanations for the hostility and depicts how refugees were completely excluded from the free movement ideal of the EU. He signals how the system might weaken the refugee concept and looks at possible ways to construct a system that is more inclusive.

¹ See e.g. Editorial Comments, *CMLRev* 2016 (53) 1-12, at 7

Where border controls may lead to physical exclusion of people, austerity measures imposed by the EU can lead to social exclusion. Bart Vanhercke and Jonathan Zeitlin discuss the –streamlined - response of the EU to that type of exclusion. On the basis of a study of country specific recommendations, they signal that the social dimension and tackling the social consequences of the crisis seem to have been hidden in other topics such as labour market and education. Once these social elements are uncovered in the country specific recommendations it appears the social dimension of the European economic policy cooperation has never been so strong. Vanhercke and Zeitlin pay attention to the need of national ownership of recommended reforms for the purpose of improving implementation. One could object that this makes the EU input in social policy issues invisible, and hence difficult to recognize for the wider public. It could reinforce the idea that the EU is not capable to create a socially just and inclusive Europe. Clarification and transparency is one of the policy recommendations the authors put forward.

The theme of inclusion and exclusion of citizens of other Member States in the host State – intra-EU solidarity – figures in three papers in this collection, notably those of Paul Minderhoud and Sandra Mantu, Eleanor Spaventa, and Annette Schrauwen. They focus on what became one of the hottest issues in the Brexit debate: benefit tourism. The papers identify a tendency in the case law of the Court of Justice of the European Union to accommodate Member States' claims that welfare tourism is threatening the public purse. Each paper contests this case law from a different perspective. Minderhoud and Mantu focus on lack of empirical evidence that welfare tourism is indeed a problem and point at subtle changes in the Court's case law that in the end results in a solidarity between EU citizens only available for those who do not need it. Eleanor Spaventa makes the connection between the case law of the Court and the concept of EU citizenship. She describes three phases in the Court's case law and worries that the third – present – phase not only has consequences for our understanding of EU citizenship, but also for fundamental rights jurisprudence of the Court and the role of the Court as motor of integration. Annette Schrauwen takes a closer look at the Court's role in the debate on welfare tourism and analyses the proportionality test the Court uses in its case law on access to social benefits. The worrisome conclusion of these three papers is that the political debate and the accompanying discourses seem to infiltrate the Court's case law.

The issues discussed in this collection of papers are quite diverse in substance. The refugee crisis links to the external relations of the EU, social policy is quite a soft area of law-making within the EU, whereas internal free movement of persons is one of the foundational areas of the EU. However, in general the line of argument is similar: Member States are

reluctant to give up control over areas and issues that they perceive as lying at the core of their sovereignty. They want to remain in control of the answer to the question “who belongs” both in terms of physical presence and redistributive justice. Whether that position still makes sense in today’s Europe, is an entirely different matter.

Annette Schrauwen
Christina Eckes
Maria Weimer

A Moment of Closure

Jean-François Durieux*

The 'Welcome, refugees!' signs seen in German and Austrian train stations some time ago have quickly given way to deep-rooted fears and suspicions vis-à-vis uninvited strangers. At the same time, those positive manifestations should not be written off too quickly, especially because they ostensibly situate the refugee within a framework of 'European values'. Whatever her reasons, Ms Merkel was right to remind us that asylum indeed belongs to the set of values that bind us together as Europeans. Whether such values are adequately reflected in EU asylum law is, however, a different matter altogether. Within the extensive literature on the Common European Asylum System (CEAS) one finds a fairly consistent trend of thought according to which the EU integration project is actually hostile to refugees. This short paper will review the main (non-mutually exclusive) explanations for such 'hostility', before asking where re-inclusion of the refugee into the EU demos could be effected.

Explaining hostility and exclusion

Explanation 1a: the non-democratic negotiation of closure. Our title 'a moment of closure' is deliberately ironic, in the sense that the welcoming discourse and action we have witnessed in the summer of 2015 will probably be remembered more as a moment of openness in a history of closure. The choice of title is, however, inspired by a sentence found in Chantal Mouffe's work (cited in Noll¹) analysing the paradoxes of liberal democracy as it tries to deal with 'the stranger': the very process of constituting the "people", she writes, implies and indeed requires a moment of closure. 'This cannot be avoided, even in a liberal democratic model; it can only be negotiated differently'. One can find here a first level of rationale for the exclusion of refugees (and 'third country nationals' generally) from the EU demos: not only is the alien excluded from the demos-constituting process (which is to be expected), but the process of 'negotiating asylum' among consociates, i.e., EU Member States and citizens suffers from the democratic deficit that some see as a fundamental flaw (and indeed a paradox) of the EU project as a whole.

© Jean-François Durieux

* Jean-François Durieux is Director of the International Refugee Law and Migration Law programme of the International Institute of Humanitarian Law, based in Sanremo (Italy).

¹ Gregor Noll, *Negotiating Asylum* (M. Nijhoff 2000)

Explanation 1b: the conspiracy theory. Zeroing down on EU's immigration and asylum law and policy, Virginie Guiraudon² (see footnote 7) exploits the same vein when she argues that the acceleration of vertical integration in this field was a sort of conspiracy – a tactical choice by a few Member States' law and order policy officials, whose primary concern was to circumvent domestic constraints on migration control. What they saw as domestic constraints were, in fact, democratic controls.

Explanation 2: restrictiveness and exclusion are inherent in the process of EU construction (the neo-functionalist theory).³ From a historical perspective, it is essential to bear in mind that asylum dawned upon the EU project as an after-thought, not as a primary motivation. Consequently, the CEAS bears the legacy of earlier integration efforts (see Schengen), but also – and above all – it is imbued with the powerful logic that drives the EU integration project as a whole. It is within this logic that one finds the premises of the phenomenon I have called 'the vanishing refugee'.⁴ In that piece I explored two such premises, namely:

- ✓ mutual trust – which is reflected not only in mistrust towards the asylum seeker, but also in further alienation of the refugee; and
- ✓ the internal market logic (the abolition between Member States of obstacles to the free movement of goods, persons, services and capital⁵), which does not diminish the urge to control the movement of aliens but relocates the exercise of such control.

Put simply, the topic of 'asylum' had no *raison d'être* within the EU integration project until it imposed itself as a concern – perhaps even an

² See Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping' (2000) 38 JCMS 251

³ See in particular Gregor Noll, *Negotiating Asylum* (M.Nijhoff 2000); Gregor Noll and Jens Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies' in P. Alston (ed.), *The EU and Human Rights* (OUP 1999) and Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004); Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 Int'l J. Refugee L. 630

⁴ J.F. Durieux, 'The vanishing refugee : how EU asylum law blurs the specificity of refugee protection' in Hélène Lambert *et al* (eds), *The Global Reach of European Refugee Law* (CUP 2013)

⁵ Single European Act 1987, OJ L 169/1, article 13 reads:

The EEC Treaty shall be supplemented by the following provisions: ...
The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992
The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

annoyance – confronting the EU's ambition to establish an internal market.⁶ Without controls at the intra-EU State borders, it became imperative to

(i) organise three levels of control around, or beyond, the external frontier; and

(ii) regulate the intra-EU movement of third country nationals, including asylum-seekers and long-term lawful residents. Although this is not the preferred option of Member States, some third country nationals do enter EU territory uninvited and seek asylum there. Many – although these days not the majority – succeed in their asylum applications and are formally recognized as refugees. How these categories of persons of concern to the international community – asylum seekers and refugees – fit within or fall outside the free movement equation is arguably the litmus test of EU law's compatibility with the universal refugee regime. Within the 'Dublin' system the movement of asylum seekers is restricted and governed by an allocation system based on 'objective' criteria that leave precious little room for what UNHCR's Executive Committee wisely called their 'special situation'.⁷ Now, what about recognized refugees?

A strange asymmetry affects the mutual recognition of asylum decisions within the EU: 'if one Member State considers the asylum application of an individual and rejects it, that rejection is valid for all the Member States (notwithstanding that the recognition of refugee status remained and remains nationally limited)'.⁸ Guild's denunciation of this 'original sin' (a sin of omission, at the very least) deserves to be quoted in full:

[T]he failure to integrate refugees into the project has led directly to the current hostility of the EU towards refugee protection. ... By leaving this part of the population out of the free movement equation, the EU became hostage to its own failure towards refugees as these became the people on the basis of whom the creation of substantial coercive flanking measures to

⁶ This dominant neo-functionalist explanation has been questioned by Guiraudon and Bigo, among others. Both argue, on different grounds, that the compensatory measures rationale cannot provide a sufficient explanation for the restrictiveness of the policies and practices adopted. See Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping' (2000) 38 JCMS 251; Didier Bigo, 'Border Regimes, Police Cooperation and Security in an Enlarged European Union' in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union* (Routledge 2002)

⁷ UNHCR Executive Committee, Conclusion No. 15, para. (h)(vi).

⁸ Guild 2006, fn 3 above, at 636.

*compensate for the loss of control at the intra-Member-State borders was based.*⁹

It is sadly telling that, after affirming the principle of free movement of persons in the Single European Act, it took the EU a full 25 years to afford refugees the right to move and establish themselves freely within the EU (after satisfying the condition of five years' lawful residence in a Member State). It is doubly remarkable that this benefit should be granted on a par with other long-staying third country nationals, rather than as something incidental to their status as refugees.¹⁰ Far from being a component of the EU *demos*, refugees have been treated as third class residents ever since the inception of the integration project, less worthy of inclusion than other third country nationals legally residing in the EU.

It is worth noting that the refugee is also absent from the catalogue of those **legal migrants** whom the EU needs and welcomes. Despite the efforts of UNHCR, it has not been possible so far to obtain a mandatory commitment to an EU-wide programme of refugee resettlement (namely, admission through selection from third countries), and the annual resettlement quotas set by individual Member States, where they exist, remain alarmingly low.¹¹ Stressing the need to reshape the CEAS as an integral part of a holistic approach to migration, Chetail and Bauloz observe that a 'major systemic flaw in the current system ... stems from the EU's one-sided attitude towards migration which has created an inextricable bias both as regards its relationship with third countries and its disproportionate focus on irregular migration'.¹² Perhaps *this* is the original sin. If it is, we must agree with Didier Bigo¹³, who disputes the neo-functionalist explanation.

⁹ Ibid. at 634.

¹⁰ On 11 May 2011, the European Parliament and the Council of the EU adopted an extension of the EU rules on long-term residents by amending Directive 2003/109/EC, whereby refugees and beneficiaries of subsidiary protection will be able to acquire long-term resident status on a similar basis as other third country nationals legally living in the EU for more than five years: Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

¹¹ On 29 March 2012, the EU adopted a joint resettlement programme, participation in which is voluntary. The joint programme will provide EU Member States with additional funding for the reception and integration of resettled refugees in local communities, in particular in those countries that are considering developing resettlement programmes. Twelve Member States currently run resettlement programmes, together contributing to less than eight per cent of the annual resettlement places on offer around the world.

¹² Vincent Chetail and Céline Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?* (EU-US Immigration Systems

Explanation 3: the immigration policy deficit

Bigo argues that restrictiveness is not a necessary by-product of integration – it comes only to fill a gap of basic rules. Regional integration, notably in the area of internal free trade in goods (as opposed to people), works reasonably well because it is backed by a common external tariff and commercial policy. The EU would certainly have adopted a radically different and more positive approach to refugees and asylum seekers had it been conceived of as a region of immigration, and asylum as a mechanism for admission rather than border control. In other words, if the EU Member States were able to agree on the principles governing immigration into the EU.

Is human rights-based protection the solution?

Which takes us back to where we started, i.e. the construction of a European demos that need not be (forever) exclusive of the ‘other’.

Noll argues that ‘Strasbourg offers a mechanism for bringing a bantam bit of transparency into the construction of closure. And, indeed, it seems to be the only mechanism offering a public arena for staging the paradoxical demands of liberal democracy.’¹⁴ He is able to reach this conclusion because (1) the Strasbourg case is on inclusion – more specifically, that discourse not only involves the citizenry of Contracting Parties as ‘legal consociates’, but also a non-consociate, namely the alien claimant; and

(2) the judgments of the ECtHR are democratically *better* legitimised than the laws of the domestic legislator, or, for that matter, of the EC law and Union law legislator.

While I can agree with the last point, I beg to differ on the nature and scope of Strasbourg decisions. The so-called asylum cases decided by the ECtHR are not about inclusion, but about non-returnability [unless you combine their rationale with that found in *other* ‘alien’ cases that affirm the accrual of residence rights through ‘time and ties’]. Even if you do so, the ‘refugee’ quality of the case gets lost. This point was highlighted by UNHCR years ago, and remains valid to this date: ‘from UNHCR’s perspective, the frequency of recourse to Strasbourg may also have a downside. Although Article 3 can be helpful in individual cases, it has to be of concern where resort to it is symptomatic of a more deep-rooted but unaddressed problem in national asylum systems in the region. It would be worrying if states

2011/07, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole: European University Institute 2011), p. 32.

¹³ See fn 6 above.

¹⁴ Noll 2000, fn 1 above.

were tempted to use Article 3 more frequently so as to avoid their broader obligations to genuine refugees under the Refugee Convention.’¹⁵

It is worth recalling, indeed, that the ECHR does not actually deal with asylum, if that concept is construed to mean the sum total of protection afforded by a State to refugees on its territory or under its jurisdiction. The so-called asylum provisions of the ECHR, like those of other human rights treaties,¹⁶ were not drafted with the plight of refugees in mind.

Helpful as it may be in the individual case, recourse to ECHR protection is an incomplete, and at any rate inappropriate, remedy against the deficiencies of refugee status determination. It is true that the *non-refoulement* provisions of the ECHR – and now also subsidiary protection under the CEAS – may offer a safety net to refugees by preventing their forced return to persecution. They do not, however, remedy the basic flaw of an erroneous determination of refugee status unless – and here comes the dangerous slippage – non-return is regarded as the only protection that matters in refugee status. The danger that such an approach would represent for the refugee concept is self-evident: robust protection against forced return, such as that provided by the European human rights regime, would make refugee status redundant.

If at any point in history a refugee definition is vested with a universal vocation – which is clearly the case for article 1A of the 1951 Refugee Convention – this definition necessarily represents the international consensus over a *positive* and collective commitment to protect specific categories of persons, and to resolve the problems caused by their exodus and exile. This positive inclination, which, significantly, extends to solutions as well as protection, sets refugees (however defined at a particular moment) apart from those other persons who also, subsidiarily, need protection against forced return to personal or collective danger. In short, the refugee definition is not intended to describe those aliens whom we cannot deport – that is, negatively – but rather ‘positively’ to describe those aliens whom we want to protect.

¹⁵ Erika Feller, ‘Opening Statement’ in Council of Europe, *Second Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons: Proceedings* (Strasbourg: Council of Europe, 2000)

¹⁶ See especially the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85, and the International Covenant on Civil and Political Rights, New York, adopted 16 December 1966, in force 23 March 1976, 999 UNTS 171. See also Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009)

Who then, in the final analysis, has the ability to reinstate the refugee as a member of the European demos? While no progress has been made towards an authoritative judicial interpretation of the Refugee Convention, it is significant that the CJEU has started issuing preliminary rulings on the interpretation of the Qualification Directive provisions. In doing so, the court can hardly avoid referring to concepts and phrases directly imported from the Refugee Convention, or taking notice of such things as UNHCR's views on its interpretation. It remains to be seen whether, and in what terms, the CJEU will dare to cross the systemic lines and admit that its reading of the Qualification Directive – including, should the question arise, the rationale for the primacy of refugee status – is not just a matter of EU law, but indeed a matter of international refugee law to be interpreted with the interests of the Contracting States to the Refugee Convention in mind. What is required is a tripartite conversation between EU asylum law, as authoritatively interpreted by the CJEU, and its two international law sources of 'international protection', namely the Refugee Convention, on the one hand, and the ECHR, on the other.

Further Socializing the European Semester: Moving Forward for a ‘Social Triple A’

**Bart Vanhercke and Jonathan Zeitlin
with Astrid Zwinkels***

This paper¹ focuses on the social dimension of the European Semester. In a previous study we analysed the evolution of the social dimension of the European Semester from 2011 through 2014 (Zeitlin and Vanhercke, 2014, 2015). We concluded that over this period, a partial but progressive ‘socialization’ of the European Semester had taken place, both at the level of substantive policy orientations and at the level of governance procedures. This paper reviews developments in the 2015 European Semester and provides recommendations about ways of further strengthening its social dimension, including as regards broader social stakeholder participation. We also discuss recent more ambitious proposals for restructuring the European Semester.

‘Streamlining’ the European Semester: Innovations in the 2015 Cycle

The new Juncker Commission introduced a series of significant procedural innovations to the 2015 European Semester. The new Commission ‘streamlined’ the Semester process by integrating two key documents – the In-Depth Reports prepared as part of the Macroeconomic Imbalances Procedure and the Staff Working Documents supporting the Country-specific Recommendations (CSRs) – into single Country Reports. The Commission also released both the Country Reports and CSRs earlier in the Semester cycle, leaving more time for review and debate within the EU committees as well as with national and European policymakers (for the revised Semester timetable, see Figure 1).

The most fundamental change was the Juncker Commission’s decision to reduce drastically the number and scope of the CSRs, focusing on key

© Bart Vanhercke & Jonathan Zeitlin

* Bart Vanhercke is Director at the Brussels-based European Social Observatory (OSE). Jonathan Zeitlin is Professor of Public Policy and Governance, and Distinguished Faculty Professor in the Department of Political Science and the Faculty of Social and Behavioral Sciences (FMG) at the University of Amsterdam. He co-founded and co-directs ACCESS EUROPE, a platform for research, education and public debate about Europe, the European Union and its member states.

¹ This paper draws heavily on the executive summary of a report produced for the Luxembourg Presidency of the Council of the European Union (Vanhercke and Zeitlin, 2015).

priority issues identified as actionable and monitorable within a 12-18 month timescale. In most but not all cases, this new generation of CSRs focused more on the 'what' of reform challenges and outcomes rather than the 'how' specific policy measures to meet them.

Substantive Policy Content: A Less Social Semester?

Did the EU's social and employment policy objectives figure more or less prominently in the 2015 Semester than in preceding cycles? The Annual Growth Survey (AGS) 2015 no longer considers 'tackling unemployment and the social consequences of the crisis' as an overarching priority, but does refer to a range of social and employment issues in its second pillar on 'a renewed commitment to structural reforms' (European Commission, 2014). Compared to 2014, the number of CSRs addressed to Member States on social and employment policy declined substantially. This was primarily a consequence of the policy decision by the Juncker Commission to significantly reduce the total volume of recommendations. Considered in relative rather than absolute terms, however, there was no clear decline in the proportion of socially oriented CSRs.

A striking feature of the 2015 CSRs (European Commission, 2015a) is their more integrated character, whereby social objectives and concerns were 'mainstreamed' into recommendations formally focused on other issues, such as labour market policy, education, and taxation. Figure 2 reworks the Commission's overview table to take account of these 'hidden' social CSRs, adding in the social dimension of CSRs primarily coded as directed to other topics. The 'Key to Figure 2' below provides the detailed list of CSRs that are referred to in the table.

If the relative decline in the proportion of socially orientated CSRs on closer examination seems more apparent than real, it remains nonetheless true that the linkages between social inclusion and employability received considerably stronger emphasis than in previous years. In addition, the overwhelming majority of CSRs concerning poverty and social exclusion were addressed to central and Eastern Europe Member States. The Europe 2020 targets did not figure explicitly in the recommendations.

Governance Processes and Procedures: The Role of the Social and Employment Actors

The Directorate-General for Employment and Social Affairs (DG EMPL) plays an increasingly important role in both the cross-DG expert teams preparing the country analyses and the Core Group responsible for drafting the recommendations themselves. In 2015 DG EMPL was charged with drafting the chapter on social and employment policy in the new Country Reports coordinated by the DG for Economic and Financial Affairs. The revised timetable gave the Employment and Social Protection Committees more time to discuss and review both the Commission's Country Reports and the CSRs themselves. Compared to previous years, there was better cooperation between the various committees involved in the Semester process.

A number of problematic issues related to the streamlining process nonetheless emerged. One key concern is the increased proportion of social and employment CSRs that are being linked to the Stability and Growth Pact (SGP) and the MIP. A growing number of structural reform issues are also being included in fiscal CSRs falling under the SGP. A second problematic issue concerns the organization of 'Jumbo' meetings between the Employment, Social Policy, Health and Consumer Affairs (EPSCO) and Economic and Financial Affairs (ECOFIN) Council formations for joint review of the CSRs. The complexity of the voting rules and the high threshold needed to reach a 'reinforced qualified majority' for amending the CSRs undercut the consistency – and thus also the legitimacy – of the review process.

Neither the EU-level social partners nor civil society organizations played a significant role in the European Semester under the previous Commission, either at the EU or Member State level. Both the Juncker Commission and the EPSCO Council have formally sought to strengthen the role of social and civil dialogue within the 2015 European Semester cycle. Crucial in such initiatives are the European Semester Officers, though the emphasis they place on engaging stakeholders appears to vary widely across Member States. But it remains unclear whether this new 'openness' from the Commission's side to social stakeholders made a real difference to the working of the 2015 Semester.

National Ownership and Deliberation

A key objective behind the 'streamlining' of the European Semester was to increase national 'ownership' of recommended reforms and thereby improve their implementation. Our research confirms that these changes have been broadly welcomed by the Member States. Furthermore there is wide agreement that the quality and accuracy of the analysis in the Commission's Country Reports was much higher than in previous years.

One consequence of the dramatic reduction in the number and scope of the CSRs, however, was that many significant policy challenges did not figure in the recommendations themselves. The selection among these issues was more self-consciously 'political', focusing on assessments of the 'macroeconomic and social relevance', actionability, and monitorability of the recommendations. As a result, however, the selection of CSRs also appeared less transparent and more discontinuous than in previous years. The Commission also appears to have been less prepared than in previous years to accept compromise formulations for the CSRs emerging from the committee review process. Thus the CSR amendment process also appears to have been less deliberative than in previous years, with the outcome depending more on lobbying and coalitional voting than on the quality of evidence and arguments presented.

Beyond the CSRs: Monitoring and Reviewing Progress towards EU Social Objectives

The streamlining of the European Semester creates major challenges for the practices of multilateral surveillance, peer review, and monitoring of progress towards EU social and employment policy objectives. Were the

Employment Committee (EMCO) and the Social Protection Committee (SPC) to confine their contribution to the European Semester to multilateral surveillance of the implementation of the new streamlined CSRs, this would represent a very significant loss of collective institutional capacity to monitor national reform challenges and foster progress towards common EU social and employment objectives.

It is therefore essential to combine the sharper focus of the streamlined European Semester with more continuous and comprehensive monitoring, multilateral surveillance, and peer review of national progress towards common EU social and employment policy objectives by the SPC and EMCO. Both committees should also continue to focus attention on common emerging challenges identified through their monitoring instruments, as well as the EU Key Social and Employment Indicators Scoreboard, as the SPC already does with the 'trends to watch' in its Social Protection Performance Monitor.

The Future of the European Semester

The 'Five Presidents' Report' of June 2015 proposed using a stronger and more integrated European Semester to promote convergence of economic, social, and employment performance among euro area Member States (Juncker et al., 2015). Following up on this initiative, the Commission proposed a series of specific measures in October 2015 (European Commission, 2015b). These concern the timetable of the Semester (e.g. clarifying the relationship between the euro area and national dimensions; calling for more forward-looking NRPs) and enhancing the focus on employment and social performance within the MIP (three employment indicators have been moved to the headline indicators of the early warning Scoreboard). Undoubtedly the most ambitious but least developed of the Commission's current proposals to reinforce the social and employment dimension of the Semester is the 'European pillar of social rights', which would consist of two components: modernizing existing legislation and developing employment and social benchmarks in order to foster upwards convergence.

The future of the European Semester, including its social dimension, remains open. But for now, it seems fair to conclude that the European Semester has never been more social, both in terms of its substantive policy orientations and of its governance procedures. At the same time, however, there is still considerable room for further improvement.

Policy Recommendations

1. *CSRs on social and employment policy issues should not be overly prescriptive.* They should focus on reform challenges and outcomes rather than specifying the policy measures that Member States should adopt to meet them. To enhance national ownership, CSRs on these issues should leave sufficient political space for Member States to find their own contextually appropriate path to major reforms in consultation with domestic stakeholders.

2. *The criteria for including social and employment policy recommendations under the MIP and the SGP should be clarified and made more transparent.* CSRs on these issues should take full account of the EU's social objectives and values, consistent with the 'horizontal social clause' (Article 9) of the Lisbon Treaty. CSRs on overlapping policy issues should be jointly reviewed and adopted by the committees advising the EPSCO and ECOFIN Councils, irrespective of their legal basis, with decisions based on substantive expertise and argument rather than procedural formalities and jurisdictional claims. In analyzing the social context of macroeconomic adjustment within the MIP, the Scoreboard of Key Employment and Social Indicators should be taken into account alongside the MIP Scoreboard.

3. *The final review process for the amendment and adoption of the CSRs should be conducted more transparently and more deliberatively.* Sufficient time should be devoted to the joint EPSCO-ECOFIN meeting to allow proper debate and considered decisions on contested amendments. The voting procedures should be clarified. The Commission should be more prepared to accept amendments justified by the evidence of multilateral surveillance in the Council advisory committees, without necessarily requiring its position to be overturned by a reinforced qualified majority vote.

4. *The SPC and EMCO should continue to monitor and review the full range of EU social and employment policy commitments and objectives, including the Europe 2020 targets, as well as the broad set of national challenges identified in the Commission Country Reports and National Report Programmes.* In addition to reviewing multilaterally the implementation of the past year's CSRs, the SPC and EMCO should likewise continue to monitor and discuss national progress in addressing reform challenges flagged by earlier CSRs as well as other significant social and employment policy issues raised in the Country Reports. Both committees should also focus attention on common emerging challenges identified through their monitoring instruments, as the SPC already does with the 'trends to watch' in its Social Protection Performance Monitor.

To underpin this process, the indicators and data sources on which these monitoring instruments are based should be reinforced and key gaps filled, for example in the area of healthcare. Such reviews should be conducted thematically to maximize opportunities for multilateral discussion of promising policy approaches and mutual learning. Both country and thematic reviews should combine ex post evaluation of the outcomes of existing policies with ex ante assessments of proposed national reforms, which should be supported more systematically through Commission-funded external peer review and mutual learning activities. The SPC and EMCO should cooperate with the Commission in developing appropriate indicators for benchmarking Member States' social and employment performance, both within the context of the European Semester and of the proposed pillar of social rights.

5. *The results of this expanded monitoring and review process within the SPC and EMCO should be fed into the broader EU policy debate through the key messages of the Joint Employment Report (which should therefore be renamed the Joint Employment and Social Report, as proposed in the 'Five Presidents' Report'), drawing on the more detailed analysis in the SPC's own annual Social Europe Report.* These key messages should be discussed

by the EPSCO Council, and should inform debate on the EU's priorities in the next year's Annual Growth Survey.

6. *The participation of social stakeholders in the European Semester should be significantly enhanced, notably at the national level.* The Commission and the Council should provide stronger guidance to Member States about the participation of civil society organizations and social partners in the national phase of the Semester, both in the formulation of more forward-looking NRPs and the implementation of the CSRs. Member States should be asked to report in their NRPs on how this participation has been organized. The Commission's own planned guidance for organizing the work of the European Semester Officers and country missions should include instructions on reaching out to civil society organizations as well as national social partners.

At the European level, the Commission, the EPSCO Council and its advisory committees (EMCO and SPC) should reinforce the practice developed in recent years of consulting, in a more regular and structured way, both EU civil society networks and social partner organizations at clearly identified moments in the Semester cycle. Opportunities should be created for these groups to feed their country-specific knowledge of what is happening on the ground into the multilateral surveillance reviews conducted by EMCO and the SPC. The proposed Social Platform on Inclusive Growth should be used to involve social NGOs and other stakeholders in EU policy developments of mutual interest, including stocktaking of the European Semester.

References

- European Commission (2015a) '2015 European Semester: Country-specific recommendations', *COM (2015) 250 final*, Brussels, 13 May 2015.
- European Commission (2015b) On steps towards Completing Economic and Monetary Union', *COM(2015) 600 final*, Brussels, 21 October 2015.
- European Commission (2014) 'Annual Growth Survey 2015', *COM(2014) 902 final*, Brussels, 28 November 2014.
- European Parliament (2015) 'Resolution of 11 March 2015 on European Semester for economic policy coordination: Employment and Social Aspects in the Annual Growth Survey 2015', *2014/2222(INI)*.
- Juncker J.-C. with Tusk D.; Dijsselbloem J.; Dragi M. and Schultz M. (2015) *Completing Europe's Economic and Monetary Union*, Brussels, European Commission.
- Vanhercke B. and J. Zeitlin with Zwinkels, A. (2015), 'Further Socializing the European Semester: Moving Forward for a 'Social Triple A'', Report prepared for the Luxembourg Presidency of the Council of the European Union, Brussels: European Social Observatory, 36 p.
- Zeitlin J. and Vanhercke B. (2015) 'Economic Governance in Europe 2020: Socializing the European Semester against the Odds?', in Natali D. and Vanhercke B. (eds.) *Social Policy in the European Union: State of Play 2015*, Brussels, European Trade Union Institute and European Social Observatory, pp. 65-95.
- Zeitlin J. and Vanhercke B. (2014) 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', *Swedish Institute for European Policy Studies (SIEPS) Report 2014: 7*.
http://www.sieps.se/sites/default/files/Sieps%202014_7%20webb%20NY_2.pdf

Figure 1: Revised 2015 Semester timetable (European Commission 2014)

Figure 2: 'Hidden' Social Recommendations in the 2015 CSRs

	Public finances and welfare systems				Financial sector		Labour market			Product and service markets		Education	Social inclusion	Administration	
	Public finances	Taxation	Pension system	Healthcare system	Banking and access to finance	Housing and private debt	Labour market	Labour taxation	Wage-setting	Services and network industries	Innovation and business environment	Education and skills	Poverty and social inclusion	Administrative modernisation and rule of law	
AT							S					S			AT
BE															BE
BG									S			S			BG
CZ							S	S				S			CZ
DE								S							DE
DK															DK
EE							S						S		EE
ES															ES
FI															FI
FR															FR
HR			S												HR
HU												S			HU
IE															IE
IT															IT
LT			S										S		LT
LU															LU
LV				S									S		LV
MT															MT
NL															NL
PL															PL
PT													S		PT
RO				S								S			RO
SE															SE
SI									S						SI
SK							S					S			SK
UK							S								UK
Euro area															Euro area

Source: European Commission (2015a), Annex 1, plus own calculations from European Parliament (2015)

Key to Figure 2: 'Hidden' Social Recommendations in the 2015 CSRs

Sentences below include both 'social' CSRs and CSRs that are primarily directed to other topics but contain 'hidden' social aspects. The social dimension of these recommendations is shown in italics.

AT

Strengthen measures to increase the labour market participation of older workers and women, including *by improving the provision of childcare and long-term care services.*
Take steps to improve the educational achievement of disadvantaged young people.

BG

In consultation with the social partners and in accordance with national practices, establish a transparent mechanism for setting the minimum wage and minimum social security contributions in the light of their impact on in-work poverty, job creation and competitiveness.
[I]ncrease the participation in education of disadvantaged children, in particular Roma, by improving access to good-quality early schooling.

CZ

Further improve the availability of affordable childcare.
[T]ake measures to increase participation among disadvantaged children, including Roma.

DE

Revise the fiscal treatment of mini-jobs to facilitate the transition to other forms of employment.

EE

Take action to narrow the gender pay gap.
Ensure high-quality child care and social services at local level.

HR

Improve the adequacy and efficiency of pension spending by tightening the definition of arduous and hazardous professions.

HU

Increase the participation of disadvantaged groups in particular Roma in inclusive mainstream education, and improve support offered to these groups through targeted teacher training.

LT

Adopt a comprehensive reform of the pension system that also addresses the challenge of pension adequacy.

Improve the coverage and adequacy of unemployment benefits and cash social assistance

LV

Take concrete steps to reform social assistance, ensuring adequacy of benefits. Take action to improve accessibility, cost-effectiveness and quality of the healthcare system.

PT

Ensure effective activation of benefit recipients and adequate coverage of the minimum income scheme

RO

Increase the provision and quality of early childhood education and care, in particular for Roma.

Pursue the national health strategy 2014-2020 to remedy issues of poor accessibility.

SI

Review, in consultation with the social partners and in accordance with national practices, the mechanism for setting the minimum wage, and in particular the role of allowances, in light of the impact on in-work poverty, job creation and competitiveness.

SK

Improve the incentives for women to remain in or return to employment by improving the provision of childcare facilities.

Increase the participation of Roma children in mainstream education and in high-quality early childhood education.

UK

Further improve the availability of affordable, high-quality, full-time childcare.

Horizontal (CZ, DE, EE, HU, LT, LV)

CSRs on labour taxation call for reduction of tax wedge on low-wage or income earners.

What is Left of Union Citizenship?

Eleanor Spaventa*

Introduction

1. The debate about the limits to free movement has regained political impetus because of the UK referendum on EU membership: the Conservative Government has placed reforms in this area as one of the key demands for renegotiation. Furthermore, in a sort of circular effect, the fact that free movement of persons has become a hot political issue has also made it into a hot *popular* issue: of the items listed in Mr Cameron's letter to Mr Tusk, that relating to the free movement of persons is the one the public most identifies with, and the one which might well be very influential in determining the voters' response to the referendum question. Whilst this fact might be seen as a British problem, the heightened rhetoric about 'benefit tourism', abuse of migration law and 'good' versus 'bad' migrant has undoubtedly permeated the debate more widely so much so that it might have had an influence on the Court of Justice's interpretation of the Union citizenship provisions: it is uncontroversial to point out that the interpretation of Union citizenship has been narrowed considerably in the past few years, so much so as to leave open the question as to whether Article 21 (and 20) TFEU is still relevant beyond the rules set out in Directive 2004/38.¹ The question about the relevance of the Treaty citizenship provisions then raises also a broader constitutional question as to the relationship between primary and secondary legislation in EU law.
2. I would divide the law on Union citizenship in three phases: an initial phase, when economically inactive individuals are given (limited) rights in EU law through the three residency directives (beyond those rights economically active citizens might have had already as service recipients); a constituent and expansive phase where the Court 'enabled' the Treaty citizenship provisions; and a regressive phase, where the

© Eleanor Spaventa

* Eleanor Spaventa is Professor of European Union Law at the University of Durham and an analytical expert for the FreSsco network, a network of independent experts on the free movement of workers and social security funded by the European Commission to provide expert guidance in these fields.

¹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77

rights of Union citizens appear to be limited to those recognised (not conferred) by Directive 2004/38.

3. I will recall briefly the latter two phases, starting from the constituent phase. It is well known that following the introduction of Union citizenship in the Maastricht Treaty there was some debate about the nature of the Treaty provisions: i.e. whether they were merely cosmetic, giving Treaty recognition to the fact that economically inactive citizens were now also protected in Union law insofar as they fulfilled the conditions of economic independence provided for in the residence directives; or rather whether they were *innovative*, so that the Treaty provisions could be directly effective and Union citizenship acquire a prominent role in the armoury of rights granted to Union citizens. Those espousing the former view stressed the fact that the Treaty referred to the fact that movement and residence rights of Union citizens were subject to the '**limitations and conditions**' contained in Treaty and secondary legislation (i.e. the residence directives); those espousing the latter view, instead, relied on the significance of using resonant terminology (*citizenship*), on the need to disentangle the Union project from its exclusively economic roots, and on the fact that what was then Article 8a was capable of having direct effect pursuant to the test set out by the case law in a consistent line of case law. More fundamentally though, the debate between the cosmetic v innovative nature of Union citizenship reflects a different understanding of citizenship more generally, not only of Union citizenship. The former more traditional view places the belonging of the individual firmly within her state of origin (by birth or naturalisation) relying also on the fact that the Treaty is clear that Union citizenship does not replace national citizenship; the latter shifts the idea of belonging by birth espoused in traditional citizenship discourse to a new belonging by choice that recognises the possibility of multiple links in the transnational space created by the European Union.

The constituent phase of the citizenship case law

4. The direction taken by the Court in the constituent phase of its case law sways undoubtedly towards the *innovative* nature of Union citizenship: both the rhetoric (citizenship as the 'fundamental' status of Union citizens) and the application of the Treaty push towards the creation of a new status that 'explodes' the links of belonging, creating some transnational solidarity between citizens from different constituencies. Here it is sufficient to recall *Baumbast*² which established not only the direct effect of Article 21 TFEU, but also, and possibly more importantly,

² Case C-413/99 *Baumbast* EU:C:2002:493

the parameters to understand the relationship between Treaty rights and limitations in secondary legislation: here, consistently with long established hermeneutic technique, the Court reasserts the primacy of the Treaty right over the limitations contained in secondary legislation so that the latter, whilst legitimate in the abstract, are to be construed pursuant to Union constitutional principles amongst which the most prominent are proportionality and fundamental rights.

5. The *Baumbast* approach is not without its challenges: in particular it requires a case by case assessment of the circumstances of the claimant which might be difficult in practice to perform (or at least to perform to satisfactory standards) insofar as it locates decisions on the merits of a case in the hands of administrators whose job was previously just to perform a factual check of eligibility for residence/benefits. And yet, constitutionally the *Baumbast* approach is entirely consistent both with a dynamic understanding of Union citizenship (where links of belonging are factual rather than pre-conceptual) and with the interpretation given to the other Treaty free movement of persons rights, which is difficult to see as not being to a certain extent as belonging to the same family of rights as the subsequent citizenship rights.

Directive 2004/38 and the regressive phase of the Court's case law on citizenship

6. This constituent case law was de facto codified in directive 2004/38: in particular, the Directive made clear that recourse to social assistance of the host state could not lead to automatic expulsion of the Union citizen; it adopted an incremental approach whereby rights would increase with passage of time (and passage of time alone although the Court has decided to add some qualitative elements); and it provided for a general right to equal treatment (with the exception contained in Art 24(2) Directive 2004/38).
7. The tension between Directive and Treaty (as interpreted by the Court) however remained: in particular the *Collins*³ case on workseekers and the *Bidar*⁴ case on students were at odds with Article 24(2) Directive 2004/38: the Court subsequently decided to retreat from the latter and maintain its interpretation in *Collins*. But a broader constitutional tension also became apparent: in particular, would the provisions of the Directive dispose of the need of a case to case assessment provided in the Court's case law? And more, generally, what is the relationship between Treaty rights and secondary legislation? Here it should be

³ Case C-138/02 *Collins*, EU:C:2004:172

⁴ Case C-209/03 *Bidar*, EU:C:2005:169

borne in mind that the Treaty rights are a skeleton over which meaning is added and that the *telos* which drives the choice of this meaning is both contested and undefined. At the end of the day, then, the constitutional question also leads to the juxtaposition of the legislative and the judicial powers which, given the nature of the EU, creates a more palpable tension than that always present in the relationship between higher courts and their legislative and executive counterparts.

8. Furthermore, even though the scholarship has seen Directive 2004/38 as the codification of the case law, several ambiguities remain in its provisions (such as for instance the rights of family members covered by Article 3(2); the extent of the right to equal treatment and the definition of social assistance etc).
9. It is in this context (and in that of heightened political sensitivities pre-UK referendum) that we see a shift from constituent to regressive phase in the citizenship case law. The implications of those are fully addressed by Paul Minderhoud and Sandra Mantu in this volume: for present purposes it is sufficient to note that post *Dano*⁵ the Court has made the condition of economic independence as constituent to the enjoyment of the rights conferred by the Directive. Furthermore, in the prisoners cases⁶ the Court also introduced new qualitative criteria on top of the temporal ones provided in the Directive: in this way, we divide between poor and rich, and bad and good citizens, with only those good and solvent being able to derive rights in Union law.
10. This approach though leaves open the question as to what is left of Union citizenship: in particular, is there something more to it than Directive 2004/38? In other words, even should we accept (and many don't) that in order to be eligible for rights detailed in Directive 2004/38, Union citizens must be either economically independent or economically active, the question remains open as to whether the Treaty is triggered by the citizen's migration from one State to another. If it is, then a migrant would enjoy a minimum of Union law protection simply by virtue of moving: in particular, she would be entitled to be treated proportionately and having due respect for her fundamental rights as guaranteed by the Charter. On the other hand, should we decide that citizenship rights are exhausted in Directive 2004/38, then we would have to address other hermeneutic problems, and in particular the fact that the Directive, by its own wording lays down the *conditions* for the exercise of the right to move and reside: in other words, whilst it might be seen as "creating" a right to permanent residence which cannot be

⁵ Case C-333/13 *Dano*, EU:C:2014:2358

⁶ e.g. Case C-378/12 *Onuekwere* EU:C:2014:13

inferred from Article 20 TFEU, it is not constituent of the right to move and reside. This interpretation is consistent with well established case law pursuant to which the instruments now repealed by Directive 2004/38 simply detailed, but did not create, rights in EU law.

11. But also this question begs a more general question as to whether the case law pursuant to which a(n economic) migrant is protected by the Treaty constitutional principles upon moving is still valid, especially in relation to fundamental rights. We will first address the citizenship case law to then consider the wider picture.

The relevance of Article 20 TFEU: who falls within its scope?

12. The *Dano* case is surprising for a number of reasons: it confined the right to equal treatment of Union citizens to those who can satisfy the black letter conditions of the Directive and it subsumed Article 18 TFEU in article 24 Directive 2004/38; it failed to actually consider whether Mrs Dano had in fact sufficient resources through the help she received from her sister; and whether she had actually been in work when she was taking care of her sister's children; but, possibly more surprisingly of all, it failed to give effect to Article 21 TFEU and found that the Charter was not applicable because Germany was not 'implementing' Union law. The contrast with the ruling in *Brey*⁷ is therefore quite stark, since there the Court demanded that proportionality be fully taken into account to establish Mr Brey's rights, even though he also was economically 'lacking'.

13. It is this fact that deserves closer scrutiny: traditional interpretation of rights of free movement (both economic and non-economic) held those rights to derive directly from the Treaty, whilst secondary legislation simply 'detailed' those rights. This approach had far reaching constitutional consequences: if the right derived first and foremost by the Treaty, then the individual was protected regardless of secondary legislation. As said above this meant that proportionality and Union fundamental rights became applicable to rules which were limiting (including denying) the right to free movement. This interpretation was of course problematic (in that it affected the national constitutional protection of individuals) but it had been a constant in the case law since at least the *ERT* case⁸, if not even the *Rutili* case⁹; and it was the hermeneutic drive for the *Baumbast* case law.

⁷ Case C-140/12 *Brey*, EU:C:2013:565

⁸ Case C-260/89 *ERT*, EU:C:1991:254

⁹ Case 36/75 *Rutili*, EU:C:1975:137

14. The assumption then was that when a migrant had moved she would be protected by proportionality and fundamental rights at least in relation to those national rules which sought to regulate or limit her rights. In *Carpenter*¹⁰ this interpretation was pushed to its limits: there the Court accepted a very wide interpretation of the freedom to provide services in order to trigger a fundamental rights scrutiny. In *Akrich*¹¹, the Court also gave a broad interpretation of its fundamental rights jurisdiction; and in *Dereci*¹², even if it had found that the case fell outside the scope of the citizenship provisions, it still demanded a fundamental rights scrutiny of the application of the rules at issue.
15. Furthermore, any migrant fell (and still falls) at least to a certain extent within the scope of the Treaty, even before having established economic credentials: limitations to the right of entry as well as expulsion measure did and still do fall within the scope of Union law so that both proportionality and fundamental rights are applicable.
16. The case law on the applicability of Union fundamental rights to state action limiting or derogating from a Treaty free movement right was then codified in Article 51 of the Charter, (at least pursuant to the explanations to the Charter): the Charter applies when a Member State is 'implementing' Union law, including when it is acting within the scope of Union law by limiting a right therein conferred.
17. And yet, there is still a considerable amount of confusion as to what this obligation entails: in other words, is migration enough to trigger the Treaty? Or is it only the qualified migrant that enjoys broader Charter protection? Or is there a need of proximity between limit and right, so that we have a more varied and variable application of fundamental rights?
18. It would take a paper in its own right to do full justice to these questions: however, what we can say is that a) the applicant needs to fall within the personal scope of the Treaty before the Charter can apply; and (b) that the rule objected to must have a connection with the exercise of her Treaty rights in order to trigger fundamental rights scrutiny. This is the reason why limits to the right to entry and decisions on expulsion always fall, by definition, within the scope of the Treaty and trigger some fundamental right scrutiny.

¹⁰ Case C-60/00 *Carpenter* EU:C:2002:434

¹¹ Case C-109/01 *Akrich* EU:C:2003:491

¹² Case C-256/11 *Dereci* EU:C:2011:734

19. However, what the Court seems to imply in *Dano* is one of two things:

- a. In order to be protected by Articles 20 and 21 TFEU the migrant must satisfy the conditions of economic independence provided for in the Directive 2004/38. If she does not then she does not fall within the material scope of the Treaty and therefore is not protected by Union law including its fundamental rights. In this regard, protection for the right to entry and expulsion is provided for in the Directive itself and since in denying entry or expelling a Union citizen, the State would be implementing the Directive it would be bound by at least some fundamental rights.
This interpretation would signal the irrelevance of the Treaty citizenship provisions as those would become redundant or limited to allowing the application by analogy of the provision of Directive 2004/38 to returning migrants; and exiting migrants. Thus, the personal scope of the Treaty would now be narrowed vis-à-vis the *Baumbast* interpretation.
- b. Or *Dano* could be interpreted so as to maintain the centrality of, at least some, Union citizenship for free movement purposes: thus, it could be argued that the conditions of economic independence are only interpreted literally in relation to establishing a right to equal treatment (in relation to social advantages or more broadly?) pursuant to Article 24 Directive 2004/38; and for the enjoyment of the right of permanent residence. However, the right to reside in another Member State stems directly from the Treaty. This interpretation would then allow *Dano* to be reconciled with *Brey* where the Court demanded a proportionality assessment of the denial of Mr Brey's rights.
- c. The choice between these two interpretations is a choice between the two different notions of Union citizenship recalled above: cosmetic v innovative. Whilst I would much prefer the latter, so as to give some effect to the promise of a more equal European Union where at least some of those who are less fortunate (like probably Ms Dano) can enjoy a minimum of protection, I suspect that at least at present the Court is swaying towards the more restrictive interpretation of Union citizenship. In this respect, whilst it is true that *Brey* afforded some limited cause for optimism (very limited if one considers the interpretation of Regulation 883/2204), cases such as *Alokpa*¹³, where minors who were, and always had been, living in another Member State were prevented from exercising any right to movement because they (or their mother) did not possess resources

¹³ Case C-86/12 *Alokpa* EU:C:2013:645

but would have to work in order to sustain herself and her children. In that case, in establishing whether a residence and work permit should be granted to the mother, neither proportionality nor fundamental rights played any role (and this was a case where arguably the result would have been very different had either of these constitutional principles applied).

20. So as things stand, even should we take a more optimistic view of the developments of the case law, we would have to introduce a further qualification so that the rights of economically inactive Union citizens would look like this:

- a. **Economically independent:** full rights to Equal Treatment and residence; but right to permanent residence subject to 'qualitative' criteria; and same for enhanced protection from expulsion. Fundamental rights apply although open to debate as to the extent to which they apply.
- b. **Economically inactive that has some resources** but might be lacking the entire amount (*Brey*): the Treaty applies, proportionality demands that the State must justify (with statistics if need be) the denial of the right to reside (i.e. *Baumbast* still applies) and the right to equal treatment (NB Whilst Ms Dano was not entirely devoid of resources, the Court treated her as such). The extent and the role to be played by fundamental rights in this case is open to debate.
- c. **Economically inactive lacking any resource:** neither the Treaty nor Directive 2004/38 offer any protection (*Alokpa / Trojani*¹⁴) even when the migrant has already moved. Fundamental rights equally irrelevant.

21. In any case we should reflect whether this case law does not have broader consequences in that it also indicates a retreat in relation to the fundamental rights jurisprudence of the Court (which has always been contested and yet codified in the Charter) but also might hint a difference balance of power/responsibilities between Court and legislature that might go beyond rights of non-economically active migrants (see e.g. *Alimanovic*¹⁵). This might well signal a Union more sensitive to national and political issues; it might also signal though a considerable reduction in the capacity of the Court to act as an engine of integration.

¹⁴ Case C-456/02 *Trojani* EU:C:2004:488

¹⁵ Case C-67/14 *Alimanovic*, EU:C:2015:597

22. Overall, I am not very hopeful to the continued relevance of Union citizenship to the Union framework, even should we follow the most extensive interpretation proposed here. From my perspective this is problematic both on a constitutional and on a political level: it means reducing the force of the Treaty and it means continuing to marginalise the weakest members of society in the European Union project. To a certain extent the deal negotiated by the British Government proves this to be the case not only in relation to non-economically active citizens but also in relation to low earners.

Solidarity (Still) in the Making or a Bridge Too Far?

Paul Minderhoud & Sandra Mantu*

1. Introduction

This paper concentrates on two central themes

1. The issue of welfare tourism, which has been strongly in the spotlight of the political debates concerning the free movement of (poor) EU citizens (mainly from the newer EU Member States). However, there is no evidence that welfare tourism takes place on a wide scale in the EU.
2. An analysis of the case law of the Court of Justice of the European Union on issues of social rights and EU citizenship which shows a noticeable shift towards stricter interpretations of the scope of social solidarity for mobile EU citizens. The main question is who can still move freely within the EU?

Today the EU institutions are increasingly called to defend the fundamental character of the rules on free movement of EU citizens and show that welfare tourism is not a reality, but an exception. The contestation of mobility is very much linked to cries of welfare tourism and the portrayal of mobile citizens as ‘abusers’ who move in order to benefit from the better welfare provisions of their host states.¹ This debate is not new; it is ongoing since the introduction of EU citizenship and its expansive interpretation by the Court in relation to the principle of equality. Nonetheless, at present it has taken on new dimensions as politicians question the fundamental character of free movement of persons, with David Cameron as its most explicit example.² Legally, the main issue seems

© Paul Minderhoud & Sandra Mantu

* Paul Minderhoud is an associate professor at the Centre for Migration Law of the Radboud University Nijmegen, the Netherlands. Until 2014 he was the coordinator of the European Network on Free Movement of Workers. Sandra Mantu is researcher at the Centre for Migration Law of the Faculty of Law of the Radboud University Nijmegen

¹ For an overview see, H. Verschuere, ‘Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*’, (2014) 16 EJML, 47-179

² D. Cameron, ‘Free movement in Europe needs to be less free’, *Financial Times* (26 November 2013); E. Guild ‘Cameron’s proposals to limit EU citizens’ access to the UK: lawful or not, under EU rules?’ (CEPS 2013) Commentary,

to be whether economically inactive persons should be entitled to access social assistance and special non-contributory benefits (which sit at the intersection of social assistance and social security) in their host states.

2. Who can move? Who actually moves? Who should move?

Who can move? The right to free movement of persons is one of the original four fundamental freedoms making up the basis of what is now the European Union. Although initially limited to workers and self-employed persons, the right to move was extended to various categories of economically inactive persons in the 1990s. This process was cemented with the introduction of the legal status of European Union citizenship by the Maastricht Treaty (1992). Thus, legally the answer to the question who can move can be found in Article 21 TFEU: *“every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”* Articles 45 and 49 TFEU are seen as special legal provisions dealing with workers and respectively, self-employed persons. The text of the Treaty clearly suggests that although in theory any EU citizen can move, s/he will nevertheless need to fulfil certain conditions when doing so and that the right is also subject to limitations. These limitations and conditions are further spelled out in Directive 2004/38, which is the main piece of secondary legislation that details the rules applicable to the exercise of the right to move and reside freely in another Member State.³ It applies to EU citizens irrespective of their economic participation and to their family members irrespective of nationality.

Who actually moves?

The number of EU citizens who move has increased considerably after the 2004 enlargements and it is estimated that in 2013 there were 13,7 million citizens living in another EU state (2,7% of the entire EU population).

Most research into the characteristics of intra-EU movers shows that they are young, mainly move for work and contribute to the social system of their host state. A 2014 study by ECAS into the fiscal impact of EU migrants in Austria, Germany, the Netherlands and the UK confirmed that most EU migrants fall into the 20-44 age group, are generally younger and

<http://www.ceps.eu/system/files/EG%20Commentary%20Cameron%27s%20Proposals.pdf>

³ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77)

with fewer children than nationals, while their main objective in moving to one of the 4 states investigated was to find work.⁴

Giulietti's empirical research showed that there is no strong support for the welfare magnet hypothesis, nor for arguments that immigrants are more likely to use and abuse social programs.⁵ He argues that "*immigration is primarily driven by differentials in unemployment and wages between sending and destination countries, by the presence of social networks and by geographical proximity.*"

Who should move?

In 2013, the interior ministers of 4 EU Member States wrote a letter to the EU Commission asking for restrictive measures that would curb the abuse of the right to free movement and protect the national welfare systems that were being 'abused' by EU citizens. The letter also suggested that the only EU citizens whose mobility should be encouraged are workers, students and those wishing to set up a business in another Member State.⁶ The lack of reliable data showing that benefit tourism is actually taking place on a large scale in the EU was quoted by the European Commission and the Visegrad countries (Czech Republic, Hungary, Poland and Slovakia)⁷ in their reactions to this 2013 letter of the Austrian, German, Dutch and UK ministers calling for a reform of the free movement rules.

Since 2013, a host of studies were published that tried to bring data to understand the impact of intra-EU mobility, most of which suggests that benefit tourism is not taking place on a large scale and that generally EU migrants have positive effects upon the economies of their host states.⁸ A comprehensive study was commissioned by the European Commission which concluded that the share of non-active intra-EU migrants is small,

⁴ ECAS *Fiscal Impact of EU migrants in Austria, Germany, the Netherlands and UK*, (ECAS 2014), 13

⁵ C. Giulietti, *The welfare magnet hypothesis and the welfare take-up of migrants* (IZA World of Labour 2014) 37, doi: 10.15185/izawol.37; See also his study with Kahanec that reached similar conclusions: C. Giulietti and M. Kahanec 'Does generous welfare attract immigrants? Towards evidence-based Policy-Making,' in E. Guild and S. Carrera (eds) *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, (CEPS 2013)

⁶ Y. Pascouau, *Strong attack against freedom of movement of EU citizens: turning back the clock* (European Policy Centre 2013)

⁷ Joint statement from the Foreign Ministers of the Visegrad countries of 04.12.2013 (JAI 1115 FREMP 205 MI 1129 POLGEN 255 SOC 1019)

⁸ E. Guild, S. Carrera & K. Eisele, *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (CEPS 2013) and ECAS (2014), above fn.5, for a review of several studies

that such migrants account for a very small share of special non-contributory benefits (SNCB) recipients, that the budgetary impact of SNCB claims made by non-active EU citizens is low and that costs associated with the take-up of healthcare by non-active intra-EU migrants is very small. The study highlighted that the main driver of intra-EU migration is employment.⁹

In spite of now existing data, the political debate concerning free movement continues to be fuelled by a series of political parties from a select group of Member States.

According to European Parliament Research Service research conducted on the topic of social benefits and EU citizenship *“the discussion ... has long gone beyond proof by numbers, and some member states feel they have lost control over one of the core competences of a sovereign state, namely, their welfare system, not by agreeing to such a shift of competences, but through the back door of EU citizenship.”*¹⁰

3. Free movement and social rights under Directive 2004/38

Directive 2004/38/EC makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for longer than 5 years. Different preconditions for residence apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. All EU citizens have the right to enter any EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months.¹¹

Residence for longer than 3 months is however made conditional upon being a worker or having sufficient resources and health insurance not to become a burden on the social assistance system of the host state.¹²

When Union citizens have resided legally for a continuous period of 5 years in the host Member State they shall have the right of permanent residence there. This right of permanent residence is given to Union

⁹ ICF/GHK, *A fact finding analysis on the impact on the member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, Final report submitted by ICF GHK in association with Milieu Ltd., DG Employment, Social Affairs and Inclusion via DG Justice Framework contract, 2013

¹⁰ E-M Poptcheva, *Freedom of movement and residence of EU citizens – Access to social benefits*, (European Parliamentary Research Service 2014), 4

¹¹ Directive 2004/38, art 6.

¹² Directive 2004/38, art 7 (1)

citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources or comprehensive sickness insurance cover any more after these five years.

Inactive citizens who reside less than 5 years in another Member State face most problems. They need sufficient resources and a comprehensive sickness insurance to have a right of residence under Directive 2004/38. These conditions regarding sufficient resources and comprehensive sickness insurance do not apply to workers, self-employed persons, or persons who stopped being economically active but who retain worker or self-employed status pursuant to Article 7(3) Directive 2004/38.

Jobseekers who enter the territory of the host Member State in order to seek employment are another category of citizens for whom sufficient resources and sickness insurance are not relevant. Such persons may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. Union citizens who have resided legally and for a continuous period of 5 years in the host Member State have a right of permanent residence there. Union citizens (and their family members) enjoy this right without any further conditions, even if they no longer have sufficient resources or comprehensive sickness insurance cover.

So far, based on the Court's jurisprudence it is not possible to argue that EU citizens enjoy unconditional access to social assistance benefits in their host State. A first condition is always that the applicant has to have legal residence in the host State. In several cases the CJEU has formulated additional conditions to the extent that the applicant should "*have a genuine link with the employment market of the State concerned*" ¹³ or "*need to demonstrate a certain degree of integration into the society of the host State*".¹⁴ Equally, the CJEU recognises the right of the host Member State to stop the right of residence of the person concerned, but this should not become "*the automatic consequence of relying on the social assistance system*"¹⁵

The *Brey* case of 19 September 2013 seeks to find a balance between satisfying the condition of sufficient resources and applying for a social assistance benefit.¹⁶ This case concerned a German national, who was in receipt of a German invalidity pension of €1.087,74 and who moved together with his wife to Austria. He applied for an Austrian compensatory

¹³ Case C-138/02 *Collins*, EU:C:2004:172, paras 67-69

¹⁴ Case C-209/03 *Bidar*, EU:C:2005:169, para 57

¹⁵ Case C-184/99 *Grzelczyk*, EU:C:2001:458, para 43; Case C-456/02 *Trojani*, EU:C:2004:488, para 36

¹⁶ Case C-140/12 *Brey*, EU:C:2013:565

supplement which aimed at guaranteeing the person concerned a minimum subsistence income in Austria. The Austrian authorities refused to grant this benefit because, in their view, Mr Brey did not meet the conditions required to obtain the right to reside, due to a lack of sufficient resources.

According to the Court the fact that an economically inactive national from another Member State may be eligible, in the light of a low pension, to receive a compensatory supplement benefit, could be an **indication** that the national in question does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State, for the purposes of obtaining or retaining the right to reside under Article 7(1)(b) of Directive 2004/38.

It is important to stress that we are only in the presence of an 'indication', not of an established fact. To this end, the Court recalls that the first sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Therefore, it follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned. National authorities must carry out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole by reference to the personal circumstances characterizing the individual situation of the person concerned. The CJEU stressed that any limitation upon the freedom of movement as a fundamental principle of EU law must be construed narrowly and in compliance with the limits imposed by EU law and the principle of proportionality. The Member States' room for manoeuvre may not be used in such a manner as to compromise the attainment of the objective of Directive 2004/38, more specifically its objective to facilitate and strengthen the primary right to free movement. Relying on these elements, the Court confirmed that EU law recognizes a certain degree of solidarity between nationals of a host Member State and nationals of other Member States. The mere fact that a national of a Member State receives social assistance is not sufficient to demonstrate that he constitutes an unreasonable burden on the social assistance system of the host Member State. For that reason the Austrian legislation, by virtue of which the mere fact that an economically inactive migrant EU citizen has applied for the 'compensatory supplement' is sufficient to preclude that citizen from receiving it, is not compatible with EU law. This automatic refusal prevents the national authorities from carrying out an overall assessment of the specific burden.

4. Possibility to ask social assistance or not?

After the introduction of Directive 2004/38, one can argue that an inactive EU citizen applying for a social assistance benefit because s/he lacked sufficient resources, kept a right of residence under Directive 2004/38 until the moment this right was withdrawn, on the ground that s/he was supposed to have become an unreasonable burden to the social assistance system. A combined reading of Articles 14, 24 and of recital 16 of the preamble of Directive 2004/38 suggests that access to social assistance is not out of the question as long as the citizen does not become an unreasonable burden on the social assistance system of the host Member State.

5. The Dutch approach

In the Netherlands, the Aliens Act Implementation Guidelines¹⁷ provide very detailed information in the form of a sliding scale about when a demand on social assistance results in the termination of the EU citizen's lawful residence by the immigration authorities (IND). Each application for social assistance during the first two years of residence is in any case considered unreasonable and will, in principle, result in termination of residence. In this scenario, the IND will assess the appropriateness while considering the following circumstances of each case: the reason for the inability to make a living, its temporary or permanent nature, ties with the country of origin, family situation, medical situation, age, other applications for (social) services, the extent of previously paid social security contributions, the level of integration and the expectation for future social assistance needs.

A year after *Brey*, the CJEU delivered its judgment in the *Dano* case where it took a different approach.¹⁸ In *Dano*, two Romanian nationals, mother and son who lived in Germany were refused access to benefits under the German basic provision rules. Ms Dano had not entered Germany to seek employment and although she applied for benefits reserved to job-seekers, the case file showed that she had not been looking for a job. She had no professional qualifications and had never exercised any profession in Germany or Romania. As regards access to social benefits, the Court held that nationals of other Member States are only entitled to be treated equally with nationals of the host Member State if their residence in the territory of the host Member State meets the requirements of Directive 2004/38.

¹⁷ Vc B 10/2.3.

¹⁸ Case C-333/13 *Dano*, EU:C:2014:2358

According to the Court, Ms Dano and her son lack sufficient resources and, pursuant to Directive 2004/38, are therefore not entitled to a right of residence in Germany, nor are they entitled to benefits under the German basic provision. The *Dano* decision seems to imply that the fact that economically inactive EU citizens (residing for less than five years in another Member State) apply for a social assistance benefit automatically means that they have no (longer) sufficient resources and consequently no residence right under Directive 2004/38). Thus, if in *Brey* applying for a benefit was an '**indication**' of lack of sufficient resources, in *Dano* this has become '**certainty**'. The reasoning in *Dano* leads to the paradoxical situation where a Union citizen would only be entitled to social assistance if he has sufficient resources and therefore is not in need of any social assistance.¹⁹ We seem to be in the presence of a real Catch-22 situation.

6. The *Alimanovic* case

Ms Alimanovic and her three children are all Swedish nationals. The three children were born in Germany. After living abroad for ten years, the family re-entered Germany in June 2010. Between then and May 2011, Ms Alimanovic and her eldest daughter worked for less than a year in short-term jobs or under employment-promotion measures in Germany. The two women have not worked since. From 1 December 2011 to 31 May 2012, they received subsistence allowances for beneficiaries fit for work ('SGB II benefit'), while the other children received social allowances for beneficiaries unfit for work. Subsequently, the competent German authority stopped paying those allowances, because according to the German legislation, non-nationals (and members of their family), whose right of residence arises solely out of the search for employment, may not claim such benefits.

According to the Court, Ms Alimanovic and her daughter were not covered by the Directive as former workers anymore because on the basis of Article 7(3)(c) of the Directive Union citizens who have worked in a host Member State for less than a year retain their right of residence for at least six months after becoming unemployed, after which the Member State (as Germany did) can terminate the worker status. It is only for those six months that they are entitled to equal treatment with nationals of the host State.

This does not mean, however, that Ms Alimanovic and her daughter can be expelled. As long as they are job seekers and continue to have a genuine chance of being engaged expulsion is not possible. But after six months of

¹⁹ H. Verschuere, 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?', (2015) 52 CMLR, 381

job seeking, they no longer retain the status of worker and go back to being first-time job seekers who are not entitled to social assistance (para 58). Interestingly, according to the CJEU Ms Alimanovic and her daughter can rely in that situation on a right of residence directly on the basis of Article 14(4)(b) Directive 2004/38. The big difference between Ms Alimanovic and Ms Dano is that the first one has a residence right under Directive 2004/38 and the latter does not. The resemblance is that they both have no access to social assistance benefits.

7. The opinion of the Advocate General

The Advocate General confirmed that an EU citizen having worked in national territory for less than one year may, in accordance with EU law, will lose the status of worker after six months of unemployment.²⁰ Nevertheless, he considers that it runs counter to the principle of equal treatment to exclude automatically an EU citizen from entitlement to social assistance benefits beyond a period of involuntary unemployment of six months after working for less than one year without allowing that citizen to demonstrate the existence of a genuine link with the host Member State.²¹ In that regard, in addition to matters evident from the family circumstances (such as the children's education), the fact that the person concerned has, for a reasonable period, in fact genuinely sought work is a factor capable of demonstrating the existence of such a link with the host Member State.²² The Court, however, avoids any reflections on the importance of a possible demonstration of the existence of such a 'genuine link' on the access to social benefits.²³

8. Conclusions

This legal shift in the interpretation of the Citizens' Directive takes place in a context of rising political debates about free movement, which are increasingly focusing on the mobility of poor or economically inactive EU citizens. Although no study seems to find any evidence that social tourism, but also benefit fraud or abuse are happening on a large scale, these debates continue to take place. It is equally clear that the case law concerned with the entitlement of economically inactive EU citizens to social rights in their host States is undergoing some profound changes.

The shift we noted in the case law – from asking for social assistance being an indication of lack of resources to becoming a certainty that no longer requires an individualized examination of the case and decision – raises

²⁰ Based on Directive 2004/38, art 7(3) (c)

²¹ Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 110

²² Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 111

²³ Case C-67/14 *Alimanovic*, EU:C:2015:597

some fundamental questions about the scope of EU citizenship and seems to go against the Court's well established way of interpreting EU citizenship rights and the usual emphasis on proportionality and the need for individual assessment.

The Court's approach in *Dano* and *Alimanovic* will undoubtedly have an impact upon how fundamental EU citizenship is as a status and whom it can actually capture. An interpretation where economically non-active EU citizens must always have resources sufficient not to qualify for any social assistance benefit may lead to an effective exclusion of most economically non-active EU citizens since in their national legislation Member States may set the threshold high. Take for instance as example the Romanian pensioners who have an average old-age pension of around € 175. Such pensioners would meet the requirement of sufficient resources only in 8 of the 27 Member States (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia). The area of free movement, in which such Romanian pensioners may exercise their fundamental right to move and reside freely would shrink to less than 1/3 of the EU.²⁴

Those who work in precarious jobs and do not manage to make the one year threshold of working in the host Member State which is the 'gold standard' for a (more) durable residence right under Article 7, they must at least work a little every six months to retain their social benefits.

What type of solidarity is being promoted in the EU, if it is available only for those who do not need it and only when they do not need it? Moreover, if the political discussion is to continue along the line of problematizing the working poor, while also bearing in mind the structural changes underwent by national labour markets that increasingly rely on part-time, poorly paid jobs to generate growth, who will still be able to move freely in the EU?

²⁴ M. Meduna et al, 'Institutional report', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen*, (DJØF Publishing 2014), 236

Citizenship: A Balancing Exercise?

Annette Schrauwen*

The previous two papers in this volume identified and commented upon a turn in case law towards narrowing down social rights for EU citizens while giving more attention to (nationalist) protective reflexes of Member States. Both papers criticize the type of solidarity that results from this case law; it marginalizes the weakest members of society, and excludes them from free movement rights. The case law raises doubts on the relevance of the citizenship provisions in the EU Treaties and the fundamental nature of the status of EU citizenship, and accordingly on the role of the Court of Justice of the European Union in the debate on welfare tourism.

This paper concentrates on the latter. It will rely on and refer to the previous two papers where relevant. The questions underlying this paper are: Is the Court sensitive to the political context of fear for benefit tourism?¹ Is the Court giving up its role as an engine for further integration by following the lead of the EU legislator?² The paper will take a closer look at the arguments of the Court in the cases *Brey*, *Dano* and *Alimanovic*³ with the purpose of finding out whether it is possible to detect arguments underscoring the Court's sensitivity to the political climate.

The changing role of proportionality is the backdrop for the identified shift in the case law on citizenship. As the proportionality principle's function is,

© Annette Schrauwen

* Annette Schrauwen is Professor of European Integration, in particular citizenship law and history, at the University of Amsterdam and member of the Amsterdam Centre for European Law and Governance.

¹ Besides Paul Minderhoud & Sandra Mantu, and Eleanor Spaventa in their contributions to this volume, several authors hint at the possibility that the wider context of austerity policies and Member States' focus on control of their public spending have induced the turn towards narrowing down social rights, see e.g. Niamh Nic Shuibne, 'Limits Rising, Duties Ascending: the Changing Legal Shape of Union Citizenship' (2015) CMLR 889, 902 and 927, and Urška Šadl and Mikael Rask Madsen, 'Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Crisis' (2016) EJR, 40 who conclude that the economic crisis 'had had limited impact on EU citizenship law and remained confined to the edges of the notion of EU citizenship.'

² See Eleanor Spaventa, "What is left of Union Citizenship?", point 22, in this collection

³ Case C-140/12 *Brey*, EU:C:2013:565; Case C-333/13 *Dano*, EU:C:2014:2358; Case C-67/14 *Alimanovic*, EU:C:2015:597.

according to some at least, to secure legitimacy for judicial decisions,⁴ a focus on the proportionality analysis in the mentioned cases may allow us to test the Court's sensitivity to the political climate and the legitimacy of the shift in case law. Nevertheless there are several ways in which the proportionality principle can be interpreted.⁵ It is a consequence of what is named 'structured discretion', forcing an approach in stages.⁶ Balancing in stages allows a Court to consider things in their time and place, but also allows commentators the possibility to contrast case law with a potential alternative which is just as valid from a legal-technical point of view as the one adopted – thereby presenting the standing case as merely one of the possible alternatives instead of a path taken that can not be abandoned.⁷ The different stages for balancing outlined below are inspired by the writings of Aharon Barak on proportionality in the context of constitutional rights and their limitations.⁸

The first stage consists in distinguishing between the scope of the individual right and the justification of limits on the realization and protection of that right. Articles 20 and 21 TFEU confer the right to move and reside in another Member State, with the qualification that this right is subject to conditions and limits defined by the Treaties *and by the measures adopted thereunder*. None of the other free movement provisions refer to limitations laid down in secondary legislation – which can explain why the instruments repealed by Directive 2004/38 'simply detailed' rights in EU law and are of a different nature than Directive 2004/38 itself.⁹ The scope of the free movement right under articles 20 and 21 TFEU hence should also be determined by reference to secondary legislation. This does not mean that the Union legislature could lay down conditions and limitations to such an extent that would render the rights under articles 22 and 21 TFEU obsolete: the recognition of the right at the level of the Treaty implies that

⁴ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) ELJ, 158

⁵ Meaning that 'the different results in cases where the proportionality principle is applied are not merely due to the cases' different facts', Tor-Inge Harbo, as cited, note 2, at 180

⁶ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 461

⁷ For an example of such an approach, see Thomas Spijkerboer, 'Analysing European Case-Law on Migration: Options for Critical Lawyers' in Loïc Azoulay and Karin de Vries (eds), *EU Migration Law. Legal Complexities and Political Rationales* (OUP 2014), 188-218

⁸ See above n. 6

⁹ E. Spaventa questions the different nature in her contribution to this volume, point 10.

the essence of the right should be respected and allows no arbitrary or disproportionate intrusions of the right.¹⁰

The citizenship articles in the Treaties do not define grounds of justification for limiting the rights attached to citizenship. This stands in contrast with the economic free movement provisions that explicitly refer to public policy, public health and public security objectives. In *Baumbast*, the Court indicated that the justification for limitations and conditions in citizens' free movement rights must be understood as 'the legitimate interests of the Member States'.¹¹

The second stage concerns the proper purpose component of proportionality. Here, the question is whether the purpose in principle can limit a citizen's right to free movement and residence. Arguably, not all interests of Member States can. Directive 2004/38 elaborates which legitimate interests of Member States may limit citizens' free movement rights and specifically refers to citizens not becoming an unreasonable burden on the social assistance system of the host Member State – next to safeguarding public policy, public security or public health, and the possibility to require registration. Citizenship case law shows that the Court is of the opinion that the 'unreasonable burden' condition in the Directive is in itself not disrespecting the essence of the right to free movement and residence, nor is it an arbitrary or disproportionate intrusion of that right. However, the Court does not explain the motivation behind accepting the 'unreasonable burden' condition as a purpose that can limit citizens' rights. In *Grzelczyk*, the Court accepts that there is a limit to financial solidarity between nationals of the host state and nationals of other member states, implying that it is a legitimate interest of Member States to protect the national social benefit system from being overburdened by claims from citizens of other Member States.¹² In *Brey*, the Court is more explicit: "...the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances."¹³

The third stage concerns a test of the means chosen to attain the purpose. It concerns the familiar suitability and necessity questions that generally are considered to constitute the 'proportionality principle' under EU law.

¹⁰ Christiaan Timmermans, 'Martínez Sala and Baumbast revisited' in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart Publishing 2010), 345-355, 350

¹¹ Case C-413/99 *Baumbast* EU:C:2002:493, para 90

¹² Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 44

¹³ *Brey*, see above n.3, para 55

Under this stage, the decision not to grant social benefits to an individual should be assessed for being suitable and necessary to prevent an unreasonable burden on the social assistance system of the host Member State.

With this normative framework, the present paper intends to address the arguments of the Court in *Brey*, *Dano* and *Alimanovic*.

In the *first stage* of the proportionality analysis, with respect to the scope of the individual right of access to social benefits in the host Member State, the Court in *Brey* refers to Article 21 TFEU and Article 7 paragraph 1 (b) of the Directive; those EU citizens enjoy such access, who reside for a period longer than three months when economically inactive and have sufficient resources not to become a burden on the social assistance system of the host Member State and a comprehensive sickness insurance.¹⁴ In *Dano*, the Court refers to *Brey*, but adds references to Article 20 TFEU and Article 18 TFEU, while immediately qualifying the prohibition of discrimination as applying to situations falling “within the scope of the Treaties and without prejudice to any special provisions contained therein”.¹⁵ Since the conditions and limitations of Directive 2004/38 can be seen as laid down in “measures adopted under the Treaties” that are included in Article 20 TFEU or “measures adopted to give them effect” included in Article 21 TFEU, these conditions and limitations apply regardless of Article 18 TFEU. In other words, the conditions and limitations in Directive 2004/38 are included in the Treaty via Articles 20 and 21 TFEU, and therefore determine the scope of application of Article 18 TFEU. Article 24 of Directive 2004/38 provides for a general right to equal treatment for those *residing on the basis of the Directive* in the host Member State, with an exception contained in paragraph 2 relating to students and jobseekers. The difference in the analysis under the first stage between *Brey* and *Dano* can be explained by the preliminary question in *Dano*, which, by contrast with the preliminary question in *Brey*, explicitly refers to Article 18 TFEU next to the citizenship articles. It thereby demands that the Court distinguishes not only the scope of social benefit rights in the context of free movement and residence from the justification of limits to those rights, but also their scope in the context of the right not to be discriminated on the basis of nationality from the justification of limits to that right.¹⁶ In *Alimanovic*, the preliminary

¹⁴ *Brey*, see above n.3, paras 46- 47

¹⁵ *Dano*, see above n.3, paras 60-61

¹⁶ On the importance of the contents of the preliminary question see Timmermans, above n. 10, who writes: “It is not rare that it is the question as put forward by the national court and the way in which that question is drafted, which invites the Court to explore new avenues of interpretation and in a way unlocks the door to a new development in the interpretation of Community law”, 349.

question refers to social benefit rights in the context of equal treatment under Article 24 of Directive 2004/38 on the one hand, and on the other under Article 45(2) TFEU read in conjunction with Article 18 TFEU. Through the classification of the benefits at issue as 'social assistance' and not benefits connected to the labour market, the Court dismisses the need to determine the scope of the rights under Article 45(2) read in conjunction with Article 18 TFEU. It then turns to the scope of the right under Article 24 of Directive 2004/38 and, citing *Dano*, states that it is limited to those whose residence in the host Member State complies with the conditions of Directive 2004/38.¹⁷

Though the scope of the right is framed differently in these three cases, at the end of the day it all comes down to access to social benefits only for those who have sufficient resources not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance. Arguably, the link of the Court's analysis of the scope of the right to the content of the preliminary question can be appreciated in the context of the preliminary reference procedure as cooperation between Union and national judge. Still, the differences in framing in this first stage also influence the analysis in the following stages.

In the *second stage* the proper purpose of limiting the right to social benefits is addressed. As stated above, in *Brey* this was identified as the protection of the public finances of the host Member State. No doubt the same reasoning applies to *Dano*, but again there is a shift notable in the arguments of the Court. In *Brey* the Court refers to the objective of Directive 2004/38 to facilitate and strengthen the rights of free movement of EU citizens while at the same time conditioning that right. It then refers to recital 10 of the Preamble of the Directive as explaining the purpose of the condition of financial resources, notably protection of public finances. In *Dano*, recital 10 is not considered as an explanation for the financial conditions, but as outlying an objective of the Directive.¹⁸ The Court then links the proper purpose of limiting equal treatment with respect to social benefits to recital 10 of the Directive, and argues that the financial resource conditions of Article 7 of the Directive can form a basis for refusing equal treatment to those citizens 'who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance'.¹⁹ Here, the Court takes a second turn. It reads Article 24 of the

¹⁷ *Alimanovic*, see above n.3 para 49

¹⁸ *Dano*, see above n.3, para 74

¹⁹ *Idem*, para 78. Herwig Verschueren sees this phrase as evidence that the Court's ruling in *Dano* is limited to situations where the intention of mobile citizens is solely to profit from the benefit system of the host Member State, in 'Preventing

Directive in conjunction with its Article 7 and constructs protection of public finance not as justification for discriminatory treatment in a specific situation, but as verification whether a person resides in the host state on the basis of the Directive. Those who do not have sufficient resources do not reside in the host Member State on the basis of the Directive, and fall outside the scope of the equal treatment right of Article 24 of the Directive for the purpose of social benefits. Hence the examination of an individual situation concentrates on the question whether a person fulfils the financial *residence* conditions of the Directive and not on the question whether a person is an unreasonable burden for the public finance of the host Member State.²⁰ In the case of *Dano*, the referring judge had already established that the financial conditions of the Directive had not been fulfilled.²¹ As a consequence, the situation falls outside the scope of Article 24 of the Directive and fundamental rights do not apply in this situation.²² In *Alimanovic* the Court again has to address the proper purpose of limitations to equal treatment under Article 24 of the Directive. With a reference to *Dano*, it argues again that the proper purpose of preventing citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State justifies derogation from equal treatment of those who do not have a right of residence under the Directive. However, the Court does not refer to the financial resource conditions of Article 7 of the Directive, nor to the intention of obtaining another Member State's social assistance, as it did in *Dano*²³.

It comes as no surprise that the proper purpose for limiting the right to social benefits is protection of public finance of the host State. In *Dano*, that purpose is not so much seen as justification for a limitation of the right to equal treatment, but the purpose is blurred with the scope of the right to equal treatment. This is problematic from a legal point of view. The Opinion of Advocate General Wathelet in *Dano* offers an alternative argument, which better adheres to the structured discretion and an approach in stages under the principle of proportionality.²⁴ He

"Benefit Tourism" in the EU: a Narrow or a Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*? (2015) 52 CMLR, 363-390 at 374-375.

²⁰ Or, in the words of Spaventa, above n. 2, economic independence becomes *constituent* to the enjoyment of the right to equal treatment in social benefits, point 9

²¹ *Dano*, see above n.3, paras 44 and 81

²² Contra, see Verschueren, above n. 19, at 387. Note that the referring judge asked the Court to rule on the application of the Charter with respect to substantive conditions to grant benefits and the extent of benefits. However, with respect to the other preliminary questions, the Court did not refer to the Charter

²³ See above, n. 19

²⁴ See Verschueren, above n. 19, for a good analysis of that Opinion, 371-372

distinguishes the purpose of the protection of public finance from the right to equal treatment, and assesses the right of the host State to demand the existence of a 'genuine link' between claimant and host State under the third stage of proportionality. The final outcome of the case would not have been different, however it would have secured legitimacy for the decision, which now is under attack from a lot of commentators.²⁵ The Court's confusion of scope and purpose in *Dano* makes the third stage of proportionality review redundant. Therefore, our analysis of the Court's application of the third stage of proportionality can only cover *Brey* and *Alimanovic*.

The *third stage* is the proportionality assessment commonly used in free movement cases: the suitability and the necessity of the measure limiting free movement rights for the attainment of the purpose. In *Brey*, the 'classic' route of an individual assessment of the situation of the claimant is followed. Member States have the power to assess, 'taking into account a range of factors in the light of the principle of proportionality', whether granting a social benefit in an individual case could place a burden on the Member State's social assistance system as a whole.²⁶ The Court adds that the mere fact that a national of a Member State receives social assistance is not as such sufficient to show that he constitutes an unreasonable burden on the system of the host State.²⁷ Member States should take into account the amount and regularity of the income of the claimant, the fact that he has been initially granted a certificate of residence, the period during which he would receive the grant and the extent of the burden the grant would place on the national system, taking into account the proportion of citizens of other Member States receiving that grant.²⁸ In *Alimanovic*, where the claimants - whose last employment in the host State had ended more than six months ago - resided in the host Member State as jobseekers on the basis of Article 14(4)(b) of Directive 2004/38, the Court rejects the necessity of an individual examination. The context of the assessment is Article 24 (2) of the Directive, which allows the host State to refuse social assistance to those whose residence is based solely on their status as jobseekers. The Court examines the proportionality of the refusal and states the Directive itself takes into account the individual situation of each claimant by granting a right to social assistance for a period of six months after cessation of employment. Furthermore, the six-month period guarantees a significant level of legal certainty and transparency and is considered proportionate. The Court could have stopped there, but it adds another argument. In paragraph 62 the Court states: "(...). However, while an

²⁵ See above, n.1

²⁶ *Brey*, above n.3, para 72

²⁷ *Idem*, para. 75

²⁸ *Idem*, para 78

individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which *would be submitted to it* would be bound to do so.”²⁹ The Court shows it is convinced by the ‘welfare magnet’ argument mentioned in the contribution by Sandra Mantu and Paul Minderhoud.

The difference between the Court’s approaches in *Brey* and *Alimanovic* can be explained by the relevance of Article 24(2) of the Directive in the latter case. The Court recognizes limits to social benefits rights explicitly agreed by the EU legislature, while at the same time testing it for compatibility with the demand for an individual examination that is implied in Article 8(4) of the Directive. From a legal perspective, this is defensible. The reference to transparency and legal certainty as an element of proportionality show the Court is inclined to take into account the national authorities’ difficulties with individual examinations. Case by case decisions might lead to legal uncertainty: where criteria for eligibility have been laid down in EU law, the Court opts for ‘a significant level of legal certainty and transparency’.³⁰

Some final remarks

The Court can be criticized for blurring the scope and the purpose of limits to EU citizens’ rights to social benefits in the host State. It is not only problematic in the specific case of *Dano*, but also in view of subsequent cases that might build on the Court’s reasoning in *Dano*. An example is the Opinion of AG Cruz Villalon in the infringement action against the UK on child benefits, where he links the sufficient resources condition of Directive 2004/38 to the granting of child benefit under Regulation 883/2004.³¹ On 14 June 2016, the Court followed its AG, and took the opportunity to clarify that checking financial resources may not be carried out systematically. Only in the event of doubt the authorities may verify whether claimants satisfy the financial conditions of Article 7 of Directive 2004/38.³²

The Court cannot be accused of blindly following the EU legislature. It examines the limits to equal treatment inherent in Article 24(2) of Directive 2004/38. The Court is showing deference to the EU legislature, but that does not mean the Court is giving in on its capacity to act as an engine of integration.

²⁹ My italics, A.S.

³⁰ See also Case C-158/07, *Förster*, para 57, from which para 61 of *Alimanovic* seems to have been copy-pasted and adapted to the relevant benefit

³¹ Case C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2015:666, para 77; for an account of possible consequences in practice see Verschueren, above n.16, 378-381. The judgment is due 14 June 2016

³² Case C-308/14, above n. 30, para 84

The political debate and accompanying discourses are infiltrating the Court's jurisprudence. The Court accepts the 'welfare magnet' argument in *Alimanovic*,³³ even though research contests this argument.³⁴ But if the Court takes the political climate into account, it must make sure it does not copy false arguments. One could argue that demanding data collection from States could help to reframe the 'welfare magnet' argumentation. However, if it is true that the debate has moved beyond proof by numbers, data collection alone would not help. It would then be better to turn to the question why politicians focus on the national solidarity system if there is no evidence that these are under threat because of free movement? The European Parliament Research service suggests the core of the Member States' reluctance is based on the feeling of implicit loss of competences over their welfare system³⁵ – and that might be a better explanation of the current political debate on welfare tourism. Kees Groenendijk submits that it is about justifying the protective function of the state and sending out the message to the voters that the state is still able to protect its citizens and their social capital.³⁶ He sees this protection of 'our welfare system' as a proxy for protection of national identity. It is therefore crucial to make the debate on free movement more rational and evidence-based; at the same time we must find ways to address the fear of loss of national identity.

³³ *Alimanovic*, above n. 3, para 62

³⁴ See the contribution of Paul Minderhoud and Sandra Mantu to his volume

³⁵ E-M Poptcheva, *Freedom of movement and residence of EU citizens – Access to social benefits* (European Parliament Research Service 2014), 4

³⁶ Kees Groenendijk, 'Access for Migrants to Social Assistance: Closing the frontiers or reducing citizenship?' in E. Guild, S. Carrera and K. Eisele, *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (CEPS 2013), 1-21, at 20-21