Chapter 11

Alternative views on EU citizenship

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11.1. *Introduction*

The direction in which EU citizenship is heading has been a matter of debate for some time, although there is little agreement as to whether the interpretation given to the rights of mobile EU citizens is too restrictive, or too generous. 2016, as the year in which a majority of the British people voted to leave the European Union (EU) and, consequently, renounce their status as EU citizens, may turn out to play an important role in shaping the future of EU citizenship. In this context, the extent to which EU citizenship will live up to the expectations derived from its characterization by the EU Court of Justice as destined to become the fundamental status of the nationals of the Member States seems to be an open question. Brexit is a reminder that at least a sufficient number of British citizens failed to see the benefits associated with EU citizenship. If the political campaign preceding the vote on leaving the EU is anything to go by, the main legal right associated with EU citizenship, namely the right to move and reside freely within the territory of the Member States, proved to be a divisive matter in assessing the benefits of UK's EU membership.

Against this background, the aim of this contribution is to flag out a series of aspects concerning EU citizenship that could serve as a basis for reflection on its potential to act as a fundamental status. My starting point is the increasing politicization of the right to free movement as evidenced by debates on the (negative) effects of free movement that are taking place in a number of Member States.¹ The decision of the British people to leave the EU was partly fuelled by discontent towards free movement and accompanied by the message that the mobility of certain EU citizens is undesirable and should be limited. In other Member States, such as Germany, while support for free movement remains politically the main message, 'poverty migration' and 'welfare tourism' are

¹ Mantu S. & P. Minderhoud (2016), 'Exploring the limits of social solidarity: welfare tourism and EU citizenship', *UNIO-EU Law Journal* 2, p.4-19.

branded as problematic cases of EU mobility.² Who exactly is targeted by such notions is not always clear, since from a legal perspective such discourses seem to involve a combination and conflation of mobile poor EU citizens, economically inactive EU citizens, EU citizens who engage in poorly paid work, citizens from poorer Member States etc. I want to suggest a number of alternative perspectives on EU citizenship that may inform discussions on how EU citizenship can achieve its ‘radical’ and ‘transformative potential’.³ While I agree that it is necessary to problematize EU citizenship, its meaning and potential, I want to suggest that this can be done without recurring to racialized discourses such as those relying on ‘poverty migration’, which castigate some EU citizens as unworthy of mobility and EU citizenship. While these discourses proved popular with voters, as shown by Brexit, they deflect our attention from questioning to what extent and how EU citizenship can achieve its potential and function as a fundamental status, with all the consequences and expectations attached to such a label.

The discussion below builds upon the idea that EU citizenship can be explored as a ‘momentum concept’⁴ that must be continuously reworked in a way that realizes more and more of its egalitarian and anti-hierarchical potential. As Lister points out, this means engaging with citizenship’s exclusionary-inclusionary nexus to deal with marginalized groups’ calls for social justice.⁵ The analytical lenses through which EU citizenship and mobility are examined in this chapter depart from the traditional frames of constitutionalism or European integration and offer a critique of EU citizenship that builds on: the figure of the ‘Other’; the notion of biopolitics, and questions of difference and embodiment.

These alternative ways of thinking about EU citizenship and its relevance are an attempt to break out of the mould of EU law as the main disciplinary frame through which EU citizenship is approached and naturalized as producing knowledge on and of EU citizens’ mobility.

2 K. Nowrot & B. Struckmeyer-Öner (2014), ‘Sozialtourismus in Europa?: Unions- und sozialrechtliche Anmerkungen zu einer aktuellen Debatte’, *Policy Papers on Transnational Economic Law* 40, Transnational Economic Law Research Centre; D. Bräuninger (2015), ‘Debate on free movement - Does the EU need new rules on social security coordination?’, Deutsche Bank Research Briefing.

3 D. Kostakopoulou (2014), European Union citizenship rights and duties: civil, political and social, in: E. Isin & P. Nyers (eds) *Routledge handbook of global citizenship studies*, Abingdon, Oxon: Routledge, pp. 487-488.

4 John Hoffmann quoted in R. Lister (2007), ‘Inclusive Citizenship: Realizing the Potential’, *Citizenship Studies* 11:1, p.49.

5 Lister (2007) p. 49.

11.2. *To whom does EU citizenship belong? Who is the 'Other' of EU citizenship?*

According to Mezzadra, the very discourse of citizenship is historically and theoretically based upon the distinction between an inside and an outside, which is not easily escaped while remaining within the discourse of citizenship itself.⁶ Moreover, national citizenship is usually understood to be a bounded category, closely associated with the development of the nation-state as the main political unit and container of people within delimited territorial units. If EU citizenship is built upon the image of national citizenship, as Article 20 TFEU seems to suggest⁷, one can ask to what extent it implies a similar closure and boundary making exercise in determining its reach and the people it embraces. Through the lens of citizenship as an exercise into 'othering', one can start to articulate whether EU citizenship, similar to national citizenship, requires the existence of an 'Other' in opposition to which it is defined. Who is caught by the personal scope of EU citizenship has been a vexing issue since the introduction of EU citizenship by the Maastricht Treaty.⁸ This issue has been raised in relation to the exclusion of third-country nationals (TCNs) from the personal scope of EU citizenship, which was seen as confirmation of EU citizenship's exclusionary nature (similar to the exclusionary nature of national citizenship). Groenendijk feared that this distinction between '*us*' (EU citizens) and '*them*' (TCNs) would have a detrimental effect upon the legal position of the latter group, although he later acknowledged that the Court's jurisprudence did much to alleviate this sort of concerns by interpreting the secondary EU legislation dealing with TCNs in a positive manner and by trying to approximate their rights to those of EU citizens.⁹ In his contribution to this volume, he again voices concerns about the

6 S. Mezzadra (2011), 'The gaze of autonomy - Capitalism, migration and social struggles', in: V. Squire (ed), *The contested politics of mobility. Borderzones and irregularity*, Abingdon, Oxon: Routledge, p.24.

7 Article 20(1) TFEU states 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'

8 A. Føllesdal (2000), 'Third country nationals as European citizens: the case defended', *The Sociological Review* 48:1, p.104-122; R. Hansen (1998), 'A European citizenship or a Europe of citizens? Third country nationals in the EU', *Journal of Ethnic and Migration Studies* 24:4, p.751-768.

9 K. Groenendijk (2009), 'Forty Years of Free Movement of Workers: Has it Been a Success and Why?', in: P. Minderhoud & N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishers, p.11-25; K. Groenendijk (2006), 'Citizens and Third Country Nationals: Differential treatment or Discrimination?', in: J.Y Carlier & E. Guild (eds), *The future of free movement of persons in the EU*, Brussels: Bruylant, p.79-101.

impact that Brexit will have on the rights of TCNs, showing that the issue is still salient and unresolved. A different set of criticisms relating to EU citizenship's reach concerns the position of those EU citizens who never move. Besides having the nationality of one of the Member States, the other condition for being able to exercise what the Treaty labels EU citizenship rights, is to physically move to another EU Member State.¹⁰ Although the Court's jurisprudence is making a series of inroads into this condition in cases such as *Zambrano*¹¹ or *Rendón Marín*,¹² its implications remain limited to exceptional situations that involve minor EU citizens whose genuine enjoyment of the substance of their rights as EU citizens would be violated should they not come within the protective scope of EU law.

From a legal perspective, Articles 20-25 TFEU detail to whom EU citizenship belongs and what this citizenship entails. As such, every person holding the nationality of a Member State is a citizen of the Union and in this capacity she has a series of rights: the right to move and reside freely within the territory of the Member States, electoral rights, the right to diplomatic protection while outside of the EU, the right to petition the European Parliament and the Ombudsman, the right to petition EU institutions, and the right to access EU documents. In addition, Article 18 TFEU establishes a right to non-discrimination on the basis of nationality. Despite this panoply of rights, EU citizenship remains associated primarily with the right to move and reside freely in another Member State. Opinion polls confirm that free movement is the most visible achievement of EU citizenship and a right most cherished by EU citizens themselves.¹³ Without repeating the history of EU citizenship and its coming into being upon the already existing provisions concerning the free movement of workers, it is nevertheless important to stress that the transformation of EU citizenship into a meaningful legal status is intrinsically connected with the incorporation of economically inactive citizens into the legal framework of EU free movement of persons. This process was driven by the case law of the Court of Justice that relied on the joint reading of the provisions on EU citizenship and the principle of non-discrimination on the basis of nationality in order to bring economically inactive citizens within the scope of application of the Treaty. Tomkin describes EU

10 E. Guild (2014) Migration, security and European citizenship, in: E. Isin & P. Nyers (eds) *Routledge handbook of global citizenship studies*, Abingdon, Oxon: Routledge, p. 421.

11 CJEU 8 March 2011, C-34/09, *Zambrano*, ECLI:EU:C:2011:124.

12 CJEU 13 September 2016, C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675.

13 Flash Eurobarometer 43, 2016; Standard Eurobarometer 83, 2015.

citizenship as the '*dedicated legal home*' for non-economically active EU citizens.¹⁴ In his view, this explains why after its introduction, the Court stopped squeezing certain categories of economically inactive citizens into the scope of Article 45 TFEU that deals with EU workers and '*then perform conceptual gymnastics in order to distinguish their rights from the rights of economically active workers*'.¹⁵

A combined reading of Articles 20, 21 and of the Court's citizenship case law, suggests that in theory, every national of a Member State is a EU citizen who has a subjective and enforceable right to move. However, if we start deconstructing the idea that EU citizenship is a universal status or as the Court of Justice states '*the fundamental status of nationals of the Member States when exercising free movement rights*',¹⁶ it becomes clear that not all EU citizens enjoy free movements rights in the same way. Conditions and restrictions can be placed through secondary legislation, such as those enacted through Directive 2004/38, also known as the Citizens' Directive. Different legal categories of citizens enjoy different rights when they want to reside in a host Member State for longer than 3 months, while the performance of an economic activity remains the main axis of differentiation between the rights of mobile EU citizens. This differential treatment is meant to end once a mobile EU citizen has resided legally in a host state for 5 continuous years, after which she is entitled to acquire permanent residence. However, clocking the 5 years of continuous residence is going to be more difficult for some EU citizens: economically inactive citizens who find themselves temporarily without resources or become unemployed may find it difficult to meet the conditions set by the Directive.

It can be argued that the conditional nature of the right to reside for longer than 3 months means that only those nationals who meet the criteria of self-sufficiency or performance of an economic activity will be able to enjoy their EU citizenship rights, and that EU mobility has a set of inbuilt filtering mechanisms. Yet, the mobility of some categories of EU citizens is described as problematic and in need of control. Calls to restrict the free movement of EU citizens focus on citizens from poor EU states exercising free movement rights, EU citizens who circumvent restrictive family reunification rules in their own state of nationality by exercising free movement rights as EU citizens, and criminal EU citizens,

14 J. Tomkin (2009), 'The Worker, the Citizen, their Families and the Court of Justice: Tales of Free Movement from Luxembourg', in: P. Minderhoud & N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishers, p.56.

15 Tomkin (2009).

16 CJEU 20 September 2001, C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458.

whom their state of residence cannot expel as easily as non-EU migrants. Focusing on what is termed 'poverty migration' alone, the underlying message is that citizens from poor Member States move to benefit from the generous welfare systems of the richer EU States and that this movement is somehow abusive - both an abuse of free movement rights and an abuse of the host state's welfare system that ultimately endangers the prosperity of the host state and of its national citizens. Traces of such thinking are present in the demands put forward by David Cameron in relation to Brexit and the amendment of EU free movement rules. Similar ideas were underpinning the letter sent by the ministers of interior Austria, Netherlands, UK and Germany to the president of the EU Commission in 2013 prior to the end of transitional arrangements for Bulgaria and Romania, two of the EU's poorest Member States, claiming that the end of the transitional measures would see an increase in free movement from these two Member States that would implode their welfare systems.¹⁷ According to the critics of EU mobility, the only persons who should be able to move within the EU are workers, students if they have enough resources, and persons looking to set up a business in a host Member State. Unemployed citizens, those who perform atypical work or have patchy employment histories, and citizens who lack resources do not seem to have any place in such visions of EU citizenship. Their mobility is to be regulated, not least by denying them access to the host state's welfare system.

The data that exists on the mobility of EU citizens shows that the number of mobile EU citizens remains low (under 3% of the entire EU population is mobile) and, while, most migration takes place from EU10 to EU15, the main reason for which people move in the EU is work. The popular theme of migrants moving to draw welfare benefits is not supported by empirical data. Since 2013, a host of studies were published in an effort to collect data to understand the impact of intra-EU mobility on host states. Most of these studies show that the number of economically inactive citizens who draw welfare in their host states is small, 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.¹⁸ A comprehensive study commissioned by the European Commission concluded that the share of non-active intra-EU migrants is small; such migrants account for a very small share of special non-contributory benefits (SNCB) recipients whereas the budgetary impact of SNCB claims made by non-active EU citizens is low;

¹⁷ Mantu & Minderhoud (2016), p. 10.

¹⁸ ECAS (2014) *Fiscal Impact of EU migrants in Austria, Germany, the Netherlands and UK*, Brussels; E. Guild, S. Carrera & K. Eisele (2013), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, CEPS: Brussels.

moreover, costs associated with the take-up of healthcare by non-active intra-EU migrants is equally small.¹⁹

Based on existing empirical data, one is tempted to argue that the main beneficiaries of EU citizenship are persons who engage in an economic activity. Qualitative sociological studies looking at the mobility patterns of Romanian citizens in Southern Europe depict these mobile EU citizens as:

*mobile labour force that is willing to change countries in times of economic hardship' while their response 'to changes in the labour market is further migration and not reliance on the welfare state.'*²⁰

The patterns of their migration are described as '*an adaptation to the structural opportunities inherent in economic and political systems*', while the choice of destination relates to the possibility to integrate into the labour market or educational system, depending on the reason for migration.²¹ Studies focusing on how EU citizens perceive their mobility, highlight the transformational impact of EU citizenship based mobility for Eastern European citizens:

*in the wider EU, human mobility will help cross-border liberalisation, because mobility has the ability to liberate localities from central authority and encourage new dynamics of connectivity in such a way as to confound both core/periphery expectations and conventional models of growth and competitiveness.*²²

These accounts highlight the positive role that EU citizenship and the model of free movement associated with it can have on citizens seen as individuals who have dreams and aspirations. This is not to deny that there may be individual cases of EU citizens drawing social welfare benefits without entitlement, but the overall picture one gets from empirical studies is not one of abuse or fraud.

One can approach the question of who are the addressees of EU citizenship in a variety of ways— legally, socially, culturally etc. Although in this section the starting point in answering this question was EU law, one can argue that the 'Other' of EU citizenship is not only the legal 'Other' of citizenship status, namely,

19 K. Fóti (2015), *Social dimension of intra-EU mobility: Impact on social services*, Eurofound report EF1546; ICF/GHK (2013); *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*, Brussels.

20 R.O. Ciobanu (2015), 'Multiple Migration Flows of Romanians', *Mobilities* 10:3, p.482.

21 Ciobanu (2015), p.469 and p.471.

22 S. Marcu (2016), 'Learning Mobility, Challenging Borders: Cross-border Experiences of Eastern European immigrants in Spain', *Mobilities* 11:3, p.358.

the third country national (TCN) or the asylum seeker. The 'Other' appears as a fluid category that covers an undetermined number of possibilities - different persons can be classified as the 'Other' at different moments in time, drawing on different rationales. It is the 'poor Other' that haunts EU citizenship at the moment. To paraphrase Bridget Anderson,²³ it becomes increasingly clear that the EU citizen in law and in data is not the same as the EU citizen of popular and political discourse. The gap between these different constructions of EU citizenship is difficult to close which, in turn, has consequences for public perceptions of EU citizenship. To question who are meant to be the beneficiaries of EU citizenship involves delving into a discussion about the normative assumptions upon which EU citizenship was built and continues to be developed legally through existing legislation, its application by the Member States and its interpretation by the courts, including the European Court of Justice. What the discussion on EU 'poverty migration' shows is that those who are legally included, may nevertheless find themselves symbolically excluded. The undoing of EU citizenship at a symbolic level and through discursive practices may constitute the first steps towards the legal reconfiguration of EU citizenship. Prior to the British referendum on leaving the EU, the European Commission negotiated a series of amendments to the current rules on EU citizenship and free movement as a way of appeasing British concerns on these topics. As Groenedijk discusses in his contribution, if adopted, they would have implied a reduction in the rights of EU citizens and affected the position of TCNs. Even if such proposals seem abandoned as a result of the Brexit vote, the precedent is set.

11.3. *Dangerous 'Others': towards a biopolitics of EU citizenship?*

Claims that the mobility of some EU citizens is, in the words of David Cameron 'too free' and needs to be controlled²⁴, can equally be examined through the lens of studies that analyse the links between citizenship, security, and the development of forms of governance that are connected to notions of risk, fear, anxieties and insecurity in the population.²⁵ These studies explore how discourses about migration conflate a plurality of threats (terrorism, crime, disease, unemployment) with the image of the migrant. Some of them rely on M.

23 B. Anderson (2012), *What does 'The Migrant' tell us about the (Good) Citizen?*, Working Paper 94, University of Oxford (WP-12-94).

24 D. Cameron (2013), 'Free movement in Europe needs to be less free', in: *Financial Times*, 26 November 2013.

25 X. Guillaume & J. Huysmans (2013), *Citizenship and Security: the Constitution of Political Being*, Abingdon, Oxon: Routledge, p.1-18; K. Rygiel (2010), *Globalizing Citizenship*, UBC Press: Vancouver, esp. p.92-113; P. Nyers (2004), 'Introduction: What's left of citizenship?', *Citizenship Studies* 8:3, p.203-215; E. Isin (2004), 'The neurotic citizen', *Citizenship Studies* 8:3, p.217-235.

Foucault's notion of 'biopolitics' to capture state practices of power that rely on processes of organization and categorization aimed at the selection of migrants by filtering out the deserving from the undeserving ones. In this section, the use of the term is influenced by the work of Imogen Tyler who has shown how British citizenship law can be examined as 'biopolitics', namely, a field of biopolitical techniques and practices (legal, social, moral) through which populations are controlled and fashioned.²⁶

We can ask whether in the EU context, we are moving towards a biopolitics of EU citizenship that rests on framing certain groups of EU citizens as problematic and risky since their exercise of free movement rights threatens 'our' security and prosperity. In turn, this requires legal practices to control the free movement of EU citizens and make it manageable. The framing of EU mobility as 'poverty migration' can be seen as playing on 'our' fears of poverty and of losing the sense of security that the welfare state brings along. During the Brexit debate, parts of the UK government presented EU mobility as a threat to public services, employment, and the general wellbeing and prosperity of the national community.²⁷ Likewise, UK political parties argued that EU mobility needs to be controlled since most of these EU citizens come here to claim 'our' benefits and 'our' jobs.²⁸ For the same part, the UK could be substituted for a number of EU Member States – Austria, Belgium, Germany or the Netherlands. To the framing of EU mobility as 'poverty migration', one can add the prevalent negative depiction of Roma EU citizens exercising their mobility rights as disruptive and a threat to the security of the host state.²⁹ In a number of EU States, the 'poor Other' is inscribed within a racialized discourse about the mobility of EU citizens from the Eastern states. Parker highlights how mobile Roma are designated or produced as 'delinquent citizens' and subjected to two different logics:

a political realist logic of security, which seeks to eliminate the existential threat to community or citizenry, and a liberal logic, which

26 I. Tyler (2010), 'Designed to fail: A biopolitics of British citizenship', *Citizenship Studies* 14:1, p.61-74.

27 D. Cameron (2015), *The Future of Britain's relationship with the UK*, Chatham House 10 November 2015.

28 A. Geddes (2014), 'The EU, UKIP, and the Politics of Immigration in Britain', *The Political Quarterly* 85:3, p.289-295; D.O. Vicol & W. Allen (2014), *Bulgarians and Romanians in the British national press: 1 Dec 2012-1 Dec 2013*, Migration Observatory report, COMPAS, Oxford: University of Oxford.

29 S. Pallida (2016), *Governance of Security and Ignored Insecurities in Contemporary Europe*, Abingdon, Oxon: Routledge, p.151-152.

*seeks to manage risks to the internal market as a space of mobility and economic freedoms.*³⁰

The situation of Bulgarian and Romanian mobile Roma and their difficulties in exercising EU citizenship rights is illustrative of EU citizenship's limits, which stem from the securitizing and exclusionary potential hidden within EU citizenship and free movement law.³¹

In her work on sovereignty and the building of (physical) walls to keep out migrants, Wendy Brown asks what makes efforts of walling parts of a country so popular and desired by late modern subjects.³² Whereas in the EU, attempts to build walls are primarily targeting non-EU economic migrants disguised as 'bogus' asylum seekers, bearing in mind the conflation that exists in migration management discourse between non-desirable TCN economic migrants and EU 'poverty migration', the answer Brown gives to this question is significant for understanding what is at stake in relation to claims that EU mobility needs to be controlled. The conflation I refer to is best observed in the UK, where part of the public debate on EU migration concerned the need to regain control over EU migration in order to bring it more in line with UK's sovereign powers over non-EU migration. Although during the pre-Brexit debates it was never proposed to build a wall to seal off the UK from the rest of the EU, several ideas about limiting rights were being deployed as ways of managing EU migration. They went further than simply limiting mobility rights for economically inactive EU citizens and included proposals to limit access to social rights for EU workers.³³ After the vote in favour of Brexit and, at the moment inevitable conclusion that the UK will no longer be an EU Member State in the foreseeable future, it seems that there will be some form of migration control involving EU citizens migrating to the UK - in a post-Brexit world, those EU citizens will no longer enter an EU Member State, thus their EU free movement rights will no longer be legally relevant in that territory. The same will be true for British citizens (no longer EU citizens) when entering an EU state. The exact solution that will be reached after Brexit in relation to free movement of persons is at the moment of writing unclear (see Groenendijk in this volume), but the political signals coming from both London and Brussels suggest that future arrangements will depart from the mobility framework championed by EU citizenship. We seem to be moving away from the notion of a borderless space of freedom in which people move freely and

30 O. Parker (2012), 'Roma and the Politics of EU citizenship in France: Everyday Security and Resistance', *Journal of Common Market Studies* 50:3, p.477.

31 Parker (2012), p.488.

32 W. Brown (2014), *Walled states, Waning Sovereignty*, Zone Books: New York.

33 Cameron (2015).

uninhibited by regular border controls. Similarly, the idea of labour circulating freely where it is most needed, which was the building block of the free movement of persons in the first stages of European integration, also appears to have lost its sheen.

While Brexit is not the equivalent of building a wall (along the lines of the U.S.-Mexico wall, for example), it can be read as a desire to extricate the country from the transnational space created by EU citizenship and re-inscribe it within a national space, defended by a wall of sovereign power. In her work, Brown notes that although (physical) walls are in fact icons of faltering sovereignty and failure, they are nevertheless strongly desired and imbued with popular passions.³⁴ Using Freud's psychoanalytical theory of defense, she argues that:

*walls facilitate a psychic defense against recognition of a set of internal or systemic failures that are relocated to the outside and against recognition of a set of unacceptable facts of dependency, unprotected vulnerability, or even responsibility for colonial violence in the context of declining sovereign power.*³⁵

While it is illusionary to believe that walls can stem off transnational migration flows, from the perspective of a modern subject (a citizen) who faces a loss of horizons and identity as well as being faced with the decline of state sovereignty, walls offer psychic reassurances. Brown's 'diagnosis' of the underlying causes for desiring walls, containment and security in the familiar space of the nation state is relevant for discussions on EU citizenship and its capacity to deliver a unifying supranational project of peace and economic prosperity that places the (EU) citizen at the centre of its design. As such, '*... declining protective capacities of the state, diluted nationhood, and the increasing vulnerability of subjects everywhere to global economic vicissitudes and transnational violence*'³⁶ fuel the search for protection mechanisms which may take the form of a physical wall or, as in the context of increasing migration, more restrictive migration policies and practices. It does not seem accidental that in the EU, the contestation of EU citizens' mobility started to build momentum as the effects of the global economic crisis were starting to be felt in various EU countries, and as EU governments started to adopt restrictive welfare policies designed to implement austerity measures. It is at this moment of (economic) crisis that national solidarity towards mobile EU citizens starts to show its cracks, as welfare rights are reinforced as the hallmark of national belonging and worthiness. Thus, it becomes possible not only to

³⁴ Brown (2014), p. 114.

³⁵ Brown (2014), p. 125.

³⁶ Brown (2014), p. 114.

politically rally voters around cries for regaining sovereignty and limiting EU migration, but also to legitimately shift the boundaries of social solidarity to which mobile EU citizens are entitled to in their host states.³⁷

According to T.H. Marshall's definition of citizenship, social rights are the hallmark of being a full member of a community.³⁸ In the context of EU citizenship, this reading of citizenship has always been problematic for labelling EU citizenship as real 'citizenship' (see Guild this volume) since economically inactive citizens enjoy a much more restricted notion of social solidarity than economically active citizens. Directive 2004/38 and the Court's case law that advanced the social rights of economically inactive EU citizens were seen as part of EU citizenship's development towards citizenship in the Marshallian understanding of this term. The Directive introduced the legal status of permanent residence, which effectively means that a EU citizen who is a permanent resident in a host EU state enjoys in that state equal treatment with nationals in respect of social rights, without having to fulfil other conditions. The Court's case law that proclaimed that EU citizens may expect a certain amount of financial solidarity from their host state, if they find themselves in difficulties finds expression in the preamble of the Directive 2004/38 and Article 14 that states that expulsion should not be the automatic consequences of having access to social rights in the host state as far as economically inactive citizens are concerned. Although poor citizens are not necessarily economically inactive from the perspective of EU law, the emblematic figure of the intersection between poverty and economic inactivity is Ms Dano³⁹, a Romanian Roma single mother who lived with her two children in Germany in the apartment of her sister. In the judgment of the Court of Justice, Ms Dano is described as not working, nor looking for a job and, almost illiterate. Ms Dano was already receiving allowances for her two children, when she asked for a social benefit to supplement her resources. The German authorities refused her the benefit arguing that Ms Dano had moved to Germany with the sole aim of claiming benefits, which excluded her from entitlement to receive social assistance benefits. Based on the applicable national law, it can be argued that social solidarity in the form of social assistance benefits was not available to EU citizens who, in the eyes of the law, moved to Germany in order to seek benefits, but only to those who moved to perform activities as workers or

37 C. O'Brien (2015), 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants', *Journal of Social Welfare and Family Law* 37:1, p.116-136.

38 T.H. Marshall (1950), *Citizenship and social class and other essays*, Cambridge: Cambridge University Press.

39 CJEU 11 November 2014, C-333/13, *Dano*, ECLI:EU:C:2014:2358.

self-employed EU citizens or if economically inactive, had enough resources not to need benefits. As Minderhoud has pointed out, applicants like Ms Dano find themselves in a 'catch-22' situation: they are entitled to social solidarity as economically inactive EU citizen only when they have enough resources not to need it.⁴⁰ The Court decided that since Ms Dano did not fulfil the conditions of self-sufficiency set out in Article 7(1) of Directive 2004/38, her residence was not in line with EU law and thus not entitled to equal treatment on the basis of EU law.

It is nevertheless important to highlight that, at both discursive and legal levels, the move is not towards a complete denial of the benefits of EU free movement. Similar to contemporary migration management regimes developed by liberal economies, the aim is to manage migration and filter out the legitimate from the illegitimate,⁴¹ and intervene where the market logic breaks down and leads to unemployment, atypical work, zero hours contracts and precarity.⁴² Law is called to uphold the narrative of freedom associated with EU citizenship but also to intervene when the market disrupts that narrative by reinforcing the different treatment awarded by Directive 2004/38 to those who fail to engage with the market via performance of economic activities or via self-sufficiency and self-reliance. It is at this juncture that the case law of the European Court of Justice concerning mobile EU citizens and their claims to social solidarity is worth bringing into the discussion. Cases such as *Brey*, *Dano*, *Alimanovic*, *Garcia Nieto* or *Commission v. UK*⁴³ put forward a specific reading of free movement rights that affects the link between EU citizenship and non-discrimination in the social field - that is, the tenet upon which EU citizenship has developed as a status that transcends the free movement of workers and self-employed persons. The above mentioned cases question the extent to which an EU citizen who is not a worker or no longer a worker can in cases where she faces financial difficulties due to

40 P. Minderhoud (2016), 'Sufficient resources and residence rights under Directive 2004/38', in: H. Verschueren (ed), *Where do I belong? EU law and adjudication on the link between individuals and Member States*, Antwerp: Intersentia, p. 61.

41 Bigo, D. (2011), 'Freedom and speed in enlarged borderzones', in: V. Squire (ed), *The contested politics of mobility. Borderzones and irregularity*, Routledge, p. 46.

42 Mezzadra, S. (2011), 'The gaze of autonomy - Capitalism, migration and social struggles', in: V. Squire (ed), *The contested politics of mobility. Borderzones and irregularity*, Routledge, p. 130; C.U. Schierup et al. (2015), *Migration, Precarity and Global Governance - Challenges and Opportunities for Labour*, Oxford: Oxford University Press.

43 CJEU 19 September 2013, C-140/12, *Brey*, ECLI:EU:C:2013:565; CJEU 11 November 2014, C-333/13 *Dano*, ECLI:EU:C:2014:2358; CJEU 15 September 2015, C-67/14 *Alimanovic*, ECLI:EU:C:2015:597; CJEU 25 February 2016, C-299/14, *Garcia Nieto*, ECLI:EU:C:2015:366; CJEU 14 June 2016, C-308/14 *Commission v. UK*, ECLI:EU:C:2016:436.

unemployment or lack of sufficient resources ask her host Member State for social benefits of a financial nature to help meet the costs of daily life. The Court has gradually and increasingly started to answer 'no' to such questions by relying on the argument that Member States have a right to refuse social benefits to mobile EU citizens who cannot or no longer fulfil the requirements of self-sufficiency. This right to refuse social benefits stems from the fact that self-sufficiency is a prerequisite for exercising free movement rights for longer than 3 months, in accordance with the provisions of Article 7 of Directive 2004/38. The trend has been not only towards a more restrictive view of social solidarity and who is entitled to share in a nation's welfare, but also towards dismantling one of the legal mechanisms through which social solidarity has been pursued in the Court's previous case law, namely, the principle of proportionality. In the general economy of EU law and EU free movement of persons, state interferences with an EU citizen's right to move and reside freely can be justified if they are proportional, an exercise which relies on the individual assessment of each case based on its merits. In the more specific field of equality and social rights, Directive 2004/38 introduces the idea that, although prior to the acquisition of the right to permanent residence, a host EU state may refuse economically inactive citizens and jobseekers social assistance benefits (which are needs based and funded through general taxation as opposed to personal contribution into the welfare system), the state should nevertheless undertake an individual examination of the case and perform a proportionality assessment. At the same time, in line with neoliberal trends concerning the contraction of the welfare state, the Court of Justice has increasingly relabelled benefits social assistance, as opposed to social security⁴⁴, thus hollowing out the content of the welfare state.

The 'poor Other' of EU citizenship is the object of biopolitics because of its dangerousness for the nation as the species-body⁴⁵ that needs to be secured through governmental practices that emphasize the need to control mobility by sorting out deserving EU citizens from undeserving ones. Law plays an important role in this process as the mechanism through which legitimate claims of mobility are recognized. The case law of the Court of Justice shows a clear move towards giving value as a source of rights, protection, and equal treatment, only to residence that fulfils the conditions of Directive 2004/38. Deservingness is increasingly viewed through the lens of financial self-sufficiency and coupled with a restrictive interpretation of welfare rights. More radical readings of Marshall's citizenship theory suggest that the extension of welfare rights was meant to incorporate the working poor into the community and pacify them,

44 CJEU 11 November 2014, C-333/13 *Dano*, ECLI:EU:C:2014:2358.

45 Isin, E. (2004), 'The neurotic citizen', *Citizenship Studies* 8:3, p.230.

while equally ensuring the smooth functioning of the capitalist market.⁴⁶ The continued saliency of questions about social inclusion and exclusion in the context of EU citizenship case law points towards the failure of EU citizenship to act as an equalizer of the different social and economic conditions of EU citizens. The current legal tools contained by the citizenship and free movement provisions in the Treaty and the Citizens Directive do not seem sufficient to address how the transformation of welfare rights from citizenship rights as in the Marshallian definition of citizenship into conditional rights under neoliberalism and the rise of the precariat is played out at the EU level and, more specifically, in the context of EU citizenship.

The figure of the poor and dangerous ‘Other’ as an ‘internal Other’⁴⁷ and as an object of biopolitics confronts us with a vision of EU citizenship that is far removed from the initial optimism associated with it but which, nevertheless, reflects the mobility experiences of some EU citizens. One can interpret this development as connected with the fact that after more than 20 years, the legal implications of EU citizenship finally start to bite, as the Member States need to implement them. The economic crisis has not helped this process as it exacerbated a number of contradictions that exist within national citizenship itself, especially in relation to social rights.⁴⁸ And yet, the ‘poverty migration’ debate highlights the tension that is in-built in EU citizenship’s reach and its failure to move entirely away from has been labelled the ‘market’ model of citizenship.⁴⁹ While the economic crisis will eventually ease out and the Member States will get better at implementing the legal rights of EU citizens, the latter tension is not that easily resolved without sustained political and legal commitment to a supranational model of membership.

11.4. *EU citizenship and difference*

The previous two sub-sections have discussed how the ‘poor Other’ is the imagine that haunts political discourses and legal practices of EU citizenship, to an extent

46 Tyler, I. (2010), ‘Designed to Fail: A Biopolitics of British Citizenship’, *Citizenship Studies* 14:1, p.61-74.

47 Pullano, T. (2014), ‘How European citizenship produces a differential political space’, in: E. Isin & P. Nyers (eds), *Routledge handbook of global citizenship studies*, Abingdon, Oxon: Routledge, p.441.

48 Anderson, B. (2013), *Us and Them - The dangerous politics of immigration control*, Oxford: Oxford University Press.

49 Shuibhne, N. (2010), ‘The Resilience of EU Market Citizenship’, *Common Market Law Review* 47:6, p.1597-1628; M. Everson (1995), ‘The legacy of the market citizen’, in: J. Shaw & G. More (eds), *New Legal Dynamics of the European Union*, Oxford: Clarendon Press, p.73-89.

where it becomes plausible to interrogate discourses such as ‘poverty migration’ through the lens of biopolitics or, at the very least, a politics of fear and insecurity. In this final part, I want to propose a different take on the Court’s case law concerning mobile EU citizens by having a closer look at who claims EU citizenship rights. To put it differently, who is behind the legal fiction of the EU citizen? There are certain dangers in trying to understand the social aspects of EU citizenship by focusing on rights’ claiming and jurisprudence alone. The Court’s case law can offer a limited understanding of EU citizenship: it tells us where tensions and difficulties exist in relation to claiming EU citizenship rights, but fails to say anything about the mobility of EU citizens who do not encounter obstacles when moving or about the mobility of those citizens who lack resources to make legal claims. Equally, jurisprudence has little to say in terms of why people move or fail to do so.

With this caveat in mind, I still think it is important to ask who makes legal claims in their capacity as mobile EU citizens and what this means for our understanding of EU citizenship’s potential. A bird’s eye view of the Court’s recent case law suggests that economically inactive citizens, unemployed or job-seeking EU citizens encounter problems when seeking equal treatment with nationals of their host states in relation to welfare rights (see also Guild, this volume Chapter 10). Mobile citizens with a criminal past are also targeted by host Member States as problematic migrants who should be expelled from state territory and ideally prevented from returning.⁵⁰ Mobile Roma citizens, most of who are from Eastern Europe, are one group of EU citizens who encounter a whole range of difficulties when attempting to exercise their rights as EU citizens,⁵¹ but their struggles are not well reflected by EU citizenship case law. It can be argued that some of the persons who were supposed to find a legal home in EU citizenship continue to have difficulties in asserting their rights as EU citizens. In the introduction I suggested that EU citizenship could be approached as a ‘momentum concept’ that needs to be constantly reworked to achieve its inclusionary potential. To understand why some citizens are left out and have difficulties in exercising their EU citizenship rights, it may be useful to look beyond economic activity as the only axis of differentiation in the economy of EU citizenship provisions. This section draws on feminist concerns with embodiment and positionality to raise a series of questions about the manner in

⁵⁰ CJEU 13 September 2016, C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675.

⁵¹ Parker (2012). There is no CJEU case law concerning the expulsion of Roma citizens from Italy or France, for example. The *Dano* case which deals with access to social rights is one of the few cases involving a Roma applicant ascertain a violation of her EU citizenship rights.

which EU citizenship incorporates difference in its legal provisions dealing with free movement rights.

Lister (2007) has examined the important role played by feminist scholars in questioning the reach of citizenship's claims of universalism in the face of its failure to include marginalized groups in its theory and practice.⁵² Much of this work is doubled by feminist critiques of liberal legalism and law's use of neutral and genderless notions of personhood that are nevertheless built upon a male template, thus making it difficult for women to claim legal subjectivity and recognition. Hunter examines how feminist scholars have consistently questioned the tenet of liberal legalism that views the legal person as '*rational, autonomous, self-contained, self-possessed, self-sufficient and formally equal before the law*'.⁵³ The link with citizenship comes from the fact that modern citizens are understood as modern legal subjects, thus the superimposition of a gendered template of legal subjectivity inevitably leads to gendered citizenship. It is worth exploring the implications of this process for EU citizenship, since as a legal status it does not abandon the language of national citizenship and legal personhood with its claims of universality and neutrality. According to Rygiel feminist scholarship underlines the relational aspect of mobility by highlighting how one's access and ability to move relate to one's positionality or the body one is in.⁵⁴ The recognition of the importance of the biological body in the economy of mobility makes 'embodied mobility' the frame through which mobility and its politics are investigated. Bodies are not neutral, they are gendered and produced through relations and hierarchies of power that rest on gender, race, class, sexuality etc.⁵⁵ The lesson to be taken from feminist critiques of citizenship is the need to think of how bodies are differentially included into the body politic, despite being legally included as citizens. Beyond the fiction of the legal person enjoying the legal status of EU citizenship there is a physical body whose characteristics influence one's experiences of (EU) citizenship, the possibility of moving and the manner in which movement is legally captured. To put this into a personal perspective, although I share the same nationality as the applicant in the *Dano* case my experience of free movement as an EU worker citizen is miles

52 Lister, R. (2007), 'Inclusive Citizenship: Realizing the Potential', *Citizenship Studies*, 11:1, p.49-61.

53 Hunter, R. (2013), 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism', in: M. Davies & V. Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory*, Abingdon, Oxon: Routledge, p.13.

54 Rygiel, K. (2011), 'Governing borderzones of mobility through e-borders', in: V. Squire (ed), *The contested politics of mobility. Borderzones and irregularity*, Abingdon, Oxon: Routledge, p.143-168.

55 Rygiel (2011) p.144.

apart from hers. This remains true even if, in the legal framework of EU law, it is traditionally our nationality that singles us out for different treatment as mobile EU citizens in a host state. EU citizenship does not depart from the liberal understanding of citizenship that exists at the national level according to which all citizens are equal before the law as ideal-type legal subjects. Since in an EU context, EU citizens have different nationalities this is dealt with by making the principle of non-discrimination on the basis of nationality an instrument to neutralize difference as well as the building block of the internal market.

Once we attempt to go beyond the legal categories used by the Citizens' Directive to capture the mobility of EU citizens, it becomes clear that terms such as 'worker', 'economically inactive' or 'jobseeker' fail to reveal the personal stories and characteristics of the bodies that exercise mobility. From the vantage point of embodied practices of mobility, some of the Court's case law can be described as comprising women, single mothers, sometimes with a foreign spouse with an immigration problem,⁵⁶ pensioners with low incomes,⁵⁷ poor people,⁵⁸ low-skilled workers,⁵⁹ people with a criminal background,⁶⁰ or Roma making claims based on their EU citizenship status.⁶¹ This alternative view posits gender, class, social origin, ethnicity, age etc as relevant factors for understanding EU citizenship and its differentiated meaning. Despite EU citizenship's claim to universality that posits that every EU citizen has a right to move, it is possible to speak of a logic of exclusion that maps onto gender, age, class etc. In turn, this raises questions as to how categories of citizens who are marginalized at the national level can assert supranational rights at the EU level and to what extent EU citizenship is a mechanism through which agency can be exercised. EU citizenship can be approached as a strategy to negotiate access to rights at various levels. This is shown by the line of case law opened by *Zambrano* that brought within the scope of EU law citizens who have never moved and who were traditionally viewed as outside the reach of EU citizenship rights. This new direction is encouraging when thinking of EU citizenship as a work in progress since it highlights its transformative potential. Yet, this line of case law is difficult to square with that on social rights as EU citizenship rights which at the moment is moving into a

56 CJEU 5 May 2011, C-434/09, *McCarthy*, ECLI:EU:C:2011:277; CJEU 6 December 2012, C-356/11, *O. & S.*, ECLI:EU:C:2012:776.

57 CJEU 19 September 2013, C-140/12 *Brey*, ECLI:EU:C:2013:565.

58 CJEU 10 October 2013, C-86/12, *Alokpa & Moudoulou*, ECLI:EU:C:2013:645.

59 CJEU 15 September 2015, C-67/14, *Alimanovic*, ECLI:EU:C:2015:597; CJEU 25 February 2016, C-299/14 *García Nieto*, ECLI:EU:C:2016:114.

60 CJEU 23 November 2010, C-145/09 *Tsakouridis*, ECLI:EU:C:2010:708; CJEU 16 January 2014, C-400/12 *G.*, ECLI:EU:C:2014:9.

61 CJEU 11 November 2014, C-333/13 *Dano*, ECLI:EU:C:2014:2358.

more restrictive direction.⁶² We need critical engagement with the tensions that EU citizenship has to address in order to become a transformative status for all EU citizens and achieve its inclusionary potential. Economic activity or lack thereof is not the only factor that can lead to a different experience of EU citizenship and of the right to move. Differences based on age, gender, ethnicity, social class are equally important in structuring the mobility of EU citizens and they deserve a more prominent place in analyses of EU citizenship.

11.5. *Concluding remarks*

This chapter has tried to sketch some alternative ways of thinking about EU citizenship, which incorporate socio-political aspects of EU mobility and citizenship. The aim is to broaden the analysis of EU citizenship and the frames of reference beyond the legal rules contained in the Treaty, secondary legislation, and their interpretation by the EU Court of Justice. If EU citizenship is indeed to become a fundamental status for EU citizens, a number of contradictions that are inbuilt in the notion of citizenship itself need to be articulated and confronted at the EU level. The area of social rights is one where the inclusionary-exclusionary nexus of citizenship has been most visible, as claims about ‘poverty migration’ show very well. Public and political debates concerning EU citizens and their mobility have shown that there is a danger that some EU citizens will be labelled ‘poor’ and ‘dangerous’ Others and left outside the scope of EU citizenship. The capacity of EU citizenship law to deal with differences based on other categories besides nationality is an equally problematic aspect of how law frames the mobility of EU citizens. The tensions and difficulties discussed in this chapter are intended as a critique of EU citizenship and as a reminder that the legal expression of this status and of the rights associated with it has exclusionary consequences that are difficult to square with the proclaimed universality and neutrality of EU citizenship. EU citizens use their status and make claims in their capacity as EU citizens, to which national and EU authorities must respond. These encounters are constitutive of the process through which EU citizenship gains weight and materiality, and hopefully reaches its inclusionary potential.

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